

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD

APPEAL NO. AT-40/2017

Assistant Commissioner SRB, Karachi Appellant

Versus

M/s Fauji Akbar Portia Marine Terminals Ltd. Respondent

Mr. Aamir Ali, then Deputy Commissioner, SRB, Karachi
Ms. Anum Shaikh, Assistant Commissioner, SRB and
Mr. Awais Raza, Assistant Commissioner, SRB For the Appellant

Mr. Muhammad Tarique, ITP and
Mr. M. Umair, Senior Supervisor / ITP For the Respondent

Date of hearing 28.03.2018
Date of Order 30.03.2018

ORDER

Razia Sultana Taher: This appeal has been filed by the Appellant challenging the order in appeal No.61/2017 dated 15th May, 2017 passed by the Commissioner (Appeals) in appeal No.314/2016 modifying the order in original No.868/2016 dated 28th November, 2016 passed by the Assistant Commissioner (Unit-16), SRB. The same is reproduced for ready reference:

"For the given reasons the OIO is upheld to the extent of tax on the reimbursement of labour charges and the default surcharge thereon. Whereas, the same is set aside to the extent of remaining amount of tax on the 'penalty for delay' and the 'NOC Charges'.

As far as the penalties are concerned it will be seen that the reasons above written have enabled me to set aside most part of the order in original and yet the element of "reimbursement of labour charges" needed a thorough interpretation as the nature of transaction was misleading. Therefore, to my humble view there do not exists mens rea / malafides on the part of the appellant and thus the penalty on the remaining amounts is set aside as well. Order accordingly".

2. In short, the facts of the case as stated in the order in original are that the appellant registered with SRB as service provider in the taxable category of Port Operators, Airport Operators, Airport Ground Services Providers and Terminal operators falling under tariff heading 9819.9090 of the Second Schedule to Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as SStoS Act, 2011).

3. The concerned Assistant Commissioner in the order in original No.868/2016 dated 28th November, 2016 concluded that the registered person deliberately had not complied with the statutory provisions of section 2(98), 3, 5, 8, 9, 17 and 30 of the SSToS Act, 2011, holding that the registered person deliberately evaded government revenue (tax) in relation to revenue heads (i) penalty for delay amounting to Rs.13,865,756/- and Rs.16,433,195 (ii) NOC Charges amounting to Rs.12,498,092/- and Rs.1,610,000/- and (iii) Reimbursement of expenses amounting to Rs.1,379,082/- for the tax periods of 2013-2014 and 2014-2015 and assessed Sindh Sales Tax of Rs.6,316,463/- and also imposed penalty under section 43(3) of the SSToS Act, 2011 and default surcharge under section 44 of the SSToS Act, 2011.

4. The said order of the assessing officer was challenged by way of filing of appeal before the Commissioner (Appeals) SRB who set aside the order in original to the extent as detailed in paragraph I of this order.

5. During the course of hearing, the appellant represented by Mr. Aamir, DC submitted copy of reply to the misc. application wherein he enclosed copy of relinquishment of charge showing 12.07.2017. The respondent submitted that Notification of SRB Chairman SRB No.3-4/22/2017 dated 10.07.2017 was issued on 10.07.2017 and drew attention to para 2 which states that the powers under superseded notification No.SRB-3-4/20/2016 dated 01.12.2016 or its related notification shall stand transferred to the respective officer of SRB under this notification i.e. Unit-19. The respondent continued that with the issuance of the notification, the concerned Assistant Commissioner had no jurisdiction to file appeal against the respondent in the instant appeal case. The notification is issued under section 34 of the SSToS Act, 2011 whereby the Board has transferred jurisdiction of the case from Unit 21 to unit 19 on 10.07.2017. Another relevant is section 61(2)(b), which requires that appeal before Tribunal is required to be filed with verification in a prescribed manner. Verification filed by then appellant states that he was competent to file, whereas the appeal filed on 11.07.2017 which was beyond his jurisdiction which is stated in the notification dated 10.07.2017.

In counter reply Mr. Tarique submitted that Section 36(2) is not operative when the notification of jurisdiction has been issued. Secondly, stated that Commissioner can only direct the officer who is subordinate to him and on 10.07.2017 after issuance of notification Mr. Vicky was not subordinate to Commissioner-III but was subordinate to Commissioner-I.

In reply Mr. Aamir appellant's representative submitted that the respondent raised objection as to the authorization of Mr. Vicky Kumar AC-SRB to file the appeal before Tribunal and drew attention that the charge relinquishment report of Mr. Vicky Kumar AC may be referred from which it is clear that the charge was relinquished on 12.07.2017 and appeal was filed on 11.07.2017. Thus the appeal was filed when officer had jurisdiction over the case. The respondent further relied on para 2 of jurisdiction notification No.SRB-3-/22/2017 dated 10th July, 2017, which pertains to pending cases – and filing of appeal does not constitute pending case. The learned Deputy Commissioner further added that as per section 36 subsection 2 the Commissioner authorized Mr. Vicky Kumar to file the appeal before the Tribunal. The Deputy Commissioner also showed the noting of the original file of SRB and copy of the same was also provided to the respondent adding that the officer not only had jurisdiction but was authorized by the Commissioner SRB.

The appellant representative Ms. Anum, Assistant Commissioner submitted that according to the respondent then AC Mr. Vicky Kumar was not subordinate to the Commissioner-III therefore he cannot file appeal before the Appellate Tribunal. The then AC Mr. Vicky Kumar had not relinquished the charge of terminal operator thus he remained subordinate to Commissioner-III and not Commissioner-I. The charge was relinquished by Mr. Vicky on 12.07.2017 and appeal was filed on 11.07.2017 under section 61(1) appeal to the Appellate Tribunal – the word used is officer of SRB and thus any of the officer of the SRB can file appeal before the Appellate Tribunal.

6. As regards merits of the case, the appellant's representative submitted that appeal has been filed based on two issues namely NOC Charges and penalty. The NOC charges and penalty. The NOC charges is the authorization to other terminal operator companies to handle vessels / cargo relating to rice, wheat, oil seeds. When the respondent authorizes the terminal operator companies to handle the vessels the relation created was that of franchise. The appellant added that granting or surrendering the rights are irrelevant the main thing is rights are transferred.

7. Mr. M. Umair Sr. Supervisor ITP representing the respondent submitted that there are two issues involved. Firstly penalty for delay. The respondent is a terminal operator and the space in their terminal is occupied by vessels of wheat, rice and oil seeds. At the terminal the vessels are allowed for schedule time to occupy terminal space, after the schedule time the terminal penalizes them due to occupying beyond time. The terminal operator charges penalty and the SRB holds this penalty for delay as service charges. The second issue, is that when the other vessel is coming in the terminal but it is already occupied therefore NOC is given / issued to other vessel to discharge the goods like wheat, oil seeds to any other terminal. The appellant treated such NOC as franchise service which was not confronted in the SCN. The respondent added that primarily the issue was never confronted in the show cause notice on the other hand the Commissioner (Appeals) in its paragraph 6 of the order in appeal states that for constituting NOC as franchise service the rights are to be primarily vested in the franchiser and those rights are to be delegated to franchisee but in the instant case the respondent surrendered its rights to Port Qasim Authority (PQA) and thereafter Port Qasim Authority allowed the vessel to load at another terminal and this surrender of right cannot be constituted as franchise service. In here, the appellant imposed penalty for tax fraud which is an injustice.

8. Before proceeding with the case on merit, we first take up the issue raised in the misc. application regarding maintainability of departmental appeal. The contention of the learned respondent in the present appeal case that the then Assistant Commissioner, officer of SRB filed appeal on 11th July 2017 without jurisdiction over the respondent's case in terms of notification vide No.SRB-3-4/2-/2017 and SRB-3-4/22/2017 both dated 10th July 2017. The said officer was not competent as the respondent case was transferred to officer of Sindh Revenue Board Unit-19 on 10th July 2017 vide Notification 10th July, 2017.

We have heard and gone through the arguments presented by both the sides on the issue raised in the misc. application by the respondent. The charge relinquishment report of the Assistant Commissioner was signed on 12.07.2017, which shows that the appeal was filed when officer had jurisdiction. As regards para 2 of Notification No.SRB-3-4/22/2017 dated 10th July,

2017 refers to pending cases including the cases in which hearing notice or show cause notice was issued....., in here it was filing of appeal which is not covered under paragraph 2 of the said notification. Thus the Assistant Commissioner had the jurisdiction as he relinquished the charge on 12th July, 2017 and appeal was filed on 11th July, 2017. Hence the objection raised by the respondent is unfounded

9. We now proceed to take up the case on merit. Perusal of the notesheet from the file of Assistant Commissioner on record shows that the Assistant Commissioner at para 46 b had written to the Commissioner that 'appeal before Appellate Tribunal SRB be filed against (i) penalty for delay and (ii) waiver of penalty and default surcharge, however the ground may not be raised on respect of NOC charges because the franchise services were not confronted in SCN and same may not sustain before Tribunal'

The appellant's representative during the course of hearing submitted that appeal has been filed on two issues namely NOC charges and penalty. If an issue has not been confronted in the show cause notice, thus we find no reason to entertain an issue not confronted in the show cause notice as the same is not sustainable. Furthermore, the verbal arguments forwarded by the appellant at the time of hearing and reading through the grounds of appeal, we find no substantive reasons have been given by the appellant to counter the discussions of Commissioner (Appeals) at paragraphs 6, 10 and 11 of the order in appeal.

10. In our opinion the Commissioner (Appeals) for valid reasons has exercised discretion in favor of respondent and waived penalties and we do not find any reason to interfere with the order in appeal.

11. In view of the above discussions the appeal is dismissed. The copy of the order be provided to the authorized representatives of the parties.



(Muhammad Ashfaq Balouch)
JUDICIAL MEMBER



(Razia Sultana Taher)
TECHNICAL MEMBER

Karachi

Dated:30.03.2018

Certified to be True Copy

Copies supplied for compliance:-

1. The Appellant through authorized Representative.
2. The Assistant Commissioner (Unit-), SRB, Karachi.

Copy for information to :-

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


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APPELLATE TRIBUNAL
SINDH REVENUE BOARD