

(Grand file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

APPEAL NO. 04/2023

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)

2nd 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. Mohammad Yousuf advocate for the appellant.

Mr. Saindad Joyo AC-SRB for the respondent.



ORDER

Justice ® 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. 406/2019 dated 23rd 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.

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Q2. 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 1st July, 2013 to 30th June, 2014 under section 3, 8, 9 and 17 of the Act.

Q3. The allegations against the appellant contained in the SCN/OIO were that during the scrutiny of Sales Tax Returns (STR), it surfaced that the appellant provided or rendered taxable services of Rs. 7,696,240/- involving Sindh Sales Tax (SST) of Rs.1,231,398/=. The appellant had also not filed Sales Tax Returns (STR) for the above stated tax periods.

Q4. The appellant was served with a Show-Cause Notice (SCN) dated 05.04.2019 to explain as to why the SST of Rs.1,231,398/- should not be assessed under section 23 of the Act and recovered along-with default surcharge under section 44 of the Act.

Q5. The appellant submitted Reply dated 28.03.2019 in which it was stated that presently the appellant is non-operational as their license expired in the year 2016 and that the appellant was operating within the precincts of Karachi Airport perhaps not relevant. 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 2nd October, 2015 and their predecessor, Mr. Naveed Aslam, never acknowledged 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.

Q6. The Assessing (Officer)(AO) passed OIO and determined the SST at Rs.1,231,398/- 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 under Serial No. 3, 8, and 11 of the Table under section 43 of the Act.

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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 appeal filed against the order of Commissioner (Appeals).

08. The CA-SRB in his Report dated 02.01.2022 stated that the appeal was fixed 17 times but most of the time the appellant sought time to come prepared. As per the Report the appeal was last 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 1313 days were lapsed out of which the appellant obtained adjournments of 582 days and a total of 719 (1313-584) statutory days had lapsed and statutory 120 days were lapsed on 02.06.2021.

09. The learned advocate for the appellant submitted as under:-

i. The SCN dated 05.04.2019 was issued for the tax periods 01.07.2013 to 30.06.2014 and was time barred as issued after lapse of statutory limitation as provided under sub-section (2) of section 23 of the Act.

ii. The substitution of period from 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 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 reported as CAA v SRB, 2013 PTD 2048 a DB judgment of High Court of Sindh and SRB v PCAA reported as 2017 SCMR page 1344 a judgment of Supreme Court of Pakistan.

iv. The appellant facilitated aircraft operators of non-scheduled flights to obtain permission of landing from PCAA and the same was not an



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economic activity and was not liable to SST during the tax periods involved in this appeal.

v. 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.

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

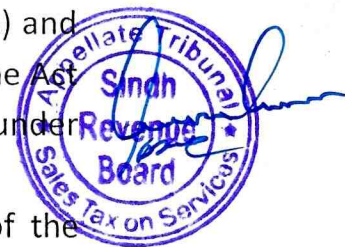
vii. The mere registration of the appellant was not sufficient enough to tax the appellant and hence tax cannot be imposed merely on the basis of revenue entries available in the audited financial accounts.

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

ix. The tax was charged on 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 was illegal.

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

xi. 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 PIFFA versus SRB, 2017 PTD page 1 is also applicable as the services were provided within the Airports, and being federal territory, province has no jurisdiction to tax those activities performed in the federal territory.



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

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- 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.
- ii. 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" as defined 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**(emphasis supplied), and also include the handling agents authorized by Civil Aviation Authority or other airport operators."
- iii. 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.
- iv. The economic activity performed by the appellant was fully covered under Rule 40A and 40B of the Rules.
- v. The appellant being a service provider of Airport Services was bound to charge, collect and pay SST.
- vi. 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.
- vii. The notes attached to the financial statements were silent with regard to the nature of services provided by the appellant.
- viii. The appellant being the successor of the previous owner of the appellant was liable to pay the SST under section 19 of the Act.
- ix. 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 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

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the provincial service tax (SST) and the appellant being licensee of PCCA was not liable to charge, collect and pay SST to SRB.

12. I have heard the learned representatives of the rival 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 during the previous tax periods. The stance taken by the appellant was that the SCN was time barred, it was not liable to be registered and not liable to pay SST as it has performed the function of Pakistan Civil Aviation Authority (PCAA) and has not provided any taxable service and was not liable to pay SST and that the services were also provided in other provinces. The appellant has also challenged the authority of the province to levy service tax on the appellant. The stance of the Department was that the appellant being provider of taxable service listed in the Second Schedule in the Act was bound to get registration and was bound to charge, collect and pay SST to SRB.



14. The first ground required consideration is whether the SCN dated 05.04.2019 issued for the tax periods 01.07.2013 to 30.06.2014 was time barred as provided under sub-section (2) of section 23 of the Act. Initially sub-section (2) of section 3 of the Act provided a period of five years for issuing a SCN. The Sindh Finance Act, 2016 extended the period to eight years. The period for which the SCN was issued was from July-2013 to June-2014. The SCN was issued after amendment of eight years in the provision. The DB of High Court of Sindh has considered the said insertion in the reported case of Summit Bank V SRB 2022 PTD 1279. The precise question considered by the Court was as under:-

"Learned Counsel for the Petitioner [1] has contended that when Returns for respective periods were filed, the Petitioners were covered by limitation of five years, whereas, through Sindh finance Act, 2016, effective from 01.07.2016, the limitation period has been extended to 8 years and admittedly all Show Cause Notices are time barred, being issued after expiry of 5 years. According to him vested right has accrued in favour of the Petitioners and it is settled law that limitation in tax matters is not procedural in nature; but is a substantive right and amendment itself has been made effective from 01.07.2016 by the Legislature;

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hence the extended period of limitation would not apply to the case of the Petitioners" and held as under:-

"7. Perusal of the aforesaid provisions of Section 23[5] reflects that a show cause notice could have been issued within a period of 5 years from the relevant tax period [6], whereas, through Sindh Finance Act, 2016 in sub-section (2) for the words "5 years", the word "8 years" has been substituted. It is not in dispute that Sindh Finance Act 2016 came into effect from 01.07.2016. Precise case, as pleaded on behalf of the Petitioners is on the ground that some vested rights have accrued to the Petitioners inasmuch as they are to be governed by the limitation period of live (5) years applicable when the respective monthly Sales Tax Returns were filed. According to them subsequent amendment would only be applicable on Sales Tax Returns filed on or after 01.07.2016 and on this analogy, they have contended that the show cause notices are time barred: however, with respect we are unable to agree with these submissions. It is a matter of admitted position that the 2011 Act was promulgated w.e.f. 01.07.2011 and it provided a limitation period of 5 years under Section 23 and after its promulgation, the liability to get itself registered and filing of a tax return started from August, 2011, and keeping such date in mind, it appears that the limitation period had not expired on 30.06.2016 before which the Sindh Finance Act. 2016 was introduced and was passed by the Legislature giving it effect from 01.07.2016. It is not in dispute and is a matter of record, that when this amendment in Section 23 was introduced, the original limitation period as provided in the 2011 Act, in respect of all the Petitioners before us had not expired; hence in our view no vested right had accrued to the Petitioners on the date when this amendment and enhancement of limitation was introduced. This is so, because, had this change/ enhancement in limitation not been brought in the Act. they could have been easily issued show cause notices by Sindh Revenue Board ("SRB") on or before 30.06.2016, if so needed. In such a situation, it is neither a case of a past and closed transaction: nor of accrual of any vested right in favor of the Petitioners. The SRB was well within its right and could have issued show cause notices before expiry of the previous limitation period, if so desired, had the impugned amendment not been brought in the Act. The limitation period stands extended, and merely for the fact that the impugned show cause notices have been issued after introduction of Sindh Finance Act, 2016, it's an incorrect approach to say that the limitation period had expired when the impugned show cause notices were issued. Here, in the given facts of the case, since no vested right had accrued right as the original limitation period had not expired when Sindh Finance Act, 2016, was promulgated, the amendment, whereby, limitation has been extended, would be deemed to be procedural in nature. This is so, as no right had accrued to the Petitioners before introduction of the amendment through Sindh Finance Act,



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2016. If it had been a case wherein the original limitation period had expired: and the amendment in the Act was brought thereafter, only then it was a past and closed transaction. We are of the considered view that once a matter becomes barred by time then the subsequent enhancement in the period of limitation shall not have the effect of reopening the past and closed transaction and resuscitating the matters which attained finality and had gone in the annals of history [7]. In the present case the original limitation had not lapsed: hence, no vested right had accrued as the enhancement in limitation was made before expiry of the limitation”

15. In view of the above it is held that the SCN was not time barred.

16. 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 the judgment of the Supreme Court of Pakistan in Sindh Revenue Board versus Civil Aviation Authority, 2017 SCMR 1344. The contention of the appellant was that the appellant being a licensee of the PCAA was performing function of PCAA and in view of the above judgment was not liable to pay SST. The contention of the AC was that the appellant was performing airport services under license from PCAA 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:-

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 during the previous tax periods and when the short paid SST was demanded the appellant contended that it has not provided any taxable services. The appellant facilitated aircraft operators of non-scheduled flights in obtaining 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,

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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;"

ii. The 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 definition of given economic activity in sub-section (1) of section 4 of the Act which read 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 provided or rendered services to operators of unscheduled flights against consideration and under Article 114 of the Qanun-e-Shahadat Order, 1994 is stopped 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 wherein protection is available to the Federal Government and Provincial Government only. The appellant is neither a government nor governmental organization and could not equate itself with PCAA a statutory body established under the Pakistan Civil Aviation Authority Ordinance, 1982(PCAA Ordinance) for promotion and regulation of civil aviation activities and to develop 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 provides that PCAA shall be responsible for regulation and control of civil aviation activities in the country. The PCAA is a regulatory authority which performs 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 by merely providing services under a license issued by PCAA is not entitled to equate itself with the PCAA and is not entitled to claim the protection under Article 165 of the Constitution.

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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 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

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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 Legislative 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”.



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

18. 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

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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 since e-registration with SRB.

19. 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 in its reply provided details of services provided in other provinces but no evidence was provided in this regard as held by the AO in OIO. The AO has not taken any note of this plea taken by the appellant and did not ask the appellant to furnish the evidence for providing service out aside Sindh and without evidence and details had passed the OIO. In case the appellant provided services in other provinces the same were to be excluded in view of sub-section (2) of section 3 of the Act which provides that where a person has a registered office or place of business in Sindh and another outside Sindh, the registered office or place of business in Sindh and that outside of Sindh shall be treated as separate legal persons. For the services provided outside Sindh, the SRB has no jurisdiction to charge SST. The charging of SST on the services provided in other provinces against the provision of the Act and cannot be sustained.



21. It is apparent from the OIO that the SST was charged only on the basis of revenue entry available in the audited accounts of the appellant. SST liability cannot be assessed solely on the basis of revenue entry without any evidence of corresponding taxable service made in the course of economic activity. The practice of charging SST on the basis of credit entry in the bank statement has been considered by the High Court of Sindh in the reported case of Alhilal Motors Stores versus Collector, Sales Tax and Central Excise (East) as under:-

"We are persuaded to agree with the contention of the learned counsel for the appellants that in terms of the provisions contained in section 3 of the Sales Tax Act, 1990, which is the charging section, the sales tax shall be charged, levied and

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paid on taxable supplies made in Pakistan by a Registered person in the course of furtherance of any taxable activity carried on by him and on the goods imported in Pakistan."

22. The position is same under the Act. Section 8 is the charging section which provides that the SST shall be charged, levied and collected on the value of the taxable services. Section 3 of the Act provides that the taxable service is the service listed in the second schedule to the Act which is provided by a registered person from its registered office or place of business in Sindh. It was incumbent upon the AO to establish that the revenue entry in the audited accounts was exclusively related to providing or rendering services in Sindh and not otherwise. The AO by charging SST on the basis of revenue entry alone has charged SST on assumption and presumption that the entire amount pertains to providing services within Sindh which was not permissible and committed an illegality and the OIO cannot be sustained on this ground.

23. The appellant has also challenged the authority of the Sindh Province to levy Sales Tax on Service. This appears to be a constitutional issue and is not within domain of this Tribunal.

24. In view of the above discussions the appeal is allowed and the OIO is set aside and the case is remanded back to the AO to examine whether the appellant has provided taxable services in other provinces also and to pass a fresh OIO after providing proper right of hearing to the appellant.

25. The appeal is disposed of in above manner. A copy of this order is endorsed to the learned representative of the parties.

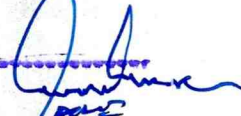
Karachi:


Dated: 19.10.2023

(Justice[®] Nadeem Azhar Siddiqi)

CHAIRMAN



20/10/2023
Order issued on 
Registrar

20/10/2023
Order Dispatched on 
Registrar

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APPELLATE TRIBUNAL
SINDH REVENUE BOARD

- 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.

