

*Ground file*

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

**APPEAL NO. 02/2023**

**SB-I**

**(ARISING OUT OF APPEAL NO. 95/2019)**

M/s Airspeed Charter (SMC-Pvt.) Ltd.

(SNTN: 3682712-6)

Rupali House 241/242, Upper Mall Scheme,

Anand Road, Lahore..... Appellant

**Versus**

Assistant Commissioner, (Unit-31),

Sindh Revenue Board (SRB)

2<sup>nd</sup> Floor Shaheen Complex,

M. R. Kayani Road, Karachi..... Respondent

Date of Transfer of Appeal 04.01.2023

Date of hearing 09.08.2023

Date of Order 19.10.2023

Mr. Muhammad Yousuf advocate for the appellant.

Saindad Joyo AC-SRB for the respondent.

**ORDER**

Justice <sup>®</sup> **Nadeem Azhar Siddiqi**: This appeal was filed by appellant before the Commissioner (Appeals), SRB (CA-SRB) challenging the Order-in-Original (hereinafter referred to as the OIO) No. 360/2019 dated 14<sup>th</sup> May, 2019 passed by Mr. Yousuf Ali Magsi, Assistant Commissioner (AC), (Unit-31), SRB Karachi and transferred to this Tribunal on 04.01.2023 under section 57(9) of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) for disposal by treating the appeal as if it has been filed against the order of Commissioner (Appeals), SRB.

*M. Azhar Siddiqi*

02. The facts as stated in the OIO were that the appellant having SNTN: 3682712-6 was registered with Sindh Revenue Board (SRB) for rendering/providing taxable Airport Services classified under Tariff Heading 9826.0000 of the Second Schedule to the Act chargeable to Sindh Sales Tax (SST) at the rate of 16% from 1<sup>st</sup> November, 2011 to 30<sup>th</sup> June, 2012 under section 3, 8, 9 and 17 of the Act.

03. The allegations against the appellant contained in the SCN/OIO were that during the scrutiny of Sales Tax Returns (STR), it was surfaced that the appellant had declared service revenue of Rs.6,343/= for the tax periods from 1<sup>st</sup> November, 2011 to 30<sup>th</sup> June, 2012. However, it was observed from financial statement for the year ended June, 30<sup>th</sup> 2012, that the appellant had provided/rendered taxable services amounting to Rs.6,546,786/-. Contrary, the appellant has under declared service revenue for the subject period to the tune to Rs.6,540,443/- involving SST of Rs.1,046,470/- recoverable under section 23(1) of the Act alongwith penalties under section 43 of the Act as the same tantamount to tax fraud as defined under section 2(94) of the Act.

04. The appellant was served with a Show-Cause Notice (SCN) dated 21.03.2019 to explain as to why the SST of Rs.1,046,470.88/- should not be assessed under section 23 of the Act and recovered along-with default surcharge under section 44 of the Act.

05. The appellant submitted Reply dated 28.03.2019 in which it was stated that presently the appellant is non-operational as the license was expired in the year 2016 and the appellant was operating within the precincts of Karachi Airport. It was further stated that the SST was charged on Commission and not on reimbursement of related expenses. The Accounts Manager of the appellant appeared before the Adjudicating Officer on 19.04.2019 for hearing and submitted that the appellant provided services mostly out of Sindh province. He further stated that the appellant firm was acquired by Mr. Syed Irfan Ahmed on 2<sup>nd</sup> October, 2015 and their predecessor, Mr. Naveed Aslam, never acknowledged about the SST liability outstanding against him. Therefore, it is





unjust to ask the appellant to discharge the SST liability for a business which was never operated by them.

06. The Assessing (Officer) (AO) passed OIO and determined the SST at Rs.1,046,470.88/- under section 23 of the Act and ordered recovery of SST alongwith default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.2,300,000/- under Serial No. 3, 8, and 11 of the Table under section 43 of the Act.

07. The appellant challenged the said OIO by way of filing appeal under section 57 (1) of the Act before Commissioner (Appeals), SRB (CA-SRB) who instead of hearing and deciding the appeal himself within the limitation provided in law, transferred the same to the Tribunal under sub-section (7) of section 59 the Act after considerable delay for decision treating the same as the appeal filed against the order of Commissioner (Appeals).

08. The CA-SRB in his Report dated 29.12.2022 stated that the appeal was fixed 19 times but most of the time the appellant sought time to come prepared. As per the Report the appeal was lastly heard on 26.02.2021 when the appellant filed written submissions with a new ground that the period involved in OIO is time barred under section 23(2) of the Act and such period has been assailed in the High Court of Sindh. In the Report it was further stated that in all 1316 days were lapsed out of which the appellant obtained adjournments of 582 days and a total of 695 (1316-620) statutory days had lapsed and statutory 120 days were completed on 02.06.2021.

The learned advocate for the appellant submitted as under:-

i. The SCN dated 21.03.2019 issued for the tax periods 01.11.2011 to 30.06.2012 was time barred as provided under sub-section (2) of section 23 of the Act.

ii. The substitution of period of five years to eight years in sub-section (2) of section 23 of the Act vide Sindh Finance Act, 2016 assented on 18.07.2017 is against the fundamental rights of the appellant and is violative of various provisions of the Constitution of Pakistan.



iii. The SCN was issued for the tax periods 01.11.2011 to 30.06.2012 when the appellant was not registered with SRB and no SST could be levied prior to date of registration.

iv. The appellant is performing function under license from Pakistan Civil Aviation Authority (PCAA) and was not liable to pay SST for the reason that it is performing function of PCAA who was not liable to pay service tax and relied upon the judgments of 2013 PTD 2048 PCAA v/s SRB, a DB judgment of High Court of Sindh and SRB Vs. PCAA reported as 2017 SCMR page 1344 a judgment of Supreme Court of Pakistan.

v. The appellant facilitated aircraft operators of non-scheduled flights to obtain permission of landing from PCAA and the same was not an economic activity and was not liable to SST during the tax periods involved in this appeal.

vi. The appellant is not liable to be taxed and is entitled to the protection available to PCAA under Article 165 of the Constitution and relied upon the judgment of the High Court and Supreme Court supra.

vii. The act of seeking permission for landing for un-schedule flight was function of (PCAA) and in view of judgment of High court and Supreme Court supra the appellant is not liable to the pay the tax under the Act.

viii. The mere registration of the appellant was not enough to tax the appellant and similarly the tax could not be imposed merely on the basis of revenue entries available in the audited financial accounts.

ix. The appellant had not performed any function as elaborated in rule 40A and 40B of the Sindh Sales Tax on Services Rule 2011 (The Rules) and referred the preambles of the Act and sub-section (5) of section 2 of the Act to submit that activity performed by the appellant is not covered under the said definition.

The tax was charged on the gross revenue without bifurcation of the same into taxable and nontaxable services and without deleting the services provided outside Sindh and without deducting the sales tax charged in the invoices.

xi. The activities performed by the appellant were not covered under section 3 to section 8 of the Act.

xii. The judgment of the Supreme Court of Pakistan reported as SRB versus PCAA, 2017 SCMR page 1344 is applicable as constitutional immunity is available to PCAA and the appellant perform functions under license from PCAA. The DB Judgment of High Court of Sindh reported as PIFF Aversus



*KS*



SRB, 2017 PTD page 1 is also applicable as the services were provided on Airports, which are federal territory.

10. The learned AC-SRB submitted as under:-

i. The appellant got voluntarily registration on 03.06.2013 from SRB under Tariff heading 9826.0000 (Airport services) of the Second Schedule to the Act and voluntarily paid SST of Rs. 6,343/- and now when the short paid SST was demanded it has challenged that it had not provided any taxable services.

ii. The appellant has provided services before its registration and is covered under the definition of "registered person" provided under sub-section (71) of section 2 of the Act and was liable to charge, collect and pay SST to SRB.

iii. The appellant has not taken the ground of non-payment of SST for the period before registration before the Adjudication Officer and Commissioner (Appeals) and could not raise this ground before this forum.

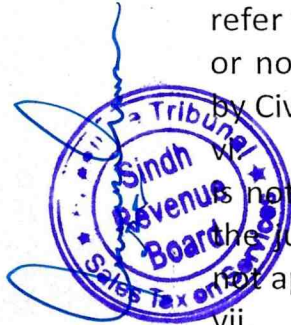
iv. The appellant is performing airport services under license from PCAA and was liable to charge, collect and pay SST from its service recipients and pay the same to SRB.

v. The appellant facilitated aircraft operators of non-scheduled flights to obtain permission for landing from PCAA and the activity squarely falls within the definition of "airport ground service provider" and "airport service provider" provided under sub-section (5) of section 2 of the Act and refer to phrase starting from "or to air craft operators of scheduled flights or non-scheduled flights, and also include the handling agents authorized by Civil Aviation Authority or other airport operators."

vi. The appellant is not a government or governmental organization and is not entitled to any protection under Article 165 of the Constitution and the judgments relied upon by the learned advocate for the appellant are not applicable.

vii. The economic activity performed by the appellant was fully covered under Rule 40A and 40B of the Rules.

viii. The appellant being a service provider of Airport Services was bound to charge, collect and pay SST.



*[Handwritten signature]*

viii. The financial statement has only one entry "Services Revenue "and despite providing opportunities to the appellant at adjudication stage no breakup of service revenue was provided.

ix. The notes attached to the financial statements were silent with regard to the nature of services provided by the appellant.

x. The appellant being the successor of the previous owner of the appellant was liable to pay the tax under section 19 of the Act.

xi. The appellant has not provided breakup and documentary evidence for providing services outside Sindh.

11. In rebuttal the learned advocate for the appellant submitted as under:-

i. The legal ground can be taken at any stage of proceedings. Non-payment of SST prior to registration is a legal ground and Commissioner (Appeals), SRB in various appeals had held that SST could not be recovered prior to date of registration and confirmed by the Appellate Tribunal, SRB.

ii. The appellant is providing facilitation to non-scheduled flights for obtaining landing permission from PCAA which was a function of PCAA and the PCAA being an organization of federal government is not liable to pay the provincial service tax (SST) and the appellant being licensee of PCAA was not liable to charge, collect and pay SST to SRB.

iii. The appellant without prejudice to its stand that the appellant is not liable to pay SST prior to its registration is not pressing the ground that the appellant is not liable to pay SST if any before the date of acquiring the business.

12. I have heard both the learned representatives of the parties and perused the record made available before me.

13. The appellant got voluntary registration with SRB on 03.06.2013 under Tariff heading 9826.0000 (Airport services) of the Second Schedule to the Act and voluntarily paid SST of Rs. 6,343/-. The stance taken by the appellant is that it was not liable to pay SST prior to the date of registration. The other ground taken by the appellant was that it was not liable to be registered and not liable to pay SST as it has not provided any taxable services and even otherwise it was under license from PCAA and not liable to SST. The stance of the Department was that the appellant being provider of taxable service was bound to get registration and is covered under the definition of "registered person" provided under sub-section

*as*



(71) of section 2 of the Act and was bound to charge, collect and pay SST to SRB from the date it has provided taxable services irrespective of date of registration. The AC-SRB also submitted that the appellant has not taken the ground of taxability prior to registration before the AO and CA-SRB hence cannot raise this ground before the Tribunal.

14. I will first take up the point: "Whether the ground not raise before the forums below could be raised for the first time verbally before this Tribunal". This is a legal ground concerning the jurisdiction of SRB to levy SST. The contention of the parties in this regard was examined by this Tribunal in Para 14 of Appeal No. AT-21 of 2021, M/s Cyber Tech versus Assistant Commissioner, SRB (Unit-04). The discussions on this point are as under.

i) *The contention of the AC is correct that this ground was not raised before the forums below and this was first time that this point was verbally raised before this forum. It is true that section 61 and 62 of the Act do not provide for allowing additional grounds after filing of the appeal as provided under sub-section (3) of section 58 off the Act. However the Act does not prohibit raising of additional ground after filing of the grounds of appeal. This is a legal ground related to the jurisdiction of SRB and goes to the root of the case. The jurisdiction means to hear and decide the controversy between the parties in accordance with law. The point of jurisdiction is very important and every authority, before proceeding with the matter, is required to determine its jurisdiction and this should not be left to be raised by the parties. In the reported case of Khyber Tractors versus Pakistan, PLD 2005 SC 842 it has been held as under:-*

*"The question of jurisdiction of a forum is always considered to be very important and any order passed by a Court or forum, having no jurisdiction, even if it is found to be correct on merits, is not sustainable".*

ii) *The department could exercise jurisdiction and levy SST on a service if the same is listed in the Second Schedule to the Act and was provided by a registered person from its registered office or place of business in Sindh. Unless these two conditions are met the department could not assume jurisdiction for the purpose of levying SST. In the reported case of Rashid Ahmad versus State, PLD 1972 SC 271 the Honorable Supreme Court relying on the observation made in the case of Mansab Ali v. Amir and others, PLD 1971 SC 197 held as under:-*



*MS*

"It is an elementary principle that if a mandatory condition for the exercise of jurisdiction by a Court, tribunal or authority is not fulfilled, then the entire proceedings which follow become illegal and suffer from want of jurisdiction. Any order passed in continuation of these proceedings in appeal or revisions equally suffer from illegality and are without jurisdiction. The learned Advocate-General fully supported this view and asked for dismissal of the appeal."

iii) The ground urged by the appellant is a legal ground. The Tribunal is vested with the power to decide factual as well as legal issues. Moreover the legal ground could be raised at any stage of proceedings and the Act does not specifically prohibit raising of additional ground at later stage. The additional ground raised by the appellant does not require any factual enquiry and matter could be resolved on the basis of material available on record. In the reported case of *Caltex Pakistan Limited Versus Collector, Central Excise and Sales Tax* it was held as under:-

"6. This is settled principle of law that a question of law arising out of the facts of the case relating to the fundamental issues involved therein, even if was not raised before the lower forum can be allowed to be taken before the higher forum and this Court for doing complete justice may, if the facts and circumstances of a case so demand, allow to raise a question of law which was not as such taken before the High Court. This is the duty of the Court seized of the matter, to apply the correct law to meet the ends of justice".

The ground raised by the appellant is not a mere technicality since it goes to the root of the case as by levying SST for the tax periods before the date of registration the department had committed an illegality which was not permissible under the Act. It is now well established principal of law that the technicalities should not come in the way of dispensation of justice and every procedure not prohibited by law could be adopted. The Honorable Supreme Court of Pakistan in the reported case of *Imtiaz Ahmad versus Ghulam Ali*, PLD 1963 SC 382 has held as under:-

".....the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on ground of public policy.....Any system which by giving effect to the form and not the substance defeats substantive rights (and) is defective to that extent".

*H.S.*



- v) *The raising of additional grounds subsequent to filing of appeal is a matter of procedure and could be allowed to be raised to meet the ends of justice. In view of the above discussions the appellant was allowed to raise additional ground.*
- vi) *The appellant is allowed to raise additional grounds.*

15. The other point which requires determination is "whether the appellant was not liable to pay SST before the date of its registration". The contentions of the parties were examined by this Tribunal in Para 19 of Appeal No. AT-18/2021, M/s WEB DNA versus AC (Unit-11) SRB vide decision dated 16.11.2021. The detailed discussion has been undertaken on this issue and the relevant provision of law and the reported judgment in M/s S.K. Steel Casting, Gujranwala, 2019 PTD 1493 was considered. The findings recorded on the issue were as under:-

"i. *The Commissioner (Appeals) in his various orders has held that no SST was payable by a taxpayer before the date of its registration. Such orders have been confirmed by us and till date the same have not been set aside by the Honorable High Court in referential jurisdiction. Few of such orders are mentioned as under:-*

a) *Appeal No.73/2018, OIA No.97/2020 M/s Sinopec International vs. Assistant Commissioner (Unit-03), SRB dated 03.11.2020.*

b) *Appeal No.308/19, OIA No.109/2020, dated 02.12.2020, and Appeal No.456/2018, OIA No.110/2020, dated 02.12.2020, M/s Fiber Link vs. Assistant Commissioner (Unit-01), SRB.*

c) *Appeal No.303/2019, OIA No.95/2019, dated 28.10.2020, M/s Tracking Work vs. Assistant Commissioner (Unit-01), SRB.*

ii. *The department levied SST for the tax periods from July-2013 to June-2016. Whereas the appellant had got voluntarily registration on 13.01.2016 under Tariff Heading 9813.7000. The tax periods from July-2013 to 12.01.2016 were prior to the date of registration of the appellant with SRB.*

iii. *The Contention of the AC was that the person liable to be registered was deemed to be a registered person and fell within the definition of registered person provided under sub-section (71) of section 2 of the Act and was liable to pay SST even before its formal registration with SRB. This contention needs to be legally examined.*

iv. *The relevant provisions dealing with the assessment and registration are sub-section (1) of section 23, and sub-section (1) of section 24 of the Act. Moreover sub-section (71) of Section 2 of the Act provides that registered person*



*M.S.*

means a person who is registered or is liable to be registered under this Act. Sub-section (1) of section 23 of the Act deal with the assessment of tax and contemplates that in case the registered person has not paid tax due on taxable services provided by him or has made short payment, the officer of SRB shall make an assessment order. Sub-section (1) of section 24 of the Act provided that registration will be required for all persons who are residents; and provide or render any of the services listed in the Second Schedule from their registered office or place of business in Sindh. If the above contention of the AC that the person liable to be registered was deemed to be registered person is accepted, sub-section (1) of section 24 of the Act relating to registration and sub-section (1) of section 23 of the Act relating to assessment of registered person would become redundant which is legally not permissible. It is a cardinal principle of statutory interpretation that redundancy or superfluity must not be attributed to the Legislature, and that no part or word in a statute could be treated as superfluous.

v. There is an apparent conflict between Sub-section (71) of section 2 of the Act, sub-section (1) of section 23 and sub-section (1) of section 24 of the Act. Sub-section (71) of section 2 is a general provision which is declaratory in nature, whereas sub-section (1) of section 23 of the Act particularly deals with assessment of tax when such tax is not paid by a registered person. Moreover sub-section (1) of section 24 of the Act deals particularly with registration of all persons who are residents and provide services listed in the Second Schedule to the Act from their registered office or place of business in Sindh. The provisions of section 23 and 24 of the Act are specific provisions dealing with specific purposes i.e. assessment of registered persons and registration of the persons providing taxable services within Sindh and will prevail over sub-section (71) of section 2 of the Act. Furthermore in case of apparent conflict between the two provisions of the same Act, the subsequent provisions i.e. section 23 and 24 of the Act will prevail. In the reported case of Mst. Sakina Bibi versus Crescent Textile, PLD 1984 SC 241 it was held as under:-

“...Moreover, section 81 being a later provision would obviously control section 73 in case there is any conflict regarding the scope of both the provisions”.

This view further gains support from the decision of Lahore High Court in the case of Commissioner Inland Revenue, Gujranwala vs. S.K. Steel Casting Gujranwala, 2019 PTD 1493 (relied upon by the AC-SRB) wherein it was held as under:-



*M. O. S.*



“.....16. Needless to say that under the law, a definition clause in a statute is of a declaratory nature. Though normally the definitions provided for in the definition clause are to be read into the provisions of the Act while interpreting the defined terms/words, but if the contents of the provisions of the Act indicate otherwise, the definition clause cannot override a main provision of the statute. Definition clause is foundational when construing provisions of law.....”

vi. The status of definition clause was considered by the Honorable Supreme Court of Pakistan in the case of Chairman, Federal Board of Revenue versus M/s Al-Technique Corporation of Pakistan Limited, PLD 2017 SC 99 and it was held as under:-

“It is settled that a definition clause is foundational when construing provisions of law. The definition given in the Act should be so construed as not to be repugnant to the context and would not defeat or enable the defeating of the purpose of the Act. It must be read in its context and the background of the scheme of the statute and the remedy intended by it”.

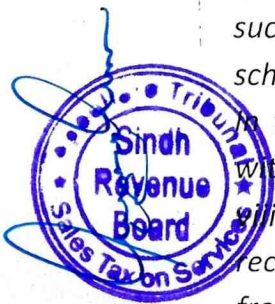
It is therefore evident that the definition clause cannot override a main provision of the statute.

vii. Section 3 of the Act deals with taxable service. Sub-section (1) of section 3 of the Act provides that a taxable service is a service listed in the Second Schedule of the Act, which is provided by a registered person from its registered office or place of business in Sindh. It is clear from mere reading of this section that it applies to the registered person and not to person liable to be registered and is not applicable to the appellant before its registration. Sub-section (2) of section 3 of the Act deals with the service that is not provided by a registered person and such service shall be treated as a taxable service if the same is listed in the second schedule to the Act and is provided to a resident person by a non-resident person.

In the explanation appended below it was provided that this sub-section dealt with the services provided by non-resident persons to a resident person.

viii. It is thus apparent from the above provisions of the Act that the services recognized by law are those services which are provided by registered persons from its registered office or place of business in Sindh and such services are provided by a non-resident person to a resident person. However this provision does not recognize the service provided by a non-registered person.

ix. Section 9 of the Act deals with the person liable to pay tax. Sub-section (1) of section 9 of the Act provides that the liability to pay tax is upon the registered



person providing the services. Since the words used are "registered person" this sub-section was not applicable to the appellant prior to registration with SRB. Sub-section (2) of section 9 of the Act provides that where service is taxable by virtue of sub-section (2) of section 3 of the Act, the liability to pay the tax shall be on the person receiving the services and sub-section (3) of section 9 of the Act commencing with the word "Notwithstanding" provides for the power of the Government to notify the services or class of services in respect of which the liability to pay tax shall be on the person providing the taxable services, or the person receiving the taxable services or any other person.

x. The sub-section (1) of section 13 of the Act commences with the words "notwithstanding anything contained in this Act" and provides that the Board may, by a notification in the official Gazette, prescribe special procedure for the payment of tax, valuation of taxable services, registration, record keeping, invoicing, or billing requirements, returns and other related matters in respect of any service or class of services and subject to such limitations and conditions as may be specified in the notification. Sub-section (2) of section 13 of the Act also commences with the words "notwithstanding anything contained in this Act" and provided that the Board may, by a notification in the official Gazette, require any person or class of persons, whether registered or not, to withhold full or part of the tax charged from or invoiced to such person or class of persons on the provision of any taxable service or class of taxable service and to deposit the tax, so withheld, with the Government, within such time and in such manner as may be specified in the notification. The provisions commencing with the word "notwithstanding" are treated as non-obstante clause and are usually used to indicate that such provision will prevail upon other provisions of the Act. By inserting sub-section (2) of section 13 of the Act the Board was authorized to shift the burden of payment of tax on any person.

xi. The words used in sub-section (2) of section 13 of the Act "require any person or class of persons, whether registered or not to withhold full or part of the tax charged". These words are indicative of the legislature's intention that where the legislature wants that the tax is to be withheld by non-registered person it was clearly mentioned in the section. The word "notwithstanding" is considered to be a non-obstante clause and was considered in the reported judgment of EFU General Insurance Company Limited versus Federation of Pakistan. PLD 1997 SC 700 wherein it was held as under:-



WCS



*"...A non obstante clause is usually used in a provision to indicate that the provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency between the non obstante clause and another provision, one of the objects of such a clause is to indicate that it is the non obstante clause which would prevail over the other clause".*

xii. *The Board with the approval of the Government of Sindh had framed Sindh Sales Special Procedure (Withholding Rules) 2011 (hereinafter referred to as the Withholding Rules, 2011) in exercise of power vested in it under section 72 of the Act read with sub-section (4) of section 3, sub-section (3) of section 9 and section 13 of the Act. However after these were repealed, the Board with the approval of Government of Sindh framed Sindh Sales Tax Special Procedure (Withholding Rules) 2014 (hereinafter referred to as the Withholding Rules, 2014) effective from 01.07.2014. The tax periods involved from 01.07.2013 to 30.06.2014 was covered under Withholding Rules, 2011 and the tax periods from 01.07.2014 to 30.06.2016 was covered under Withholding Rules, 2014.*

xiii. *The responsibility of withholding agent is provided under Rule 3 of the Withholding Rules, 2011. Sub-rule (3) of the rule 3 of the Rules, 2011 provided that "a withholding agent having Free Tax Number (FTN), or National Tax Number (NTN) and falling under clause (a), (b), (c), (d), or (e) of sub-rule (2) of rule 1, shall on receipt of taxable services from unregistered persons, deduct sales tax at the applicable rate of the value of taxable services provided or rendered to him from the payment due to the service provider and, unless otherwise specified in the contract between the service recipient and the service provider, the amount of sales tax for the purpose of this rule shall be worked out on the basis of gross value of taxable services".*

*The responsibility of withholding agent was provided under Rule 3 of the Rules, 2014. Sub-rule (4) of the rule 3 of the Rules, 2014 provided that "a withholding agent having Free Tax Number (FTN) or National Tax Number (NTN) or Sindh sales tax registration number (STN) and falling under sub-rule (2) of rule 1, shall, on receipt of taxable services from unregistered persons, deduct the amount of sales tax, at the tax rate applicable to the taxable services provided or rendered to him, from the amount invoiced or billed or demanded or charged by such unregistered service provider and unless otherwise specified in the contract between the service recipient and the service provider, the amount of sales tax for*



*M.S.*

the purpose of this rule, shall be worked out on the basis of gross value of taxable services {under the tax fraction formula}”.

xv. It is evident from reading both the above provisions framed under section 13 of the Act that these have overriding effect over other provisions of the Act it was clear that the responsibility for payment of SST was shifted upon the recipient of taxable service from unregistered person. Section 13 of the Act is a special provision which deals with the responsibility of payment of SST and has an overriding effect on the other provisions of the Act. In the reported judgment of State versus Zia-Ur-Rehman PLD 1973 SC 49 it was held as under:-

“...It is well-established rule of interpretation that where in a statute there are both general provisions as well as special provisions for meeting a particular situation, then it is the special provisions which must be applied to that particular case or situation instead of the general provisions.

xvi. We have gone through the judgment of S.K. Steel relied upon by the AC as discussed supra. The operative part whereof reads as under:-

“...17. In view of the above, our answer to the proposed questions is that the combined reading of the provisions of the Act of 1990 and the Rules framed thereunder manifestly disclose the intention of the law maker that, where a person is liable to be registered, the applicant-department is first required to register that person compulsorily or otherwise in accordance with law, and then charge sales tax from it under section 3 of the Act, 1990, and may proceed against that person regarding prior to registration contravention of the provisions of the Act of 1990, if any. In that eventuality, tax payer shall be entitled to raise all factual and legal objections against the proceedings so initiated or to be initiated by the applicant-department which are not dealt with in this judgment”.



xvii. The issue before the Court in the above judgment was whether the ATIR was justified to set aside the orders passed by both the authorities below holding that the Order-in-Original was finalized without registration or compulsory registration, ignoring that a person liable to be registered was also included in the definition under section 25 (2) of the Sales Tax Act, 1990. It is apparent from the reading of the Order that where a person is liable to be registered, the department is first required to register that person compulsorily or otherwise in accordance with law, and then charge sales tax from it under section 3 of the Act,

M.S.



1990. However regarding prior to registration contravention of the provisions of the Act of 1990, if any, could also be proceeded against that person. No impression appears that the Court had held that the tax before registration was to be charged.

xviii. The Withholding Rules 2011 as well 2014 by specific provision shifted the responsibility of deduction and payment of SST upon the service recipient and not upon the non-registered service provider. No such provision is available in the Sales Tax Act, 1990 or rules framed there under. Thus the facts of the reported case of S.K. Steel supra are not applicable.

xix. There is another provision i.e. sub-section (3) of section 15A of the Act which clarifies the position as under:-

“(3) No person other than a person registered under sections 24, 24A or 24B of this Act shall claim or deduct or adjust any input tax in respect of sales tax paid on any goods or services received or procured by him for use or consumption in the provision of taxable services”.

xx. The contention of the AC-SRB that “all persons providing taxable services within Sindh are deemed to be registered persons” if accepted than there was no need to enact section 24, 24A and 24B of the Act. The acceptance of contention of the AC-SRB in this regard will make these provisions of the Act redundant and nugatory. Redundancy or superfluity of an Act of Parliament and a provision of law cannot be readily accepted.

xxi. In view of the above discussions it is held that the appellant was not liable to pay/deposit SST before the date of its registration with SRB and the OIA is maintained in this regard”.

The view of Commissioner (Appeals) that no SST is payable before date of registration has been upheld in various pronouncements of DB of this Tribunal. Few of such decisions are mentioned for ready reference as under:-

- a. Appeal No. AT-47/2020 dated 15.02.2021 – AC (Unit-04) vs. M/s MYN Pvt. Ltd.
- b. Appeal No.AT-234/2015 dated 26.11.2019 – Nasir Khan & Sons vs. Commissioner (Appeals) & DC (Unit-13), SRB.

*[Handwritten signature]*

c. Appeal No.AT-30/2019 dated 05.03.2021, TCS Logistics vs. The Commissioner, SRB.

d. Appeal No. AT-18/2021 dated 16.11.2021 M/s WEB DNA Works vs. Assistant Commissioner, SRB.

17. The Orders of the Tribunal passed as mentioned above are final as provided under sub-section (8) of section 62 of the Act and are still holding field and have not been set aside by the Honorable High Court in referential jurisdiction and are binding upon the Assessing Officers as well as on the Commissioner (Appeals). Any order/decision of the Assessing Officer and the Commissioner (Appeals) cannot be sustained if the same is against the order/decision of Tribunal. In an unreported Sp. S.T.R.A. No. 651/2020 SRB the DB of High Court of Sindh has held as under:-

*"Since order itself is a remand order, we need not go into the merits of the case, whereas on the undertaking given by the learned advocate on behalf of the AC no further adjudication of the grievance as above is to be recorded, hence, we while disposing these reference applications observe that the concerned officer shall remain careful in future and shall not act against the orders passed by the appellate forums, including the Superior Courts"*(emphasis supplied).

18. I therefore, relying upon the earlier Order of DB of this Tribunal in Appeal No. AT-18/2021, M/s WEB DNA versus AC (Unit-11) SRB vide decision dated 16.11.2021 hold that the appellant was not liable to pay/deposit SST before the date of its registration with SRB and the OIO is not sustainable.

19. The other ground is "whether the appellant being a licensee of PCAA was not liable to pay SST in view of the judgment of the High Court of Sindh in Civil Aviation Authority versus Sindh Revenue Board, 2013 PTD 2048 and Sindh Revenue Board versus Civil Aviation Authority, 2017 SCMR 1344. The contention of the appellant was that the appellant being a licensee of the Pakistan Civil Aviation Authority (PCAA) was performing function of PCAA and in view of the judgments was not liable to pay SST. The contention of the AC was that the appellant was performing airport services under license from PCCA and was liable to charge and collect SST from its service recipients and pay the same to SRB. The discussions on this point are as under:-



*M.S.*



i. The appellant got voluntarily registration on 03.06.2013 from SRB under Tariff heading 9826.0000 (Airport services) of the Second Schedule to the Act and voluntarily paid SST of Rs. 6,343/- and when the short paid SST was demanded it has challenged that it had not provided any taxable services. The appellant facilitated aircraft operators of non-scheduled flights to obtain permission of landing from PCAA against consideration. The activities of the appellant are covered under the definition of "airport ground service provider and airport services provider" available under sub-section (5) of section 2 of the Act, which read as under:-

"(5) airport ground service provider and airport service provider mean and include any service provider, operator and airline providing or rendering ground or ramp services, including passenger and cargo handling services, **to other airlines or to aircraft operators of scheduled or non-scheduled flights**, (emphasis supplied) and also include the handling agents authorized by the Civil Aviation Authority or other airport operators;"

lithe activity of the appellant in facilitating aircraft operators of non-scheduled flights to obtain permission of landing from PCAA against consideration is fully covered under the economic activity defined in sub-section (1) of section 4 of the Act as "an economic activity means an activity carried on by a person that involves or is intended to involve the provision of service to another person". Undoubtedly the appellant had provided or rendered services to operators of unscheduled flights and under Article 114 of the Qanun-e-Shahadat Order, 1994 is estopped from challenging that it had not provided any taxable service.

iii. The appellant in a way is claiming protection under Article 165 of the Constitution of Pakistan which protection is available to the Federal Government and Provincial Government. The appellant is neither a government nor governmental organization and could not equate itself with PCAA an statutory body established under the Pakistan Civil Aviation Authority Ordinance, 1982(PCAA Ordinance) for promotion and regulation of civil aviation activities and to develop an infrastructure for safe, efficient, adequate, economical and properly coordinated civil air transport services in Pakistan. The powers and functions of the PCAA are listed in section 5 of the PCAA Ordinance, which provided that the PCAA shall be responsible for the regulation and control of civil aviation activities in the country. The PCAA is a regulatory authority which performed the functions that were



within the exclusive domain of the Federal Legislature and the functions performed by PCAA are listed in the federal legislative list. The appellant merely providing services under a license issued by PCAA and is not entitled to equate itself with the PCAA and is not entitled to claim the protection under Article 165 of the Constitution.

iv. In the reported case of PCAA supra the full bench of the Supreme Court after examining the constitutional provisions and the case laws available on the subject has held as under:- (citation A page 1359 Para-16)

*"16. Some of the functions that 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. Item 22 of Part I of the Federal Legislative List mentions Aircraft and navigation; the provision or aerodromes; regulation and organization of air traffic and of aerodromes. Some of the other functions that CAA performs are covered by the following items of Part I of the Federal Legislative List:*

*Item 24 - Carriage of passengers and goods by air*

*Item 27 - inter-provincial trade and commerce*

*Item 32 - international treaties, conventions and agreements*

*Item 53 - Terminal taxes on passengers carried by air; taxes on their fares and freights*

*Item 54 - Fees in respect of any of the matters in this Part.*

*If any of the functions which CAA performs under the CAA Ordinance are deemed not to be covered by any of the foregoing items then these are covered by item 59 of Part I of the Federal Legislative List, which encompasses, Matters incidental or ancillary to any matter enumerated in this Part. It is therefore quite clear that the functions performed by CAA are those which are listed in the Federal Legislative List. The CAA Ordinance, which has constitutional cover, requires CAA to establish and maintain airports and to make certain that the requisite facilities and paraphernalia is also available at these airports. These facilities and paraphernalia are categorized as services in the Act and the Rules, and sales tax is imposed on them. We cannot accept that the legislative duties and functions of CAA*



*H.S.*



are services. To state what is obvious, CAA has no option but to undertake its statutory duties and responsibilities. Merely because CAA imposes a fee or charge for providing them, which Parliament has authorized it to impose, will not in itself bring the provision of these duties and functions and the facilities and paraphernalia provided pursuant thereto within the realm of services upon which sales tax can be levied.

17. Are the Sindh Legislature, which had enacted the Act, and the Government of Sindh, which had made the Rules, constitutionally empowered to impose sales tax on CAA? If, for the sake of argument, it be –purported services provided by the CAA then it could also do so in respect of other subjects listed in the Federal Legislative List. Sales tax could be imposed on all those using the services of national highways and strategic roads (item 34 of Part II of the Federal Legislative List) constructed by the Federation or by an authority under its control, such as the National Highways Authority. Similarly, sales tax on the provision of services of Railways (item 1 of Part II of the Federal Legislative List) could be imposed on passengers traveling in the province. Likewise post, telegraphs and telephones calls (item 7 of the Part I of the Federal Legislative List) received in the territory of a province too could be taxed. Those provided with new passports (item 4 of Part I of the Federal Legislative List) who now are able to avail the services of international travel could be subjected to sales tax when new passports are issued to them and also when they use their passports at the port of embarkation or disembarkation situated within the territory of the taxing province. In doing so the provinces would be taxing the subjects which are on the Federal Legislative List. The Constitution does not permit this overreach. Article 142(a) of the Constitution states that Parliament (the Federal Legislature) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List. The Federal Legislature List, after listing the specific subjects in respect whereof the Federal Legislature alone can legislate, concludes with the words matters incidental or ancillary to any matter enumerated in this part. It would therefore be appropriate to consider the scope of this incidental or ancillary provision”.



v. The perusal of the above portion of the judgment clearly reflects that constitutional protection are available to PCCA for the reason that it is performing the functions it is required to perform specifically mentioned in the Constitution and in respect whereof only the Federal Legislature can enact laws.

*[Handwritten signature]*

vi. The SST was levied in VAT mode and is an indirect tax. The responsibility of payment of SST is on service provider to be passed on to the end user, i.e. service recipient of the appellant. The appellant is liable to pay SST for facilitating aircraft operators of non-scheduled flights to obtain permission of landing from PCAA against consideration and the same is an economic activity and was liable to pay SST after the date of its registration.

vii. The appellant is a private organization providing services listed in the Second Schedule to the Act against consideration and being a service provider is liable to charge, collect and pay SST to SRB as provided under section 9 of the Act.

20. The other point raised by the learned advocate for the appellant was that the appellant had also provided services in other parts of Pakistan. The appellant has not provided breakup and evidence to show the services provided in other part of Pakistan. In absence of material and evidence it is difficult to hold that the services were also provided in other parts of Pakistan.

21. In view of the above the appeal is allowed and the OIO is set aside and it is held that the appellant is not liable to pay SST during the tax periods it was not registered with SRB

22. The appeal is disposed of. The copy of the order may be provided to the learned representative of the parties.

Karachi :

Dated: 19.10.2023

( Justice® Nadeem Azhar Siddiqi )  
CHAIRMAN

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-31), SRB, for compliance

Copy for information to:-

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

Order issued on

20-10-2023

  
Registrar

Order Dispatched on

20-10-2023

  
Registrar

Certified to be True Copy

  
20-10-2023  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD