

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD

AT KARACHI

DB-I

01. APPEAL NO. AT-26/2020

M/s Qasim Freight Station (Pvt.) Ltd.,
C-33, Block-2, Clifton, Kehkashan,
Karachi.....Appellant

Versus

Assistant Commissioner-(Unit-32)
Sindh Revenue Board,
6th Floor, Shaheen Complex,
M.R. Kiyani Road,
Karachi.....Respondent

02. APPEAL NO. AT-25/2020

Assistant Commissioner-(Unit-32)
Sindh Revenue Board,Appellant

Versus

M/s Qasim Freight Station (Pvt.) Ltd.,
Karachi.....Respondent

Date of Filing of Appeals: 20.08.2020

Date of Hearing: 03.03.2021

Date of Order: 05.04.2021



Afzal Bhatti, Advocate for appellant.

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

ORDER

Justice[®] Nadeem Azhar Siddiqi: The appeal No. 26/2020 has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.55/2020 dated 27.06.2020 passed by the Commissioner (Appeals) in Appeal NO. 81/2019 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 264/2019 dated 08.04.2019 passed by Mr. Awais Raza, Assistant Commissioner, (Unit-21), SRB Karachi.

02. The appeal No. 25/2020 has been filed by the department challenging the same OIA through which the Commissioner (Appeals) had partly allowed the appeal filed by the appellant before him and the recovery of Rs.58,717,740/=(comprising of Rs.25,733,288/= (principal) and Rs.32,984,452/= penalty) was reversed. More over the Commissioner (Appeals) had also reduced the various penalties imposed by the AO in the OIO.

03. The brief facts of the case as stated in the OIO were that the appellant was engaged in providing or rendering services of Terminal Operator and Stevedores falling under Tariff Heading 9819.9090 and 9805.2000 respectively of the of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).

04. It was alleged in the OIO that the appellant vide SRO NO.882 dated 29-06-1989 read with Standing Order No. No. 999-(PQ) dated 02.10.1999 were declared as a Container Terminal, further the appellant was also declared as Custom Station by FBR which was to operate under Custom Automated Clearance System called "WEBOC" (SRO No. 5/2012 dated 20.06.2012). Moreover, the Collector, Port Muhammad Bin Qasim Authority (Port Qasim) vide letter No.S1/Misc./140/97/PQ-admin/3095 dated 16.08.2013 has confirmed that the appellant was operating as an Off-Dock Terminal Operator and this Off-Dock Terminal Operator was included in the definition of Terminal Operator and the appellant was



also holding Container Terminal/Custom Station/ Terminal Operator authority license since 29.06.1989.

05. It was further alleged in the OIO that the income tax returns of the registered person revealed that they had provided the services of Rs.160,833,051/=, which resulted in the short payment of SST of Rs.25,733,288/- for the year ended 2011-2012 which was assessable and recoverable, under section 23 and 47(1A) of the Act respectively along with relevant penalties and default surcharge. Furthermore, the appellant in addition to the services of "Terminal Operator" was also providing the services of "Stevedoring" falling under Tariff Heading "9805.2000", but had not declared the same in their registration profile. This non-declaration was a punishable offence under clause 1 of section 43 of the Act.

06. The appellant was thus served with a Show Cause Notice (SCN) dated 13.11.2013 to explain as to why short paid SST amounting to Rs.25,733,288/- should not be assessed under section 23(1) for the tax periods from July, 2011 to June, 2013 and recovered under clause (a) of sub-section (1A) & (2) of section 47 of the Act along with the amount of default surcharge in terms of Section 44 of the Act. The appellant was also called upon to explain as to why penalties provided under Serial No. 1, 2, 3, 6(d), 11, 12 and 13 of the Section 43 of the Act should not be levied against them for contravention of Section 8,9,17,30 of the Act read with rules 12, 13, 14, and sub-rules (4) and sub-rule (5) of rule 30 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

07. The appellant had challenged the above SCN before the Honorable High Court and got it suspended vide order dated 13.12.2013. Finally the stay order was vacated on 26.03.2019. However after the vacation of the stay by the Honorable High Court the appellant was provided with another opportunity of hearing vide notice dated 28.03.2019 fixing the date of hearing on 03.04.2019. In response to the hearing notice Ms.



Has'

Navin Merchant and Mr. Salman Yousuf appeared on behalf of the appellant and submitted their written submissions as under:-

- i) The business of the registered person was not that of the Terminal Operator or of Stevedore, therefore, it was not liable to pay the taxes till the promulgation of Sindh Finance Bill 2013. However, after the amendment in the Act, through the aforesaid bill the registered person got itself registered with SRB.
- ii) That to support their contention the registered person placed reliance upon the judgment of Appellate Tribunal Inland Revenue, Pakistan and Order of Commissioner Inland Revenue Karachi.

08. The Assessing Officer (AO) passed OIO stating therein that the appellant had not declared the services of Rs.160,833,051/- and also failed to pay SST of Rs.25,733,288/- during the tax period July- 2011 to June- 2012 and directed the appellant to pay the same alongwith default surcharge under section 44 of the Act. The AO also imposed penalties of Rs. 58,717,740/= under Serial No.1, 2, 3, 4 and 6 (d) of the Table under section 43 of the Act.

09. The appellant challenged the OIO before the Commissioner (Appeals) by way of filing of appeal. The Commissioner (Appeals) upheld the OIO to the extent of SST levied on the services under Tariff Heading 9819.9090 from 24.11.2011 to 30.06.2013 and held that the SST on export related activities for the tax periods 24.11.2011 to 30.06.2013 was not recoverable from the appellant. However he totally remitted the SST if any on the Stevedoring Services prior to 01.07.2016. The Commissioner (Appeals) also reduced the penalties from Rs.58,717,740/= to Rs. 6,000,000/=, and further directed to refund the excess amount to the appellant which was already recovered from it.

10. Mr. Afzal Bhatti, advocate for the appellant submitted as under that:-

Handwritten signature/initials

Handwritten signature

- i) The appellant was neither terminal operator nor stevedore during the tax periods involved in this appeal i.e. from 2011 to 2013.
- ii) The appellant possessed a license under section 78 of the Customs Act, 1969 to operate as off-dock terminal/freight station and the appellant did not possess license under section 9 and 10 of the Customs Act, 1969 as Port Terminal. It also did not hold the license for providing stevedoring services from Port Qasim Authority (PQA).
- iii) Tax was demanded from 1st July, 2011 and at that time no definition of terminal operator was available in statute. The definition of Terminal Operator was added to the definition clause of the Act vide Sindh Finance Act, 2013 dated 11.07.2013 and the words "on-dock or off-dock terminal" were included in the definition of terminal operator and the amendment was not retrospective and thus the tax for the tax periods from July, 2011 to June, 2013 could not be charged.
- iv) The taxation is only possible when the same severally falls within the charging section of the statute, and charging of taxation through rules was not permissible. The rules cannot override the provisions of main statutes and thus the definition of something which was not provided in the statute could not be made in the Rules for enlarging the scope of tax.
- v) Port Terminal is located in front of sea, whereas the Appellant's freight station is located 11 kilometers away from PQA and is thus an off-dock terminal/freight station.
- vi) The bank accounts of the appellant were illegally attached by SRB and Rs. 58 million were recovered on 16.04.2019 against the OIO passed on 08.04.2019.

11. Mr. Imran Ali the learned AC-SRB submitted as under:-

Mr. Ali

Imran Ali

- i) The services provided by terminal operator was part of Second Schedule to the Act since its inception. However, the Tariff Heading was assigned on 1st November, 2011.
- ii) The service of Stevedore was also taxable since 1st July, 2011 under tariff heading 9805.2000.
- iii) The definition of Terminal Operator was available in the Rules since inception and the same was modified vide Notification dated 24.11.2011 and the words "off-dock" terminal were added in the definition.
- iv) The taxability is based on Tariff Heading read with charging section and not on definition clause. The levy of tax, rate of tax and the services taxed were part of Second Schedule to the Act and the responsibility lay on the appellant to pay tax.
- v) The definition of terminal operator in the rules provided that tax was to be paid by any other person doing similar activities. The appellant fall within the ambit of taxation.
- vi) The purpose of delegation of powers to the Executive to frame rules regulations and issuance of notifications was to facilitate implementation of the parent statute for achieving its object. The Executive is also vested with the powers to remove all the impediments in implementation of the law.
- vii) The Rules framed under the Act are not opposed to the parent

Act and were lawfully framed under the mandate provided in the Act. The AC relied on the following case laws:

- (a) 2018 PTD 1869 (Independent Media Corporation) Relevant Para 16 and 17. (Points regarding charging of tax).
- (b) The Orders of the Tribunal in i) Appeal No. AT-109/(A)/2015 dated 06.09.2017, M/s Pak Shaheen off dock terminal, Para 12-13 and ii) AT-20/2013 M/s Gulf Construction, Para-8.



M. cas'

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

13. The contention of the appellant was that it was an off-dock/terminal freight station licensed by the Customs Authorities under section 78 of the Customs Act, 1969. The appellant got voluntarily registered with SRB on 26.07.2013 under the services category of "Services provided or rendered by port operators, airport operators airport ground service providers and terminal operators", Tariff Heading 9819.9090 after insertion of the definition of "Terminal Operator" in the definition clause of the Act vide Sindh Finance Act, 2013 dated 11.07.2013. However the definition of terminal operator before the insertion was not available in the Act. The appellant was authorized by the Customs Authorities to act under section 78 of the Customs Act, 1969 to take into custody containers and containerized cargo immediately after discharge from the vessels for the purpose of unloading the same. The Customs Authorities had also issued Standing Order No.01/99-(PO) under clause (c) of sub-section (1) of section 78 of the Customs Act, 1969 for taking into custody the imported goods for unloading at the Qasim Freight Station.

14. The contention of the learned AC was that irrespective of inclusion of words "off-dock" in the definition of "terminal operator" by Sindh Finance Act, 2013 the services provided by Terminal Operator were part of Second Schedule to the Act under Tariff Heading 9819.9090 and were taxable by virtue of this Tariff Heading read with section 8 of the Act.

After hearing the learned representatives of the parties initially the following points were framed on 08.12.2020:

- i) Whether the appellant is a terminal operator in terms of clause (XVI) of sub rule (1) of rule 2 of Rules, 2011, and is liable to pay Sindh Sales Tax effective from 24.11.2011, or,



when the definition of terminal operator was inserted in the Act with no retrospective effect?

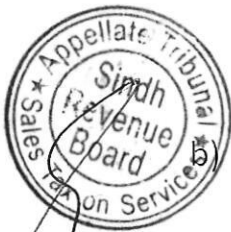
- ii) Whether the appellant is authorized to act as Stevedore and is liable to pay Sindh Sales Tax?
- iii) Whether in view of the Judgment of High Court of Sindh in case of PIFFA reported as 2018 PTD 01, the SRB can collect SST on the service of Stevedore?

16. Now we take up the issue No.1, whether the appellant is a terminal operator in terms of clause (XVI) of sub rule (1) of rule 2 of Rules, 2011, and is liable to pay Sindh Sales Tax effective from 24.11.2011, or, when the definition of terminal operator was inserted in the Act with no retrospective effect? This issue is discussed as under:-

- a) The contention of the AC was that irrespective of insertion of definition of terminal operator in the definition clause of the Act the service was liable to tax as the same was part of Second Schedule to the Act. We have examined this assertion. It is not disputed that the appellant is an off-dock operator and was authorized by Customs Authorities under section 78 of the Customs Act, 1969 to act as such. The original Entry at its inception on 1st July, 2011 in the Second Schedule to the Act was without Tariff Heading and read as under:-

“Services provided by terminal operators except terminal fee charges”.

The above Entry was amended vide Sindh Sales Tax on Services (Amendment) Act, 2012 assented on 26.01.2012. Earlier the same amendment was introduced vide Sindh Sales Tax on Services (Amendment) Ordinance, 2011 made on 1st November, 2011. The Entry after amendment read as under:-



Handwritten signature or scribble.

"9819.9090 - Services provided or rendered by port operators, airport operators, airport ground service providers and terminal operators – 16%.

(Even after amendment the words off-dock" and "on-dock" were not added in the Entry.

- c) The clause (xvi) of sub-rule (1) of rule 2 of the Rules deal with the definition of "terminal operator" and reads as under:-

"(xvi) Terminal Operator includes Karachi International Container Terminal, Pakistan International Container Terminal, and Qasim International Container Terminal or any other person doing the same activities'.

The above definition was based on the specific institutions/organizations. All the three institutions/organizations were working on the port terminal and the appellant was an off-dock terminal operator and was not covered under the definition of "or any other person doing the same activities".

- d) The clause (xvi) of Sub rule (1) of rule 2 of the Rules was amended vide SRB Notification dated 24.11.2011 and after amendment the said clause read as under:-

"(xvi) Terminal Operator includes Karachi International Container Terminal, Pakistan International Container Terminal, and Qasim International Container Terminal or any off-dock Terminal or any other person doing similar activities and also includes the cargo or baggage shed operator licensed or appointed by the Customs authorities at any airport".

- e) It is evident that the original definition of terminal operator was clearly based on the name of the institutions/organizations. The appellant's name was not appearing despite the fact that as per



the Notification dated 29.07.1999 and Standing Order No. 01/1999-(PO) dated 02.10.1999 issued by the Customs authorities the appellant was working since 1999 but it was not included in the definition clause. The appellant was also not covered under "or any other person doing similar activities" as the appellant was not operating on port like the organizations named in the definition as mentioned at (c) supra but was operating 11 kilometer away from Port Qasim and is thus not a terminal operator.

- f) The definition of terminal operator was introduced for the first time in the definition clause of the Act vide Sindh Finance Act 2013 assented on 11.07.2013 vide clause (98) of sub-section (1) of section 2 of the Act and read as under:-

"Terminal Operator includes Karachi International Container Terminal, Pakistan International Container Terminal and Qasim International Container Terminal or any on-dock or off-dock Terminal or any other person doing similar activities and also includes the cargo or baggage shed operators licensed or appointed by the Customs authorities at any customs port or customs airport or customs station".

- g) In this definition the off-dock terminal were added and thereafter the appellant had got registration from SRB and started discharging its statutory obligations. Despite the fact that the definition was available in the Rules the Sindh legislature deemed necessary to provide the definition of terminal operator in the Act knowingly that providing definition in the Rules was not sufficient to include the off-dock and on-dock terminal operators in the definition of terminal operator.

- h) The Rules were framed by the executives under delegation of power. The rules have to be necessarily in consonance with the Act to achieve its aims and objects. It needs to be emphasized here that the purpose of delegating powers to the Executive to



12/05 -

frame rules, devise regulations and issue notifications and guidelines is only to facilitate implementation of laws to the best of their object and mandate. By assuming these powers, the Executive however are not supposed to, and are also not permitted to frame rules or issue notifications which are independent of the scheme of the parent law. Any such attempt would render the subject rules, regulations etc., nullity in the eyes of law.

- i) The power to frame rules was considered in the reported case of Ziauddin v. Punjab Local Government (1985 SCMR 365 relevant page 368) wherein it was held as under:-

"Rules framed under the statute could not go beyond and over reach the statute itself. To make implementation of statutory provision consistent harmonious directory effect must be given to requirement of rule".

- j) In another case reported as Pakistan v. Aryan Petro Chemical Industries (Pvt.) Ltd. (2003 SCMR 370) in paragraph 11 of the judgment, it was held as under:-

"This is a settled principle that a statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section completes, the rule must yield to the statute. The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature must be exercised within the limits of mandate given to the rule making authority and the rules framed under an enactment must be consistent with the provisions of said enactment. The rules framed under a statute if are inconsistent with the provisions of the statute and defeat the intention of Legislature expressed in the main statute, same shall be invalid".



- k) Under the delegation of power the executive is not authorized to enlarge the meaning of the words used in the statute or in the

Los -

A handwritten signature in black ink.

Schedule to the Act. The legislature has the power to only enlarge the meaning of a word used in the statute or by a deeming clause create legal fiction and a thing is presumed to be in existence while in fact it was not in existence. The rules are sub-ordinate legislation and are made by Executive to give effect to the provisions of the parent statute, and are to be interpreted strictly in confirmatory with the provision of the statute. The Executive cannot define a word in the rule which was not defined by the Legislature in the parent statute and till such time the word is not defined by the legislature the plain dictionary meaning is to be adopted. The Executive while adding the word "off-dock" in the definition of terminal operator provided in the Rules had acted beyond their authority. The Executive cannot enlarge the meaning of word by invoking deeming provision used in the statute and cannot add in the meaning the thing which was not in existence.

- l) In view of the above discussions we hold that appellant is not a terminal operator but an off-dock terminal operator. It is therefore liable to pay SST effective from 11.07.2013 when the definition of terminal operator was inserted in the Act and the "off-dock" was included in the definition of terminal operator.

17. The second issue framed was whether the appellant is authorized to act as Stevedore and is liable to pay Sindh Sales Tax? This issue is discussed as under:-



It was submitted by the appellant that job of the stevedore was to load and unload goods on a vessel/ship. However for working as stevedore a license was required from Port Qasim Authority (PQA) which was not possessed by it. In support of its contention the appellant had relied upon an Order of Appellate Tribunal Inland Revenue of Pakistan, Karachi in STA No. 113/KB/3013 and others (The Commissioner IR, Zone-IV, LTU, Karachi versus M/s Qasim Freight Station (Pvt) Ltd., in which it was held as under:-

Has -

A handwritten signature in black ink, appearing to be "Prof. A. H. Khan".

"Thus, we feel no hesitation in holding that the respondent is engaged in the business activity as of a Freight Station and not Stevedoring, hence not liable to pay sales tax. Consequently, no adjudication is required on the issue of penalty imposed on non-chargeability of sales tax".

- b) The burden was upon the respondent to prove that the appellant was working as stevedore. However the respondent has failed to produce any documents to rebut the above Order nor could justify with documentary evidence that the appellant had provided services of stevedore.
- c) In view of the above discussions we hold that the appellant was ~~not~~ authorized to act as Stevedore and wasnot liable to pay SST.

18. The third issue was "whether in view of the Judgment of High Court of Sindh in case of PIFFA reported as 2018 PTD 01, the SRB could collect SST on the service of Stevedore"? This issue is discussed as under:-

- a) The High Court of Sindh in its judgment reported as Pakistan International Freight & Forwarders Association versus Province of Sindh, reported as 2017 PTD Page 1 (PIFFA Case) had examined the various provisions of the Act and in para 73 at page 65 had declared that the stevedoring service, clause (89) of section 2 of Act and Tariff Heading 9805.2000 (Stevedores) was ultra vires to the Constitution. It is held as under:-

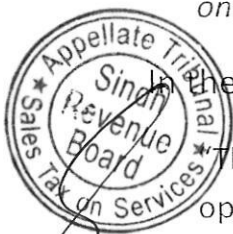


The provisions of Sindh Sales Tax on Services Act, 2011 as relate to shipping agents etc. (being clause (47), (80), (82) and (89) of section 2 and headings No.9805.1000, 9805.2000, 9805.2100 and 9805.3000 of the First and Second Schedules thereof) are ultra vires the Constitution, being a direct encroachment on the exclusive federal taxing power contained in entry No. 53 of the Federal Legislative List".

Las

b) The judgment in above PIFFA case was announced on 02.06.2016. it had declared the provisions of the Act ultra vires to the Constitution from the inception of the Act. After this judgment no SCN could be issued and no OIO could be passed against the appellant. The learned AC submitted that the Honorable Supreme Court had suspended the above Judgment in PIFFA Case. However it is pertinent to mention that the judgment declaring the provisions of law as ultra vires is a judgment in rem, whereas the order suspending the operation of the judgment is in personam. The word "in rem" applies to every person instead of a specific person. Whereas "In personam" mean against a particular person. The Order suspending the Judgment of the high Court was applicable to the parties in whose case the Judgment was suspended. Admittedly the appellant was not a party to those proceeding and no SCN could be issued to it after the judgment of the PIFFA case supra. This aspect was considered by the Honorable High Court of Sindh in Suit No. 302/2017 (and others), Fatima Fertilizer Limited and others versus Federation of Pakistan and had held as under:-

"It has been a settled principle laid down by this Court as well as by the Hon'ble Supreme Court that ad-interim order passed could only operate in personam and not in rem".



In the same Judgment it was further held as under:-


Thus, it is unanimous view that an order of suspension of the operation of the judgment and decree or leave granting order would not operate to have a binding effect on other parties; it could operate inter parties since the operation of the judgment and decree was suspended in a particular suit/appeal with reference to particular party".


110 -

- c) It is evident from the above that the definition clause relating to stevedore under section 2 (89) of the Act and the Tariff Heading 9805.2000 of the Second Schedule to the Act was declared ultra vires to the Constitution. Therefore the same are no longer part of the statute and no SCN and adjudication proceeding could be initiated against the appellant.
- d) In view of the above discussions we hold that in view of the Judgment of High Court of Sindh in PIFFA case supra the SRB could not collect SST on the service of Stevedores.

19. Considering the findings recorded on the above issues, the appeal filed by the appellant is allowed and the appeal filed by the respondent is dismissed having no merits.

20. The copy of this order may be provided to the learned representative of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:

Dated: 05.04.2021


Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner (Unit-32), 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 27/04/2021

Registrar

Order Dispatched on 27/04/2021

Registrar