

**BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT-  
KARACHI**

**DB-I**

**APPEAL NO. AT-59/2018**

M/s Karachi Port Trust,  
K.P.T Building,  
Eduljee Dinshaw Road, Karachi.....Appellant

**Versus**

Assistant Commissioner-(Unit-21)  
Sindh Revenue Board,  
12<sup>th</sup> Floor, Shaheen Complex,  
M. R. Kiyani Road, Karachi.....Respondent

Date of Filing of Appeal: 12.09.2018  
Date of Hearing: 08.02.2021  
Date of Order: 31.03.2021

Mr. Furqan Amin, ACA, Senior Manager AF-Ferguson & Co. Chartered  
Accountants for appellant.

Mr. Imran Ali, AC-SRB and Ms. Uzma Ghory AC-DR -SRB for respondent.

**ORDER**

**Justice ® Nadeem Azhar Siddiqi:** This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.140/2018 dated 26.07.2018 passed by the Commissioner (Appeals) in Appeal NO. 62/2017 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 110/2017 dated 06.05.2017 passed by Mr. Vicky Dhingra Assistant Commissioner, (Unit-21), SRB Karachi.



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02. The brief facts as stated in the OIO were that the services provided or rendered in respect of port operators, airport operators, airport ground services providers and terminal operators are chargeable to the Sindh Sales Tax ("SST") under section 8 read with Tariff Heading 9819.9090 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) read with Rule 40 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter to as the Rules). Moreover, franchises services mentioned under Tariff Heading 9823.0000 are taxable under section 3, 8 read with section 2(46) of the Act. The Relevant rule for charging SST on franchise service is rule 36 of the Rules. The said services of franchise are taxable at the rate of 10% as prescribed in Notification No.SRB-3-4/8/2013 dated 1<sup>st</sup> July, 2013.

03. It was alleged in the OIO that during examination of financial statements of M/s Karachi International Container Terminal Limited (KICT), it was revealed that KICT had paid royalty of Rs.846,655,000/- and Rs.975,909,000/- for the year ended on December-2014 (tax periods January to December-2014) and December-2015 (tax periods from January to December 2015) respectively to the appellant involving SST of Rs.182,256,400/-. It was further alleged that from scrutiny of financial statements of Pakistan International Container Terminal Limited (PICT), it was revealed that PICT had paid royalty of Rs.704,367,000/- and Rs.806,753,000/- for the year ended December-2014 (tax periods January to December-2014) and December-2015 (tax periods from January to December 2015) respectively to the appellant involving SST of Rs.151,112,000/-.

04. It was furthermore alleged that appellant had a franchise agreement with M/s Port Grand Limited (Food Court operating Co."FCOC") (Port Grand) and as per clause 8.1 of the agreement Port Grand was liable to pay Rs.1,200,000/- per month to the appellant and in this regard appellant had received royalty of Rs.28,800,000/- for the tax periods from January-2014 to December, 2015 (24 tax periods). In view of the above the total royalty



*M. Q.*

received by the appellant during the tax periods of January-2014 to December-2015 is as follows:-

Sr. No.	Franchisee	2014	2015	Value of Services	Tax involved
1	KICT	846,655,000	975,909,000	1,822,564,000	182,256,400
2	PICT	704,367,000	806,753,000	1,511,120,000	151,112,000
3	Port Grand	14,400,000	14,400,000	28,800,000	2,880,000
<b>Total</b>		<b>1,565,422,000</b>	<b>1,797,062,000</b>	<b>3,362,484,000</b>	<b>336,248,400</b>

05. The appellant was served with a Show-Cause Notice (SCN) dated 02-09-2016 to explain as to why the Sindh Sales Tax (SST) on services amounting to Rs.336,248,400/- should not be assessed under section 23 of the Act along with default surcharge under section 44 of the Act. The appellant was also called upon to explain as to why penalties under Serial No.3, 6(d), 11 and 13 of the Table under section 43 of the Act should not be imposed for contravention of provisions of section 2(46), 3, 8, 9, 17 and 30 of the Act read with Rules 36 of the Rules. The appellant failed to file any response to the SCN despite availing number of adjournments.

06. The Assessing Officer (AO) passed OIO and determined the SST at Rs.336,248,400/- and directed the appellant to deposit the said amount along with default surcharge (to be calculated at the time of payment) under section 44 of the Act with SRB. The AO also imposed penalties of Rs. 16,812,420/= under serial No. 3 (failed to deposit the amount of tax due) of the Table under section 43 of the Act and Rs. 10,087,452/= under serial No. 11 (failed to fulfill any of the conditions, limitations, or restrictions prescribed in a notification issued under any of the provisions of this Act) of the Table under section 43 of the Act.

07. The appellant challenged the OIO before the Commissioner (Appeals) by way of filing appeal. The Commissioner (Appeals) upheld the OIO to the extent of SST levied on the royalties received from KICT and PICT (TOCs) and set aside the OIO in respect of SST levied on the receipt from Port Grand and the penalties imposed by the AO, hence this appeal.



08. The learned representative of the appellant submitted as under that:

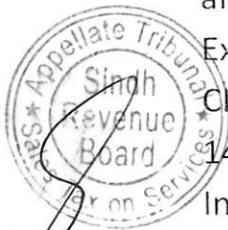
- a) The appellant was covered under Article 165 and 165-A of the Constitution of Pakistan, 1973 (Constitution) and was not liable to pay SST. It had entered into Build Operate and Transfer Contracts (BOT) with Terminal Operators Companies (TOCs) and was paying SST to SRB on these activities. However the SRB had treated the said BOT contracts as a franchise contract and was demanding SST on the royalty received from TOCs. The appellant had not entered into any agreement of franchise with TOCs and the SRB had misinterpreted BOT as a franchise agreement. The appellant referred to the judgment of the Hon'ble Supreme Court of Pakistan in the case of SRB versus Civil Aviation Authority, 2017 SCMR 1344 (CAA case) and the unreported judgment of Sindh High Court in CP NO D-2987/2018 TCS (Pvt.) Ltd V/s Pakistan Post.
- b) The appellant was established under the Federal Statue i.e. Karachi Port Trust Act, 1886 (KPT Act) and out of 11 Trustees the Chairman and 5 Trustees were to be appointed by Federal Government and Ministry of Maritime Affairs had the administrative control of the appellant. He further submitted that port operations were covered under Entry No.5& 6 of part-II of Legislative Lists of Fourth Schedule and item No. 24 of Part-I of the Legislative List of Fourth Schedule read with Entry No. 53, 54 and 59 of Part-I of the Legislative List of Fourth Schedule of the Constitution. It was submitted that appellant being a service provider was not liable to pay SST to SRB in view of the judgments in the case of CAA and Pakistan International Freight Forwarders Association, 2017 PTD 1 (PIFFA case). He further submitted that although the appellant was not liable to pay SST but it had already paid such considerable amount to SRB. Moreover the earlier order of the Tribunal passed against the appellant was challenged before High Court of Sindh and the same was still pending. He relied upon the following case laws.



- (i) Pakistan International Freight Forward Association, 2017 PTD 1 versus Province of Sindh.
- (ii) LESCO versus Province of Punjab, {(2013) 108 Tax 281 (H.C.Lah)}.
- (iii) Expo Lahore Pvt. Ltd. versus Excise and taxation Department, Government of Punjab, W.P No. 11802/2015 .
- (iv) M/s XEN Shahpur Division versus the Collector of Sales Tax, 2016 PTCL 282 (SC Pak.).
- (v) Sindh Revenue Board versus The Civil Aviation Authority of Pakistan, 2017 SCMR 1344.
- (vi) Un-reported judgment in TCS Pvt. Ltd. versus Pakistan Post and another, CP-D. No. 2987/2018 (DB-Sindh High Court).
- (vii) Commissioner of Income Tax Peshawar Zone versus M/s Siemen A.G., PLD 1991 SC 368.

09. The learned AC-SRB submitted as under that:

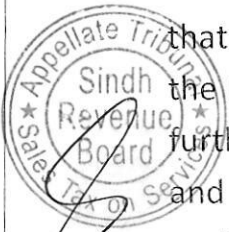
- a) After 18<sup>th</sup> Amendment in the Constitution the exclusive authority to tax services vested in the provinces and he relied upon para 73(a) of PIFFA case as mentioned supra. He further submitted that the appellant was paying other provincial taxes i.e. Property Tax and Municipal Tax and had not taken shelter under Article 165 and 165A of the Constitution. He stated that the subject matter of Article 165 and 165A of the Constitution related to the Income Tax and Property Tax, which are in the nature of direct taxes and the appellant without any objection was also paying Federal Excise Duty under the Federal Excise Act, 2005 (FE Act) and referred to the judgment reported as CIR Zone-I, LTU, Karachi versus Karachi Port Trust, 2014 PTD (Trib.) 1428. Moreover the appellant was also paying Income Tax under the Income Tax Ordinance, 2001 (ITO) and referred to the case of KPT reported as 2010 PTD (Trib.) 2306.
- b) It was further referred to the earlier Orders of the Tribunal passed in appeal No. AT-34/2016 (KPT V/s Commissioner (Appeals)-SRB dated 30.06.2017, Appeal No. AT-06/2016, Port Qasim Authority versus AC-



SRB dated 19.04.2017 and Appeal No.AT-77/2019, Port Qasim Authority versus Assistant Commissioner, Unit-32, SRB dated 28.12.2020 and it was submitted that the point raised by the learned Advocate was already settled and it was held that the SST was payable on the services of franchise provided by the appellant. It was further submitted that no SST was levied on appellant and being service provider it was to charge and collect the SST from the service recipient and to pay the same to SRB. He relied upon the following case laws.

- i) M/s PAKSAT International Pvt. Ltd. versus the CIR Zone-IV, RTO-II, Karachi, STA No. 182-KB-2015 (Appellate Tribunal Inland Revenue).
- ii) M/s Port Qasim Authority versus AC-SRB, Appeal No. AT-06/ versus AC-SRB, Appeal No. AT-06/2016 dated 19.04.2017 (Appellate Tribunal SRB).
- iii) M/s Karachi Port Trust versus Commissioner (appeals)-SRB, Appeal No. AT-34/2016 dated 30.06.2017 (Appellate Tribunal SRB).
- iv) M/s Port Qasim Authority versus AC-SRB, Appeal No. AT-77/2019 versus AC-SRB, Appeal No. AT-06/2016 dated 28.12.2020 (Appellate Tribunal SRB).
- v) Province of Punjab versus Muhammad Tufail, PLD 2017 SC 53.
- vi) CIR Zone-I, LTU, Karachi versus Karachi Port Trust, 2014 PTD (Trib.) 1428 (Appellate Tribunal Inland Revenue).

10. The learned representative of the appellant in rebuttal submitted that the appellant was a Federal Functionary and its control was vested in the Federal Government and Sindh province could not levy tax upon it. He further submitted that federal taxes were different from provincial taxes and if the appellant was paying federal taxes it was entitled to the protection available to it under Article 165 and 165A of the Constitution. The Sindh Province cannot legislate in respect of items mentioned in the Federal Legislative List.



*M. Q. S.*

11. We have heard the learned representative of the parties and perused the written submissions filed by them and the record made available before us.

12. The Appellant was voluntarily registered with SRB, under the Tariff Heading 9819.9090 (Service provided or rendered by Port Operators, Airport Operators, Airport Ground Service Providers and Terminal Operators) with effect from 17.08.2011 and was discharging its obligation under the Act. It was argued by the appellant side that it was a creation of a federal statute and performed the functions of the Federal Government and was not liable to taxation under the Provincial Act. Whereas it was argued by the respondent side that the appellant was an autonomous body created by a Federal statute and was not itself Federal Government and after Eighteenth Amendment in the Constitution by way of an exception in Entry No. 49 of the Fourth Schedule the Provinces were mandated to tax the services. It was further argued that no tax was levied on appellant since under section 9 of the Act the appellant was not personally liable to pay SST but was required to charge and collect SST from the service recipient and to pay the same to SRB.

13. The dispute in the instant appeal is whether the appellant being a service provider of franchise services was liable to charge and collect tax from service recipients in respect of franchise service, Tariff Heading 9823.0000 provided by it to Terminal Operating Companies (TCOs). To resolve the controversy the following issues were framed on the suggestion of the learned representative for the appellant on 12.11.2018:



i) Whether the appellant enjoys Inter governmental immunity from payment of provincial taxes in terms of Articles 165 and 165A of the constitution?

ii) Whether the agreements/contracts which are based on BOT (Build, Operate and Transfer) can be re-characterized as Franchise Agreements by the tax authorities?

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However, after hearing the arguments the following issue was added in the issues framed earlier:-

iii) Whether the Sindh Legislature was authorized to impose any tax on services provided by a statutory body (KPT) which was established under the Federal Statute?

14. Now we take the first issue "whether the appellant enjoys Inter governmental immunity from payment of provincial taxes in terms of Articles 165 and 165A of the Constitution". This issue is discussed as under:-

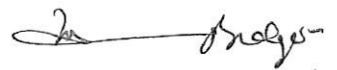
a) Articles 165 and 165-A of the Constitution read as under:-

*"165. Exemption of certain public property from taxation. (1) The Federal Government shall not, in respect of its property or income, be liable to taxation under any Act of Provincial Assembly and, subject to clause (2), a Provincial Government shall not, in respect of its property or income, be liable to taxation under Act of 1[Majlis-e-Shoora (Parliament)] or under Act of the Provincial Assembly of any other province.*

*(2) If a trade or business of any kind is carried on by or on behalf of the Government of a Province outside that Province, that Government may, in respect of any property used in connection with that trade or business or any income arising from that trade or business, be taxed under Act of 1[Majlis-e-Shoora (Parliament)] or under Act of the Provincial Assembly of the Province in which that trade or business is carried on.*

*(3) Nothing in this Article shall prevent the imposition of fees for services rendered".*

*"165A. Power of Majlis-e-Shoora (Parliament) to impose tax on the income of certain corporations, etc. (1) For the removal of doubt, it is hereby declared that 2[Majlis-e-Shoora (Parliament)] has, and shall be deemed always to have had, the power to make a law to provide for the levy and recovery of a tax on the income of a corporation, company or other body or institution established by or under a Federal law or a Provincial law or an existing law or a corporation, company or other*



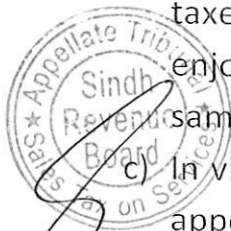


body or institution owned or controlled, either directly or indirectly, by the Federal Government or a Provincial Government, regardless of the ultimate destination of such income.

(2) All orders made, proceedings taken and acts done by any authority or person, which were made, taken or done, or purported to have been made, taken or done, before the commencement of the Constitution (Amendment) Order, 1985, in exercise of the powers derived from any law referred to in clause (1), or in execution of any orders made by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court or tribunal, including the Supreme Court and a High Court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court, including the Supreme Court and a High Court, on any ground whatsoever.

(3) Every judgement or order of any court or tribunal, including the Supreme Court and a High Court, which is repugnant to the provisions of clause (1) or clause (2) shall be, and shall be deemed always to have been, void and of no effect whatsoever".

b) From perusal of the above provisions it is evident that it was the Federal Government which in respect of its property or income was not liable to taxation under any Act of Provincial Assembly and similarly subject to clause (2), a Provincial Government shall not, in respect of its property or income, be liable to taxation under Act of Majlis-e-Shoora (Parliament). The appellant is not itself a Federal Government, but at the best it can be said that it is an institution established under a Federal statute. Admittedly the appellant was paying Income Tax, Federal Excise Duties and provincial property taxes without any objection and reservations. If the appellant was enjoying the status of Federal Government it would had not paid the same.



c) In view of section 25 of the KPT Act, admittedly all the properties of appellant were vested in it without any control and interference of the Federal Government and the appellant being an autonomous body was free to manage its affairs without any interference from the Federal Government. The appellant despite creation of a Federal statute could not claim the status of Federal Government. Article

165-A of the Constitution clearly refutes the claim of the appellant. The Article provided for the power of Majlis-Shoora (Parliament) to impose tax on the income of certain corporation, company or other body or institution established by or under a Federal law or a Provincial law. Article 165 of the Constitution deals with the provision of income and property which fall in an ambit of direct taxes. After the Eighteenth Amended in the Constitution the Provinces were authorized to levy SST on services. In Sindh the SST was levied as value added tax (VAT), and under the Act no SST was directly levied on income and property tax of the appellant. The SST was to be charged and collected by the appellant from its service recipients who were paying the SST without any objection to the appellant.

- d) In the instant case the appellant is not an aggrieved person or party as no tax was levied on it and it was not required to pay SST from its pocket. The aggrieved person or party would be the service recipients who were paying the SST to appellant for paying the same to SRB. Earlier the appellant was made liable to pay FED on the same franchise services. In the reported case of CIR Zne-1, LTU, Karachi versus Karachi Port Trust 2014 PTD (Trib.) 1428 at paragraph 32 it was held as under:-

*"32. Having traversed through all the above pages of this order, we feel ourselves a bit able to have given answers to the questions raised herein above. It is evident that respondent/subject company has given/assigned the rights to TOCs to engage in the business activity of providing services related to port facilities on the assigned berths of terminal and in lieu thereof the respondent/subject company has been receiving a fee from the licensees/authorized TOCs which has been referred to as 'royalty' in the business agreements between KPT and TOCs, therefore, in all the fours of law and facts, the subject company (KPT) is liable to pay FED on amounts received by it from TOCs as royalty besides any fee in addition thereto".*



- e) That the plea of appellant for exemption from payment of income tax being Federal Government was not accepted. It was held in the case reported as 2010 PTD (Trib.) 2306 as under:-

*"35. In view of above discussion and respectfully following the decisions of Honorable Islamabad High Court in the case of PTA, Islamabad Tribunal in the case of SECP and other case law cited at Bar, we are convinced and accordingly hold that KPT is not Federal Government and not exempt from payment of income tax. Its income is chargeable to income tax within the meaning of subsection (4) of section 49 of the Income Tax Ordinance, 2001 like all other bodies, institutions, development and regulating authorities mentioned therein".*

- f) That the plea of appellant for exemption of payment of property tax under the provisions of West Pakistan Immovable Property Tax Act, 1958 was not accepted. In the reported case of Karachi International Container versus Government of Sindh, 2005 SCMR 1183 it was held as under:-

*"13. There is no doubt in our mind that being owner of the property till proved otherwise K.P.T is liable to make payment of property tax at first instance and in case of its failure undoubtedly notice for recovery of property tax could be issued under section 14 of the Act and further action for attachment can be taken pursuant to the provisions as enumerated in section 16 of the Act against the petitioner who is responsible to pay property tax in view of Clause 14.3(c) and Clause (18) of the Implementation Agreement dated 1-6-1996 and Clauses (2) and (3) of Indenture of Lease executed between the petitioner and K.P.T."*



The status of KPT is like Water and Power Development Authority (WAPDA) as the WAPDA is also a body established under a Federal statute and also claims exemption from payment of FED. In the reported case of Central Board of Revenue, Islamabad versus WAPDA and another, PLD 2014 SC 766 it was held as under:-

*W.S.*

"13. From the above analysis it is seen that although WAPDA's affairs to some extent are controlled by the government but for all practical purposes it is an independent entity and authorized to carry out the business of utilization of water and power resources of the country and to generate electricity and in this connection has been given a freehand".

h) It was now settled that after insertion of Article 165A in the constitution the lifting of veil of incorporation in the matter of statutory bodies are not required. It was held by the Honorable Supreme Court in the reported case of Karachi Development Authority, 2005 PTD 2131 as under

"7. It is true that what is mentioned in Article 165-A (1) of the Constitution is limited to the levy of income-tax. Nevertheless, the purpose, the object and the field of Article 165-A of the Constitution is to fix the legal ownership of the property and the identity of the receipt of the income. This has been achieved by reinforcing the statutory corporate veil for all fiscal purposes. The lifting of the corporate veil as such is no longer permissible and the distinct juristic personality of the incorporated or statutory body has been recognized notwithstanding the control, the destination and the functioning of such bodies. Such a declaratory law would certainly stand in the way of the appellant because the same distinction which was sought to be created by lifting the veil in the matter of the income tax is sought to be achieved in the matter of sales tax".

Even in the case of CAA supra in view of its findings the Honorable Supreme Court has held as under:-

"Therefore, the question whether CAA can benefit from the exemption under Article 165 (1) of the Constitution becomes irrelevant.



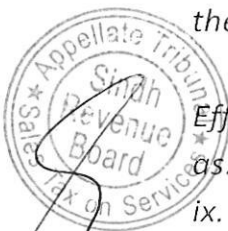
In view of the above discussions we hold that the appellant does not enjoy Inter governmental immunity from payment of provincial taxes in terms of Articles 165 and 165A of the Constitution.

15. Now we take up the second issue "whether the agreements / contracts which are based on BOT Build, Operate and Transfer) can be re-characterized as Franchise Agreements by the tax authorities.

- a) The above issue was already decided by this Tribunal in its earlier decision dated 30.06.2027 passed in Appeal No. AT- 34/2016 filed by the appellant against SRB and the relevant portion is reproduced for ready reference as under:-

*"...As far as the nature of implementation agreements is concerned, it is true that words franchise service was not used in the agreements. The word royalty has been used in the agreements. It has to be seen in what context the word royalty has been used. The agreements are on BOT (Built Operate and Transfer) basis. Under the Agreements with KICT and PICT the appellant has assigned its statutory duties of erection of wharves and permit KICT and PICT to erect private wharves and to handle cargo which is otherwise the job/duty of the appellant. The KPT (appellant) has allowed KICT and PICT exclusive rights to design, engineer, finance, insure, construct, complete and maintain the terminal (common user container terminal), at the site until the earlier of the expiry date or termination of agreement. The erection, construction and establishment of the container terminal and handling cargo are the part of statutory duties of the KPT which were assigned to KICT and PICT. In this regard it is appropriate to refer to the definition of franchise, which is available in the Sindh Sales Tax on Services Rules, 2011 since inception. Rule 2 (ix) of the Rules, 2011 and reads as under:*

*"ix. ["Franchise" means an authority given by a franchiser under which the franchisee is contractually granted any right to produce, manufacture, sell or trade in or do any other business activity relating to goods or provide service or to undertake any process identified with franchiser against a fee or consideration including royalty, technical fee, trade mark, trade name, logo, brand name or any such symbol, as the case may be, is involved."] (Emphasis supplied)*



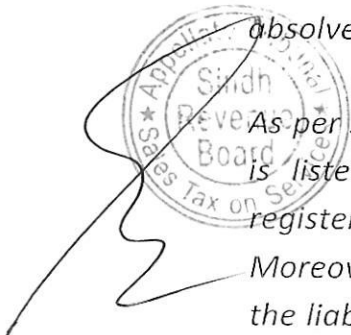
*Effective 1<sup>st</sup> February, 2012 the said definition was amended and read as:*

*ix. ["Franchise" means an authority given by a franchiser under which the franchisee is contractually or otherwise granted any right to produce, manufacture, sell or trade in or do any other business activity in respect of goods or to provide service or to undertake any process*

identified with franchiser against a fee or consideration including royalty or technical fee, whether or not a trade mark, service mark, trade name, logo, brand name or any such representation or symbol, as the case may be, is involved;] (Emphasis supplied)

If we consider the definition of franchise in the rules it appears that the same is very exhaustive and cover various aspects of "franchise". The said definition apart from other aspects of franchise provides that "or to provide services or to undertake any process identified with franchiser against a fee or consideration including royalty or technical fee (Emphasis supplied) whether or not a trade mark, service mark, trade name, logo, brand name or any such representation or symbol, as the case may be involved". From this definition it is clear that for deciding whether or not the relationship of franchiser and franchisee exist between appellant and three TOCs Companies, it is sufficient that the franchisees (Terminal Operating Companies [TOCs]) are providing services or is undertaking any process identified with franchiser. In this case TOCs are providing services or undertaking a process of handling containers which is the statutory duty of KPT and under the Implementation Agreements are assigned to TOCs against consideration in the name of "Royalty". Under the agreements the TOCs are liable to pay royalty at the rate of 15% of the printed/published container loading/unloading charges. From this definition it is apparent that the TOCs are undertaking a process which is identifiable with franchiser (KPT) against a fee or consideration including royalty or technical fee. (Emphasis is supplied) Mere describing the Franchise Fee as "Royalty" in the Agreements does not absolved the appellant from payment of Franchise Fee.

As per section 3(1) of the Act-2011, a taxable service is a service which is listed in the Second Schedule and is provided or rendered by registered person from its registered office or place of business in Sindh. Moreover, as per section 9(1) read with section 3(1) of the Act-2011, the liability to pay tax is on the service provider and charging section is 8 of the Act-2011. The appellant is a registered person and is paying



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*Sindh Sales Tax on its other services without claiming any immunity under Article 165 of the Constitution. The service which the appellant is providing to TOCs is listed in the second schedule of the Act, 2011 and the activities of KPT is fully covered under tariff heading 9823.0000 (Franchise Services).*

b) In view of the above decision we hold that the agreements/contracts executed between the appellant and T.OCs were based on BOT (Build, Operate and Transfer) and were in essence Franchise Agreements and the appellant is liable to charge, collect and pay SST to SRB.

16. Now we take up the third issue "whether the Sindh Legislature was authorized to impose any tax on services provided by a statutory body (KPT) which was established under the Federal Statute". This issue is discussed as under:-

a) In the instant case it is evident that no tax has been imposed on the income of the appellant. The SST was levied under the exception of Entry No.49, which provides that (except sales tax on services). The tax has been imposed by the legislature of Province of Sindh in terms of mandate given by the 18<sup>th</sup> amendment of the Constitution. After such amendment Entry No. 49 of the Fourth Schedule of the Constitution was amended. The Entry No. 49 before amendment read as under:

*"49. Taxes on the sales and purchase of goods imported exported, produced, manufactured or consumed".*

Such entry of the Fourth Schedule of the Constitution after amendment read as under:

*"49. Taxes on the sales and purchase of goods imported exported, produced, manufactured or consumed. (Except sales tax on services)" Emphasis supplied.*

The Honorable High Court of Sindh in its latest judgment reported as Pakistan International Freight and Forwarders Association versus Province of Sindh and others 2017 PTD 1, in paragraph 58 considers the exception by



framing a question "how does the "exception" apply and what is the effect? While replying the question Mr. Justice Munib Akhtar speaking for the Bench held as under:-

*"In our view, the "exception" added to entry No. 49 is not a true exception. Rather, it is an independent provision in its own right. It has two primary effects. Firstly, and most importantly for present purpose it recognizes expressly on the constitutional plane that a taxing power in respect of the taxing event of rendering or providing services vests in the provinces.....The real effect of the "exception" is to "shift" the taxing power in relation to the taxing event of rendering or providing of services from the Federation to the Provinces.*

In paragraph 59 of the judgment it was further held as under:-

*"59. The second effect of the "exception" though not directly relevant for present purpose, may also be adverted to. Entry 49 is concerned with; inter alia, the sale of goods. The taxing power in relation thereto vests solely in the Federation. The taxing power in relation to the rendering or providing of services now vests solely in the Province".*

- b) In view of the above judgment the authority of the Province to tax the services cannot be questioned on the touch stone of Article 143 of the Constitution. Article 143 can be applied if there is inconsistency between a Federal and Provincial Law. The Sales Tax Act 1990 was enacted to levy tax on sale, importation, exportation, production, manufacture or consumption of goods, whereas the Sindh Sales Tax on Services Act, 2011 was enacted to levy tax on services provided, rendered, initiated, or consumed in the Province of Sindh. The subject matter of the two laws is different and distinguishable and both have their own field of application.
- c) The learned representative of the appellant relied upon the case of CAA as mentioned supra and submitted that the Sindh Government



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could not impose any tax on services provided by a statutory body performing the functions of the federation. In the case of CAA, the Honorable Supreme Court had held that some of the functions CAA is required to perform are those that are specifically mentioned in the Constitution and in respect whereof only the Federal Legislature can enact laws. Thus the CAA was also held to be a federal regulatory authority and the functions and regulatory duties performed by it were held to be within the exclusive sphere of the Federal Legislature and the Provincial Government could not impose sales tax on the purported services provided by CAA.

- d) The Act was promulgated after the passing of the Eighteenth Amendment in the Constitution whereby Item No. 49 of Part I of Fourth Schedule was amended and the power to levy sales tax on services was given under the domain of the Provinces. After Eighteenth Amendment in the Constitution the President of Pakistan issued The Distribution of Revenues and Grants-in-Aid Order 2010 and Clause 10 of the same provided that "*Sales Tax on Services: NFC recognized that sales tax on services is a provincial subject under the Constitution of the Islamic Republic of Pakistan, and may be collected by respective Provinces, if they so desired*". After the Eighteenth Amendment the Sindh Province under the mandate of Item No. 49 promulgated The Act (The Sindh Sales Tax on Services Act, 2011) by which the services listed in the Second Schedule to the Act provided or rendered in Sindh were taxed effective from 01.07.2011.
- e) The learned representative of the appellant relied upon Items No. 24, 53, 54 and 59 of the Part I of the Fourth Schedule and Item No. 5 of Part II of the Fourth Schedule inserted vide the Constitution Eighteenth Amendment Act, 2010. The item No. 24 deals with carriage of passengers and goods by sea or by air. Item No. 53 deal with terminal taxes on goods or passengers carried by railway, sea, or air; taxes on their fares and freights. Item No. 54 deals with fees in respect of any of the matters in this part, but not including fees taken in any court. Item No. 59 deals with matters incidental or ancillary to any matter enumerated in this part. It is thus clear that none of the



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items directly deal with the ports and its activities and are therefore not directly applicable in this case. The subject matter of this case is the SST levied on franchise services provided or rendered by appellant in Sindh. The item No. 5 of Part II of Fourth Schedule deals with Major Ports, i.e. the declaration and delimitation of such ports, and the construction and powers of port authorities therein. Under this item, Majlis-e-Shoora (Parliament) has the power to legislate in respect of declaration of major ports and its delimitation and construction and the powers of the port authorities. This item also did not deal with the SST levied on services provided by appellant in Sindh. The learned representative of the appellant submitted that like CAA the KPT is a federal statutory body and the province has no authority to levy sales tax on its services. In the CAA case the services provided by CAA were treated as the functions of the federation and it was held that the CAA had no choice but to perform those functions. It was also held that CAA is the regulatory authority and regulates aircrafts and air traffic control. It was also held that the management of CAA vests in the Board. Moreover the Federal Government exercised control over the financials of CAA and its budget was required to be approved by the Federal Government and its accounts were audited by the Auditor General, Pakistan. It is thus evident that CAA was not setup as a commercial entity.

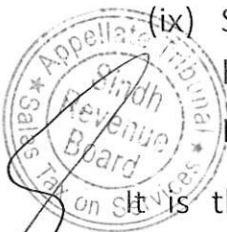
- f) The appellant was established as a Trust to manage the affairs of Port of Karachi. The duty of carrying out the provisions of the KPT Act was vested in the Board called "Trustees of the Port of Karachi" which consist of 11 members. The Chairman was to be appointed by the Federal Government and Vice Chairman was to be elected by the Board of Trustees. Out of remaining 10 Members five were to be elected by the institutions of private sector and five were to be appointed by the Government.
- g) The following sections of Karachi Port Trust Act, 1886 (KPT Act) stipulates that the appellant was autonomous body which was



created by Federal Statute and was not itself Federal Government, and it has no monopoly over the maritime affairs of Pakistan.

- (i) Section 25 of the KPT Act: under this section the Board had the power to acquire and hold movable and immovable properties.
- (ii) Section 18 of the KPT Act: under this section the Board was authorized to lease, sell and transfer any movable or immovable properties for the purposes of the Act, which have become vested or been acquired by the Board except the lease of immovable property for a term exceeding twenty five years.
- (iii) Section 43 of the KPT Act: under this section the Board is authorized to frame scale of tolls, dues rate and charges.
- (iv) Section 56 of the KPT Act: under this section the Board is authorized to make bye laws with the approval of the government.
- (v) Section 61 of the KPT Act: under this section the moneys belonging to the Board shall be held by them in trust, and applied in the payment of charges mentioned in sub-sections.
- (vi) Section 62 of the KPT Act: under this section the Chairman is required to submit annual estimate to the Board.
- (vii) Section 64 of the KPT Act: under this section the Board will submit the estimate to the Government who may disallow such estimate or portion thereof and return the same for amendment.
- (viii) Section 68 of the KPT Act: under this section the accounts are to be laid before the Government and shall be audited by the auditors appointed by the Government.
- (ix) Section 79A of the KPT Act: under this section the Government has the power to cancel, suspend or modify the acts or proceedings of the Board.


It is thus evident from the above sections of KPT Act that the appellant has no monopoly over the maritime affairs of Pakistan and is not the only regulatory authority of ports in Pakistan. Moreover

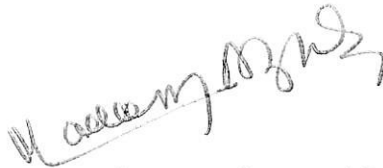


the Government has no say in the matter pertaining to managing the affairs of Karachi Port Trust. Whereas the case of CAA was totally different since it was the only body to manage all airports of Pakistan and regulate the aviation in the country.

- h) The service which were taxed in the instant case were the franchise services provided by appellant to TCOs and the same could not be said to be the function of the Federation.
- i) In view of the above discussions we hold that the Sindh Legislature could impose tax on services provided by a statutory body (KPT) which was established under the Federal Statute.

17. In view of our findings on the above issues we are of the opinion that the appellant is liable to charge, collect and pay SST on its providing or rendering of franchise services to TOCs, resultantly the appeal is dismissed. The copy of this order may be provided to the learned authorized representatives of the parties.

  
(Imtiaz Ahmed Barakzai)  
TECHNICAL MEMBER

  
(Justice® Nadeem Azhar Siddiqi)  
CHAIRMAN

Karachi.

Dated: 31.03.2021

Copy for compliance:

- 1) The Appellant through authorized Representative.
- 2) The Assistant Commissioner (Unit-21), SRB, Karachi.

Copy for information to:-

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

Certified to be True Copy

  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order issued on

23/04/2021

Order Dispatched on

23/04/2021

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