

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. AT- 62 /2017

M/s Interocean Cargo Service (Pvt.) Ltd. ....Appellant

Versus

Commissioner-III, SRB, Karachi.....Respondent

Mr. Mohammad Yousuf, Advocate for Appellant

Mr. Irfan Waheed, AC - SRB for Respondent

Date of hearing 13.02.2018, 13.03.2018 and 02.07.2018

Date of Order 11.07.2018

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.108/2017 dated 22.08.2017 passed by the Commissioner (Appeals) in Appeal No. 212/2016 filed by the Appellant against the Order- in-Original No. 533/2016 dated 10.06.2016 passed by the Deputy Commissioner (Mr. Syed Rizwan Ali) SRB, Karachi.

*M. A. S.*

01. The facts of the case as mentioned in the Order-in-Original are that the appellant is registered with SRB as service provider for providing and rendering taxable services in Sindh. It was also stated that the appellant has an agreement of technical services consultancy and trade mark service with M/s Gulf Agency Company Limited, Vaduz, Liechtenstein (hereinafter referred to as the foreign company) and under the agreement the foreign company as licensor granted appellant right to use trademark against consideration.
02. It was alleged in the order in original that in the audited financial statement for the years ended December, 2013 and December, 2014, under note 20, there is a provision for royalty for the years 2013 and 2014, which shows that the appellant is engaged in relationship of franchisor and franchisee under service category of 9823.000 (Franchise Services) of the 2<sup>nd</sup> schedule of the Sindh Sales Tax on Service Act, 2011 (herein after referred as the Act). It was also alleged that note 22 of the audited financial statement shows that appellant earned revenue during years 2013 and 2014 against rendering services of terminal handling falling under tariff heading 9819.9090 (Terminal Operators) of the 2<sup>nd</sup> schedule of the Act, 2011. It was further alleged that the appellant is liable to pay Sindh sales tax of Rs.4,763,173/= on account of franchise services and Rs.42,037,831/= on account of terminal handling service.
03. That a show-cause notice dated 24.02.2016 was served upon the appellant to show-cause as to why tax liability of Rs.46,801,005/= should not be assessed and determined along with default surcharge and penalties. The appellant filed its reply dated 11.05.2016. In the reply the appellant has denied to have provided terminal handling service and submitted that the appellant is providing empty container depot facility and container washing and repair related service. It was also stated that only persons licensed by Customs authorities can do terminal handling service and the appellant has no license for terminal handling. Regarding franchise it was stated that sales tax is payable at the time of remittance as per rule 36 of the Sindh Sales Tax on Services Rules, 2011 (herein



after referred to as the Rules) and in this case the amount has not been remitted.


04. It was stated in para 13 of the order in original that the authorized representative of the appellant initially agreed to deposit the tax on franchise service. However, on 19.05 2016 the representative of the appellant stated that the State Bank of Pakistan has restrained the appellant from transacting foreign exchange to the principal. The appellant further informed the Assessing Officer that the Board of Directors of the Company has decided to reverse/write back the liability of royalty from the accounts for the confronted period.

05. The Assessing Officer has passed Order-in-Original. Regarding the terminal handling service the Assessing Officer has held that the audited financial statement provides that the appellant economic activities include the empty container depot facility and container washing and repair related services and at present, such services are not covered under the tariff heading 9819.9090 (Terminal Operators) and SRB office will take up such services separately. Regarding the franchise service the Assessing Officer has held that charges contained in the show-cause notice have been established and determined the sales tax of Rs.4,763,173/= along with default surcharge and penalty of Rs.238,159/=.

06. The appellant challenged the said order of the Assessing Officer by way of filing appeal before the Commissioner (Appeals), who dismissed the appeal upholding the order in original in toto. The appellant has now challenged the said order in appeal passed by the Commissioner (Appeals) before this forum.

07. Mr. Mohammad Yousuf, the learned advocate for the appellant submitted as under:

- i) The officer who had issued the SCN dated 24.02.2016 was not authorized to issue notice regarding alleged franchise services allegedly acquired by the appellant. He then submitted that the Show Cause



Notice was issued by Mr. Syed Rizwan Ali, Deputy Commissioner Unit No.15 who as on the date of issuing show-cause notice dated 24.02.2106 was authorized to deal with the cases of Shipping Agents, Ship Management Services, Ship Chandlers, Freight Forwarding Agents and Stevedores. Whereas the Franchise services was fell within jurisdiction of unit No. 5 and at the relevant time Ms. Sania Anwar was the Assistant Commissioner Incharge of Franchise Service Sector. He placed reliance upon two notifications dated 6<sup>th</sup> July, 2015 by which jurisdictions were assigned to the various officers of SRB.

- ii) At the time of issuance of show-cause notice the department was fully aware that the appellant being a stevedore is discharging its obligation in terms of understanding arrived between the SRB and Stevedores Corporation and under the order of the High Court and for that reason no demand was raised in respect of stevedore services.
- iii) The appellant has not received any franchise services and he referred to the definition of Franchise under section 2(46) of the Act. He also submitted that the requirements mentioned in the definition clause are not available in the agreement and the appellant is not exposed to the law.
- iv) The reason for which State Bank did not allow appellant to remit further amount was that there was no element of franchise.
- v) If tax is charged on franchise service from the appellant it will not be able to pass on the same to the end user as the service of stevedore is out of the ambit of Sindh Sales Tax in view of judgment of Sindh High Court reported as 2017 PTD page 1.
- vi) The amount parked as franchise fee was reversed and since no amount was paid on account of franchise no tax is payable.
- vii) Even if franchise service is acquired the same was acquired in relation to stevedore service which is not in the domain of Provincial Government.

08. Mr. Irfan Waheed the learned AC referred to the report dated 24.04.2018 regarding payment of tax on Franchise Fee by the appellant for the tax periods from July 2011 to October 2012. He also referred to his written arguments and submitted that Mr. Muhammad Yousuf Advocate in his arguments had submitted that appellant has never paid



tax on franchise fee, which is not correct in view of the report, dated 24.04.2018.

09. The learned AC further submitted as under:

- i) He submitted that the Officer who had issued show-cause notice was fully competent to issue notice to the appellant as the appellant had acquired franchise services in relation to its business as Stevedore. He then submitted that the appellant is registered in the category of stevedore and the SCN was issued by the AC who had jurisdiction at that time to deal with the stevedores and since the appellant is recipient of various services including franchise services the AC is empowered to issue SCN for multipurpose / all taxable services.
- ii) He then submitted that the contention of the appellant was that the permission to remit foreign exchange was not granted by the State Bank, but nothing has been produced on record in this regard.
- iii) He then submitted that appellant in its financial statements has made provisions for payment of tax on franchise fee but the same has not been paid to SRB on the pretext that permission from State Bank is required, which is not correct. He then submitted that there is an agreement of payment of franchise fee between appellant and Foreign Company, which agreement is still in existence.
- iv) He then submitted that the reversal of payment of franchise fee by the Board of Directors is not binding upon SRB and once services has been received from the non-resident person the appellant is liable to deposit the tax as per rule 36 of the Rules, 2011.

We have heard the learned representative of the parties and perused the record made available before us.

10. The show-cause notice dated 24.02.2016 was issued under the specific tariff headings 9805.2000, (stevedores), 9819.9090 (Terminal Operators), and 9823.0000 Franchise services). In the show-cause notice it was alleged that appellant has earned income from terminal handling and received franchise services. The show-cause notice is silent with regard to stevedore service. The appellant got registration under specific Tariff Heading 9805.2000 (stevedores). In the order in original the



Assessing Officer for obvious reason has avoided to mention the category under which the appellant has got registration. There was also no allegation against the appellant that it is not discharging its obligations in relation to stevedore service. In the order in original the appellant was discharged from the allegation of providing or rendering terminal services and the tax was only charged on franchise services.

11. Section 34 of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) provides that for the purpose of this Act, the Board may, by notification in the Official Gazette, appoint any person in relation to any area, any case or class of cases specified in the notification to act as an officer of the Board. Section 35 of the Act provides that any officer of the SRB appointed under section 34 shall exercise such powers and discharges such duties as are conferred or imposed upon him under this act and rules made thereunder. Section 36 of Act provides that Board may, by notification in the official gazette and subject to such limitations or conditions as may be specified therein, empower by name or designation authorize the Officers of SRB to exercise powers.
12. From the perusal of the above provisions of the Act it appears that the powers can be entrusted upon the officers of SRB by the Board by notification in the official gazette. The notification in exercise of powers under section 34 of the Act was issued by the Board on 06.07.2015 by which the powers and functions of officers of SRB were assigned to the officers (Assistant Commissioners/Deputy Commissioners) specified in the column (2) of the notification in respect of functions and description, specified in column (3) of the notification. Unit No.15 was entrusted with the powers to deal with the cases of Shipping Agents, Ship Management Services, Ship Chandlers, Freight Forwarding Agents and Stevedores and was authorized to issue show cause notice. Unit No.5 was entrusted with the powers to deal with the cases of Franchise Services and Intellectual property services and was authorized to issue show cause notice.



13. The other notification of the same date was issued in exercise of powers under section 34 and 35 of the Act and Ms. Sania Anwar, Assistant Commissioner was assigned to exercise jurisdiction relating to Unit 5 and Syed Rizwan Ali, Deputy Commissioner was assigned to exercise jurisdiction relating to Unit -15.
14. The Show Cause Notice dated 24.02.2016 was issued by Mr. Syed Rizwan Ali, Deputy Commissioner, Unit-15, for the recovery of tax under Tariff heading No. 9819.9090 and 9823.0000. At the assessment stage the tax liability was found only in respect of franchise service and no other services of terminal handling or stevedores. The franchise service at that time was within jurisdiction of Unit-5. From this it is apparent that Mr. Syed Rizwan Ali, Deputy Commissioner Unit-15 was not authorized by the Board to deal with the case of Franchise Services. The show-cause notice was malafidely issued including other services upon which no tax was payable just to bring the matter with in the jurisdiction of Unit-15.
15. Same is the position with the order in original dated 10.06.2016 passed by Mr. Syed Rizwan Ali, Deputy Commissioner Unit No. 15. At that time the Notifications dated 06.07.2015 were in field and according to those notifications Ms. Sania Anwar, Assistant Commissioner, Unit No. 5 was authorized to deal with the case of franchise service.
16. The exercise of jurisdiction under the Act is subject to issuance of notification in the official gazette by the Board without which the officers cannot exercise jurisdiction. The issuance of notification for the purpose of exercise of jurisdiction appears to be mandatory condition which cannot be waived or ignored. Section 34 and 35 of the Act regulate and specify the jurisdiction of the Officers of SRB. Section 35 of the Act clearly provides that an officer of SRB appointed under section 34 shall exercise such powers and discharge such duties as, are conferred or imposed upon him under the Act and rules made thereunder. From this provision it is clear that the officer of SRB can only exercise such powers and discharge such duties as, are conferred or



imposed upon him. At the date of issuance of show-cause notice Unit-15 was not authorized to deal with the cases of franchise service.

17. In the reported case of Izhar Alam Faruqi Advocate versus Sheikh Abdul Sattar Lasi and others 2008 SCMR 240 it has been held that jurisdiction cannot be assumed with the consent of parties and notwithstanding the raising of such an objection by the parties, the forum taking cognizance of the matter must at the first instance decide the question of its jurisdiction. It was further held that there can be no exception to the principle that an order passed or an act done by a court or a tribunal not competent to entertain the proceedings is without jurisdiction and that it is mandatory for the court or tribunal as the case may be to attend the question of jurisdiction at the commencement of the proceedings because the jurisdictional defect is not removed by mere conclusion of trial or enquiry and objection to the jurisdiction can be raised at any subsequent stage. The Honorable Supreme Court has relied upon the reported case of Rashid Ahmad versus State PLD 1972 SC 271 in which it was held that if a mandatory condition for the exercise of a jurisdiction before a court, tribunal or authority is not fulfilled, then the entire proceedings which follow become illegal and suffer from want of jurisdiction. Any orders passed in continuation of these proceedings in appeal or revision equally suffer from illegality and are without jurisdiction.

18. In the reported case of Ms. Aluminum Processing Industrial International (Pvt) Ltd. Versus Pakistan through Chairman Central Board of Revenue 2011 PTD 2128 the Honorable High Court of Sindh had held that the authority dealing with a matter must possess the jurisdiction to deal with the same and if such authority does not have the power the initiation of proceedings are liable to be quashed being coram-non-judice and non-est in the eyes of the law.

19. We are satisfied that the show-cause notice was issued without lawful authority and all proceedings initiated or undertaken in consequence thereof including the order in original and order in appeal are also





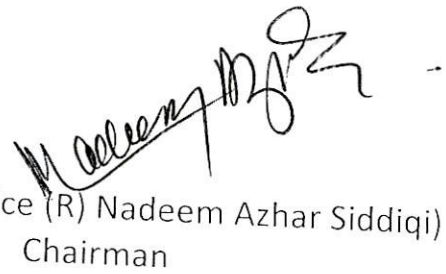
without lawful authority. The appeal is allowed and in consequence thereof the order-in-original and order-in-appeal are set-aside. The department is at liberty to issue fresh show-cause notice to the appellant.

20. As far as the other points raised by the learned representative of the appellant are concerned, in view of the above findings and discussions, deliberation on the same are not necessary.

21. The appeal is disposed of in above terms. Copy of the order may be supplied to the learned authorized representative of the parties.



(Agha Kafeel Barik)  
Member Technical



(Justice (R) Nadeem Azhar Siddiqi)  
Chairman

Karachi. Dated. 09.07.2018  
*WOS*

Copies Supplied to:

- 1) The Appellant through Authorized Representative
- 2) The Assistant Commissioner, SRB for compliance  
Copy for Information
- 3) The Commissioner Appeals, SRB
- 4) Guard File
- 5) Office File