

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD

AT KARACHI

DB-I

APPEAL NO. AT-77/2019

M/s Port Qasim Authority,
Karachi.....

Appellant

Versus

Assistant Commissioner-(Unit-32)
SRB, Karachi

Respondent

Date of Filing of Appeal: 05.11.2019

Date of hearing: 26.11.2020

Date of Order 28.12.2020

Mr. Atir Aqeel Ansari, Advocate for appellant.

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

ORDER



Justice[®] Nadeem Azhar Siddiqi:

This appeal has been filed by the appellant challenging the Order-in-Revision (hereinafter referred to as the OIR) dated 03.09.2019 passed by the Aamir Ali, Commissioner-III SRB in the Revision Application filed by the Appellant against the Order- in-Original (hereinafter referred to as the OIO) No. 156/2019 dated 01.0.2019 passed by the Assistant Commissioner Mr. Awais Raza (Unit-32), AC SRB, Karachi.

02. The facts of the case as stated in the OIO were that the appellant was registered with SRB for providing or rendering taxable services of Port Operator and Terminal Operator falling under Tariff Heading 9819.9090 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).

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03. It was alleged in the OIO that during the cross matching of Financial Statement for the Financial Year 2013-14 (Tax Periods July-2013 to June-2014) with statutory returns of the same tax periods, it was revealed that the appellant had short declared the value of taxable services amounting to Rs.1,705,686,464/- thereby short declaring the Sindh Sales Tax (SST) amounting to Rs.272,909,834/-. The detailed description is given as under:-

Description	Amount
Value of Taxable Service as per Financial Statement for FY 2013-14	5,572,297,045
Value of Taxable Service declared in Statutory Returns for FY 2013-14	3,866,610,581
Short Declared Value of Taxable Service	1,705,686,464
Applicable Tax Rate	16%
Short Paid Amount of Tax	272,909,834

04. The appellant was served with Show Cause Notice (SCN) dated 08.05.2018 under section 23 of the Act to explain as to why the short paid amount of SST of Rs.272,909,834 shall not be assessed as payable on the provision of taxable services of Rs.1,7065,686,464 alongwith default surcharge under section 44 of the Act. And why the penalty prescribed at Sr. 2, 3 and 6 (d) of Table under section 43 of the Act should not be imposed.

05. M/s Nishtar and Zafar Advocates and Consultants, filed written reply dated 05.07.2018 on behalf of the appellant and the relevant portion is reproduced below:

"In this regard, it is explained that we are unable to identify that wherefrom your office has taken the figure of Rs.5,572,297,045/- as we could not trace the same in the financial statement of PQA. Kindly share the computation and reference to said figure to enable to respond in this matter.

Without prejudice to above, as explained in respect of parallel proceedings for period 2012-13, the annual accounts of PQA show income from royalty which is subject matter of separate order (which is subject matter of litigation), rent from industrial and

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commercial estate, as well as income from gate pass and weighment charges which is not received in relation to vessel thus not chargeable to Sindh Sales Tax under Rule 40 of the Sindh Sales Tax on Services Rules. Besides, it is also pertinent to mention that in the given period the export related services were not chargeable to sales tax.

Once your office will take these aspects into account while reviewing the accounts, it will become clear that there is no shortfall and PQA has charged sales tax on all taxable services. In view of above you are requested to withdraw the notice and oblige. In case your office wishes to proceed with the notice kindly share the break-up how the value of Rs.5.57 billion was computed in your show-cause notice."

06. The AR on behalf of the appellant again filed Written Reply dated 16.07.2018, the relevant portion is reproduced as under:-

"In our submissions made vide our earlier letter dated 05-07-2018, we have explained that many items among the revenue were not part of taxable services like lease rentals, gate pass etc. Besides, royalty has already been taxed in earlier order by SRB.

Apart from above, the export related services are not taxable. We are furnishing herewith the details of import and export related services as well as invoices of export related services.

On review of enclosed documents it will be clarified that PQA has properly charged sales tax on all applicable transactions."

07. The Assessing Officer (AO) after reconciliation of the short declared amount summarized the value of service and payable SST as under:-

Summarized Calculations	
Reconciliation of Value of Services	
Revenue And Other Income	5,572,297,045
Less: Declared in Returns	(3,866,610,581)
Less: Royalty Income assessed Earlier	(809,283,881)
Less: Lease Rentals	(164,278,031)

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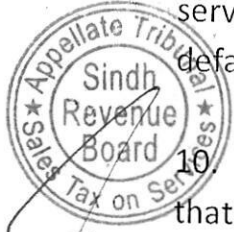
Value of Services (Short Declared)	732,124,552
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Tax on Short Declared Value of Services	
Tax on Port and Terminal Operator Services Rs.617,633,791/- @ 16%	98,821,407
Tax on Royalty Rs.114,490,761/- @ 10%	11,449,076
Short Paid Amount of Tax	110,270,483

08. The AO passed OIO under section 23 of the Act in the sum of Rs.110,270,483/- on the basis of short declared value of taxable services of Rs.732,124,552/- alongwith default surcharge under section 44 of the Act. The AO also imposed the penalty of Rs.5,513,524/= under serial No. 3 of Table under section 43 of Act.

09. The said OIO was challenged by the appellant before the Commissioner-III, SRB by way of filing of Revision under section 55 of the Act, who partly allowed the relief by deleting SST on export related services and maintained the OIO on other items. He also maintained the default surcharge and penalty imposed by the AO.

10. Mr. Atir Ansari, the learned advocate for the appellant submitted that the license/lease charges were wrongly taxed under Tariff Heading 9823.0000 (Franchise Services). He contended in this context that the appellant provided land to Terminal Operators on built and operate basis and no taxable service were provided. He further contended that the consideration was received in two forms i.e. (a) fixed charges for using the land of appellant and (b) variable charges based on the turnover of Terminal Operator. He also contended that the tax was wrongly levied on other service i.e. weighment charges, additional wharfage, and penalty. It was contended that revenue earned from weighment charges also included the amount received from issuance of gate pass of Rs.18,774,156/- and earning from weighment charges amounting to Rs.962,225/- and for these two items there was neither any specific Tariff



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Heading nor the same were covered under Rule 40 of the Rules applicable during the tax periods July 2013 to June-2014. He further contended that revenue from issuance of gate pass was not a service and the same was issued for security purposes to identify the persons entering into port area. Moreover, the services if any which were rendered through weighment-bridge were not part of Second Schedule to the Act and thus not taxable and the providing of facility of weighment does not have any nexus with the services provided by port operators. He further contended that earning from wharfage was related to providing space for using the wharf for loading and un-loading of goods and the appellant was paying tax on wharfage. It was contended by the AR of the appellant that it was not known from where this figure of additional wharfage charges was taken and tax was levied. He further contended that the penalty was charged for the violation of environmental and safety requirements and not against any services provided or rendered by the appellant. He further contended that penalty and default surcharge were illegally imposed in violation of the various judgments of superior courts without first establishing mensrea on the part of the appellant.



11. The learned AC for SRB submitted that the appellant was undisputedly registered as Port Operator under Tariff Heading 9819.9090 (services provided or rendered by port operators, airport operators, airport ground service providers and terminal operators) and all the services provided by it as Port Operator were taxable by virtue of the above Tariff Heading read with Rule 40 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) and the appellant was not entitled to pick and choose services for payment of SST. He further submitted that besides providing port operator services the appellant had also received royalty from Terminal Operators Companies (TOCs) which was covered under Tariff Heading 9823.0000 (Franchise Services) of the Second Schedule to the Act chargeable to SST at the reduced rate of 10 percent. The appellant had received the consideration of "Royalty" from (TOCs)

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under various agreements/arrangements. Moreover, the appellant has granted right to TOCs for providing cargo handling and/or port related services. Granting of such rights fell within the definition of "franchise" which was taxable under Tariff Heading 9823.0000 of the Second Schedule at the specific rate of tax @10%. He further contended that this issue was settled by the Tribunal in Appeal No. AT-06/2016, Port Qasim Authority versus AC-SRB vide order dated 21.04.2017 and referred to the relevant portion of the Order.

12. Mr. Atir Ansari the learned advocate for the appellant in rebuttal submitted that the appellant had challenged the earlier order of the Tribunal before the High Court of Sindh by filing Reference under section 63 of the Act.

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

The AO determined the SST at Rs. 110,270,483/= which was reduced to Rs.15,949,112/= by Commissioner-III, SRB in OIR by deleting the export related services which at the relevant tax periods were not taxable.

15. The Commissioner-III, SRB finalized the assessment as under:-

1	Adjusted Revenue as per OIO No. 156 of 2019	732,124,552
2	(Less): Value of Taxable Services Pertaining to Exports	(589,508,565)
3	Value of Taxable Services Upheld Vide OIR	142,615,987
Reconciliation of Tax on As Per OIR		
1	Revenue From Royalty	114,490,761
2	Revenue From Terminal Services (i+ii+iii)	28,125,226
	(i) Revenue From Weightment Charges	19,736,881
	(ii) Revenue From Additional Wharage	2,901,095
	(iii) Penalty Charges	5,487.250
	Value of Taxable Services Upheld Vide OIR (1 + 2)	142,615,987
	(a) Tax on Royalty Rs.114,490,761/- @ 10% (a)	11,449,076

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(b) Tax on Port and Terminal Operator Services Rs.28,125,226- @ 16%	4,500,036
Short Paid Amount of Tax (a + b)	15,949,112

16. The issue of revenue from Royalty was already decided by the Tribunal vide order dated 21.04.2017 as under:

"if we consider the definition of franchise in the rules it appears that the same is very exhaustive and cover various aspects of 'franchise'..... from this definition, it is clear that for deciding whether or not the relationship of franchiser and franchisee exist between appellant and three TOCs, it is sufficient that the franchise is providing services or is undertaking any process identified with franchiser. In this case, TOCs are providing services or undertaking a process of handling cargo on behalf of appellant, which in fact is the job of the appellant, which job under Implementation Agreements were assigned to the TOCs against payment of royalty...."



In view of above findings recorded by us in the earlier appeal we hold that the SST on royalty amounting to Rs.114,490,961/= was rightly levied. However since the Reference filed by the appellant on this issue is still pending in the High Court the appellant can seek relief subsequently as per law if the case is decided in its favour.

18. Tariff Heading 9819.9090 only described the services provided or rendered by the port operators. The Rule 40 of the Rules describes the specific services to be provided by port operator and sub-rule (1) of rule 40 of the Rules is reproduced as under:-

"(1) All import related services provided by a port operator and Terminal Operator shall be leviable to tax namely:-

- i. Piloting and mooring;
- ii. Delivery charges;
- iii. Storage in port area [and terminal area] including demurrage;
- iv. Wharfage; and

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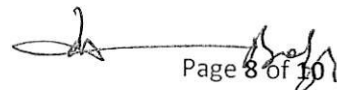
v. *Other import related services provided in port area and terminal area*"

19. The bare perusal of afore-referred sub-rule shows that only import related services provided in port area were made taxable and the same did not apply on export related services. However before taxing a service it was necessary that the some nexus was to be established for providing or rendering such service by one person to another person.

20. Mr. Atir Ansari contended that revenue earned from weightment charges also included the amount received from issuance of gate pass of Rs.18,774,156/- and earning from weightment charges at Rs.962,225/-. However, for these charges no specific Tariff Heading was available nor the same were covered under Rule 40 of the Rules applicable during the tax periods July 2013 to June-2014. We have carefully examined the contention of the learned advocate for the appellant. Issuance of gate pass is not against any service provided or rendered by a person to another person and cannot be taxed. We therefore, hold that the revenue of Rs.18,774,156/= earned from issuance of gate passes was not taxable.

21. The weightment charges of Rs.962,225/- was against a service provided or rendered by one person to another and is covered under clause (v) other import related service provided in port area [and terminal area] and has thus been rightly taxed. The appellant has not provided the bifurcation of weightment charges into import related and export related services. We therefore, hold that entire amount of weightment charges of Rs.962,225/- was rightly taxed.

22. Mr. Atir Ansari also challenged the taxing of additional wharfage valuing to Rs.2,901,095/= and submitted that appellant was paying tax on wharfage but it is not know from where this figure of additional wharfage was taken and tax was levied. The AC in the reply dated 16.03.2020 had clarified the position as under:-



"3. As far as clarification of figures under additional wharfage is concerned, the same was provided by appellant vide letter dated 01.03.2018 by bifurcating the revenue earned under Note 23 of the Annual Audited Accounts of M/s Port Qasim Authority. It was stated by the appellant that from total other income (revenue) (Note 23) of Rs.5,401,093/=, 2.5 million pertains to Bank Guarantee and the rest relates to that of additional wharfage amounting to Rs.2,901,095/=. The same amount of Rs. 2,901,095/= (5,401,093/= -2,500,000) was covered under OIO and hence was classified as taxable revenue which the appellant has failed to deposit in Sindh Government's treasury".

It is evident from the clarification of the AC that the earning from wharfage was related to providing space for using the wharf for loading and unloading of goods and the appellant was paying tax on wharfage. In the same manner the additional wharfage was also a taxable activity and is against the service provided by one person to another person. We therefore, hold that the SST amounting to Rs. 464,176/= on revenue from Additional Wharfage amounting to Rs.2,901,095/= was rightly taxed.

23. The Commissioner-III, SRB also taxed the penalty amounting to Rs.5,487,250/= received by the appellant on account of violation of environmental and safety requirements. This was not a service and was not charged against providing or rendering service by one person to another person. We therefore hold that no tax can be levied on Rs. 5,487,250/=.

24. The assessing officer also imposed penalty as prescribed under serial (3) of Table under section 43 of 2011-Act for failure to deposit sales tax as due and the same was confirmed by Commissioner-III, SRB without establishing mensrea on the part of the appellant. The superior courts have held that the nature of penal provisions in tax laws being quasi criminal, thus the existence of mens rea is mandatory condition for imposing penalty and department must establish mens rea before imposing such penalty. The onus to prove that default in payment of tax was deliberately, willfully and malafidely committed by tax payer is upon the department and without proving which the penalty could not be imposed.

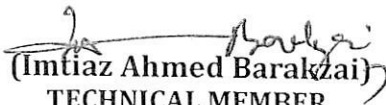
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25. In view of the above discussions we hold that the SST amounting to Rs.11,449,076/= on royalty income of Rs.114,490,761/=, SST of Rs.153,956/= on weighment charges of Rs.962,225/- and SST of Rs.464,165/= on additional wharfage of Rs.2,901,095/= were rightly imposed.

26. The appeal is partly allowed in the above terms. The SST levied on revenue of Rs.18,774,156/- received from issuance of gate passes and penalty of Rs.5,487,250/= received from violation of environmental and security requirements were not part of any service, hence annulled and setaside. The penalty imposed by the AO and confirmed by the Commissioner-III, SRB has also been annulled and setaside.

27. The copy of the order may be provided to the learned authorized representative of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 28.12.2020

Certified to be True Copy

Copy for compliance:



- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, SRB, for compliance

Copy for information to:-

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


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Order issued on 12/01/2021

Order Dispatched on 12/01/2021