JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.E.R.A. No.04 of 2021
Pakistan Television Corporation
Versus
Commissioner Inland Revenue, etc.

Applicant by:	Hafiz Muhammad Idrees and Syed Farid Ahmed Bukhari, Advocates
Respondents by:	Mr. Babar Bilal, Advocate Muhammad Khurram Additional Commissioner and M.Sarim Bhatti Deputy Commissioner, FBR
Date of Hearing:	**28.02.2022**

Sardar Ejaz Ishaq Khan, J: By this judgment, we answer the Federal Excise Reference Application no. 4 of 2021, filed under section 34A of the Federal Excise Act, 2005, against the order dated 16.11.2021 passed by the Appellate Tribunal Inland Revenue whereby the order-in-original and the appellate order were upheld and the Applicant was required to pay the excise duty on the services in question. The following questions of law were framed vide this Court's order dated 13.12.2021:

1. Whether the order passed by Respondent No.2 is within lawful jurisdiction?

2. Whether the payment received from M/s Shalimar Recording and Broadcasting Company (SRBC) is a "Franchise Fee" and fall under the definition of Franchise as given in sub section (12a) of section 2 of the Act, 2005?

3. Whether the payment received by Applicant from SRBC on account of rent premises, technical capabilities, equipment, up linking facility and salaries of deputed employees falls under the definition of "Franchise" as given in sub section (12a) of section 2 of Act, 2005?

4. Whether the relationship of Applicant and SRBC is of Franchiser and Franchisee and whether Federal Excise Duty (FED) is leviable on the payment made by SRBC to Applicant?

2 The core question of law to be answered on which the other questions turn is no. 4, i.e., whether the relationship between the Applicant Pakistan Television Corporation (**PTV**) and its subsidiary Shalimar Recording & Broadcasting Company Limited (**SRBC**) was one of franchiser and franchisee.

3 At the bar, neither of the counsels were well familiar with the corporate history of SRBC. It turns out that SRBC is an un-listed public company engaged in operating, telecasting and broadcasting facilities. Majority of its shares were reportedly owned by Pakistan Television Corporation (PTV), with Pakistan Broadcasting Corporation (PBC), Pakistan National Council of the Arts (PNCA) and members of entertainment industry holding a minority, when on or about late 2005 it metamorphosed into a joint venture to relaunch the erstwhile Shalimar TV Network (STN) channel as ATV channel from its own premises. For the joint venture, SRBC entered into a Rental Agreement dated 16.05.2007 with PTV for provision by the latter of technical support and facilities, skilled manpower, transmission uplink and other facilities, against payment of a periodic rental to PTV. This payment was recorded in PTV's accounts as fee for "technical facility"[1] received from SRBC for the relevant years in question, being 2007 to 2011, for which the order-in-original assessed PTV to excise duty with penalty and surcharge in the sum of Rs. 17.6 million on the premise that the Rental Agreement constituted a franchise with PTV as the franchisor and SRBC as the franchisee. This is the crux of the order-in-original dated 18.12.2013, the order of the Commissioner (Appeals) dated 15.05.2014, and the Appellate Tribunal's order dated 16.11.2021, against which PTV is now before this Court.

4 The service in the instant case is the TV channel transmission service by the name of "ATV"[2] channel. Learned counsel for the Applicant referred to the Rental Agreement dated 16.05.2007 between PTV and SRBC to submit that the Rental Agreement provided for a suite of technical and other facilities and services to be provided by PTV to SRBC, with each service itemized with varying prices and there wasn't one single, all comprehensive

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[1] Per the table at page 2 of the order-in-original, and not "technical fee" as erroneously noted in the ATIR's order.

[2] Page 4, paragraph 5, order-in-original.

'franchise fee' or 'technical fee' to bring the relationship within the ambit of a franchise. We have reviewed the Rental Agreement. It indeed breaks down the services and facilities extended by PTV to SRBC for round the clock transmission of ATV channel, and spans a substantial number of tangible and intangible items required by SRBC to continue the business of TV transmission services, including equipment and facilities manned, operated and maintained by personnel deputed by PTV, all for a monthly recurring payment termed 'Rent'. It was on the strength of this Rental Agreement and the payment thereunder termed as "Rent" that PTV's case before us was argued, claiming that SRBC's ATV was an *independent* TV channel service, and in furtherance of this argument, learned counsel negated that the ATV channel was "...*identified with franchiser*..." in the sense and for the purposes of section 12a of the Act. He submitted that the recording of the payments in PTV's accounts as fee for technical facility was not in and of itself determinative of a franchise, and that all the Respondents fell in error in so concluding.

5 The term "franchise" as defined in section 2(12a) of the Federal Excise Act, 2005 (the **Act**), in so far as material for our purposes (that relate to services only), is as follows:

> "franchise" means an authority given by a franchiser under which the franchisee is contractually or otherwise granted any right to ... do any ... business-activity ... or to provide service or to undertake any process identified with franchiser against a fee or consideration including royalty or technical fee, whether or not a trade mark, service mark, trade name, logo, brand name or any such representation or symbol, as the case may be, is involved."

6 The concept of a franchise was elaborated in Honda Atlas Car Pakistan Ltd. versus Federation of Pakistan and others (2016 PTD 1328). Honda Atlas was also a case turning on the application of section 2(12a), where her Ladyship, Justice Ayesha A. Malik (when at the Lahore High Court), observed as follows:

> ...a franchise agreement will grant the franchisee the right to operate its business *in the name and style of the franchisor's business*...
>
> The franchisee must ensure that the goods or services maintain the *uniformity and standard of the franchisor's goods or services.*
>
> (emphasis supplied)

While analysing the agreement between Honda Atlas Pakistan and Honda Japan to find that it was a franchise, her Ladyship observed that:

> The Petitioner essentially purchases a business package from Honda Japan which entails the provisions of services aimed at guaranteeing a *uniform operation and style of the product.*
>
> (emphasis supplied)

7 This, respectfully, is the essence of a franchise. If Honda Japan merely extended assistance to some other company to manufacture another brand of cars, it would not have been a franchise. If Chen One Pakistan makes a contract with another company to manufacture and sell bed linen under another name and not to the identical specs as its own bed linen, then it would not constitute a franchise, for the *uniformity of the product* would be lacking.

8 The phrase "*identified with franchiser*" in section 2(12a) is the key to unlock the definition of franchise, and to distinguish a franchise from other legal relationship that have common elements per section 2(12a) of "*...grant of right ... to another to...provide a service...*". Ignoring this overriding requirement of the identity of the business, service or product with that of the franchiser will broaden the amplitude of a franchise beyond all acceptable bounds of this term's universally acknowledged scope in legal and business circles, and would leave no distinction between a franchise and other contractual rights to undertake a business activity or provide a service. Innumerable examples can be wrought. By way of illustration, if a Ministry makes a contract with a construction company to construct an office complex, that too would end up falling in the rubric of franchise because all the elements of 'grant of authority to another to undertake a business activity' would be present, but it would be downright absurd to call this construction contract a franchise because the construction project does not *identify* the construction business with the business of the Ministry. If Pizza Hut contracts with Chai Khana in Islamabad to impart know-how on high-end kitchen equipment and specialist chefs to make, not pizzas, but quiches, then that too will not make Chai Khana a franchisee of Pizza Hut, because the end product is neither a pizza nor it is identified with Pizza Hut if marketed as Chai Khana's quiches. The last phrase in section 2(12a) excluding the necessity of branding by trade mark, service mark, and other

intellectual property rights, has been made irrelevant by section 2(12a) itself to determine whether a franchise has come into existence, but the absence of an intellectual property mark or branding does not eliminate the need for the essence of a franchise to exist, that was so aptly and succinctly described by her Ladyship in Honda Atlas case as the product or service in question being '*in the name and style of the franchisor's business'*, or carrying the '*uniformity and standard of the franchisor's goods or services'*, with '*uniform operation and style of the product.*'

9 The ingredients to infer a franchise under section 2(12a) of the Act are 5 in number, namely, (i) authority by the franchisor, (ii) the resultant right acquired by the franchisee, (iii) the franchised service or product, (iv) the fee therefor, and (v) the identification of the product or service with the franchisor. All the impugned orders, however, focus only on the first 4 ingredients, and leave out the most critical ingredient no. (v). Not keeping the '*identified with the franchiser*' ingredient as the overriding one leads to *reductio ad absurdum*, reducing the myriad business relationships in an economy, recognized as legally distinct relationships with distinctly peculiar characteristics, to one single description, for then the legal doctrines of agency, construction, charterparty, outsourcing, advertising, transportation, and well-nigh all else will be reduced to the singular description of franchise as they all contain the ingredients (i) to (iv) noted above. The conclusion that the Legislature did not intend so – we need to be very slow to attribute absurdity to Legislative Acts – can safely be gleaned from the words '*identified with franchiser*' found in section 2(12a), and for the good reason explained above.

10 The only obstacle in our view to stamp the conclusion in the preceding paragraph with finality is the potential ambiguity of construction whether the words '*identified with franchiser*' relate only to the antecedent word '*process*' or whether they relate back to the entire gamut of activities of '*manufacture, trade, sale, any other business activity or service*". Franchisees undertake processes too – McDonald's Pakistan follows the same process for making fries as does McDonald's USA, and Honda Pakistan follows the same car assembly and maintenance process as Honda Japan.

11 To us it is a plain case of *casus omissus*; the omissus being a comma preceding the words '*identified with frachiser*', to extend the operation of these words to the entire gamut of preceding activities listed in section 2(12a). From as far back as 1961 in Lt. Col. Nawabzada Mohammad Amir Khan versus The Controller of Estate Duty (PLD 1961 SC 119) right up to the recent decision in Abdul Haq Khan and others versus Haji Ameerzada and others (PLD 2017 SC 105), the tests reiterated by the Hon'ble Supreme Court for casus omissus are *avoidance of anomaly or absurdity and giving effect to the manifest intention of the Legislature.* The Hon'ble Supreme Court succinctly described the test in Abdul Haq Khan as follows:

> As a matter of statutory interpretation, Courts generally abstain from providing casus omissus or omissions in a statute, through construction or interpretation. An exception to this rule is, when there is a self-evident omission in a provision and the purpose of the law as intended by the legislature cannot otherwise be achieved, or if the literal construction of a particular provision leads to manifestly absurd or anomalous results, which could not have been intended by the legislature.

12 It appears to us that not supplying the omissus of a comma as aforesaid will lead to manifestly absurd or anomalous results as follows:

i) it would bring almost all business relationships between two or more persons within the rubric of a franchise; and

ii) it will render otiose many other definitions of distinct business activities within the Act itself, making them synonymous with or indistinguishable from a franchise and leaving them redundant, e.g., section 2(8)[3] for a distributor, section 2(16)(c)[4] for manufacture, section 2(16a)[5] for non-fund banking services, and section 2(25)[6] for wholesale dealers, for all these activities carry the 4 ingredients noted in paragraph 9 above, but none

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[3] Section 2(8) reads: ' "distributor" means a person appointed by a manufacturer in or for a specified area to purchase goods from him for sale to a wholesale dealer in that area.'

[4] Section 2(16) defines "manufacture" and clause (c) therefore reads: "any person who, whether or not he carries out any process of manufacture himself or through his employees or any other person, gets any process of manufacture carried out on his behalf by any person who is not in his employment."

[5] Section 2(16a) reads: ' "non-fund banking services" include all non-interest based services provided or rendered by the banking companies or non-banking financial institutions against a consideration in the form of a fee or commission or charges.'

[6] Section 2(25) reads: ' "wholesale dealer" means a person who buys or sells goods wholesale for the purpose of trade or manufacture... .'

carries the 5th ingredient of the business of the franchisee being *identified* with the business of the franchisor himself. It is trite law that redundancy cannot be ascribed to the definitions in a statute.

13 The combined force of the following canons of statutory construction, namely (i) an ambiguity in a fiscal statute is to be resolved in favour of the taxpayer[7], (ii) the use of different words in a statute import different meanings (*expressio unius est exclusio alterius*)[8], (iii) each provision in a statute must be given effect to and redundancy cannot be ascribed to any provision[9], and (iv) absurdity or anomaly is to be eschewed[10], leads us to supply the *omissus* of a comma after the word '*process*' and before the phrase '*identified with franchiser*' for the latter phrase to relate back to the entire catalogue of activities in section 2(12a) and not limited to the word '*process*' only. Once the comma is supplied, the entire definition falls in place making good sense, achieves harmony with the concept of a franchise elaborated in *Honda Atlas* case (supra)[11], and stands out distinct in its own right from other business activities defined in the Act and noted in para 12(ii) above.

14 The last phrase in section 2(12a) making the branding, marketing and use of trade names of franchisers irrelevant does not derogate from the interpretation above. This is because the franchises may not necessarily be for sale of the product to the ultimate consumer, necessitating the use of a brand name, and a franchise can exist nonetheless. For instance, a car door panel manufacturer in Lahore making door panels for Toyota Motors without branding or use of Toyota's logos will be a franchisee of Toyota if he does that business under authority of Toyota and uses the same *process, identified with Toyota,* so that his door panels conform to Toyota door panel specifications making them genuine Toyota products. So branding is

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[7] 2007 SCMR 1367, 1999 SCMR 138

[8] 2007 SCMR 1367, PLD 1987 SC 213, PLD 1973 SC 49

[9] PLD 1994 SC 894

[10] PLD 2017 SC 105

[11] And also with the internationally recognised definitions and descriptions of a franchise in legal and business circles.

obviously not a *sine qua non* for franchising, though it is most common, but the product or service itself must be identifiable with the franchiser.

15 It has not been the case of Inland Revenue that ATV channel simply rebroadcasted the TV content of PTV channel. That is to say, the 'output' or 'product' of ATV channel carried content other than the content broadcast by PTV. We must not lose sight of the product in question: it is the TV content – news, programmes, advertisements, etc, – which is the product or service that needs to be identified with PTV to create a franchise (and not the services received by SRBC to be identified with PTV). ATV channel content was a different product by all means, and the mere fact of its owner SRBC being majority owned by PTV by no means identified the product itself with PTV. By analogy, if Telenor starts a virtual mobile network service using a 100% subsidiary under a different name with OTT calls only, would that make the service a franchised service solely for that reason? Or if the BBC sets up a Pakistan subsidiary to distribute local news only using a local channel name, would that make the latter a franchise of BBC? If Isuzu Japan teams up with, say, Gandhara Motors for the latter to manufacture a local range of trucks using technology and parts not sourced exclusively from Isuzu nor conforming to the global specs of Isuzu trucks, would that constitute an Isuzu franchise? The answer in all these cases would be a resounding no, for the very reason that the final service or product will not be 'identified' with Telenor, BBC or Isuzu, regardless of it being known and acknowledged that these giants were the prime movers behind these new products, for the word 'identified' must not be given any meaning more expansive than what it means. The word 'identify' is the verb of the noun 'identity', originating from the Latin word *idem* meaning 'same' and then from late Latin *identitas* in the 16th century, also meaning 'same'. The English language ought not be abused in the interest of the State's revenues to seek to make it mean 'associated with', 'connected with', 'having common elements' or such expressions of affinity. Identity means what it means, and let us not stretch it to mean anything else, for we do not carry a poetic license to deploy cognate expressions while interpreting a taxing statute. It is trite law that words in a statute in the absence of express language to the contrary are to be given their ordinary and plain meaning.

16 The order-in-original inferred a franchise solely for the reason that SRBC was a subsidiary of PTV, claiming this fact alone to lead to a franchise relationship '...beyond any iota of doubt...'. It went on to find that the Rental Agreement was used as a means to '...disguise the nature of the transaction...". These argument leave one appalled. These are *ad hominem* arguments, arguing from an unfounded premise of ill-motive, reaching backwards from a desired result, and resting on the highly fallacious assumption that a parent-subsidiary relationship is invariably also a franchisor-franchisee relationship. It proceeds on the ad hominem assumption that any company wishing to launch a new product or service through a subsidiary has an underlying foul motive to evade the duty, for it rests on the unstated premise that, if the object was not to avoid the duty, there would have been no need to undertake that business through a subsidiary. One wonders what to make of the fundamental right to do business under the Constitution, apart from what the men of business would think of this approach, for it is a daily staple in Pakistan and abroad for businesses to set up subsidiaries for branching out in new or modified products and services for myriad reasons including financial or administrative ring-fencing, diversification of governance options, later spin-offs, investments that would not be made in the parent company, and many others. One need say no more on this point, except for the dismay that both the Commissioner (Appeals) and the learned ATIR fell in the same error oblivious of universal corporate norms. The learned ATIR fell into further error, just as did the officer passing the order-in-original, that fee charged for technical services is a *per se* ground to infer a franchise, when neither section 2(12a) so prescribes nor is this a business reality. The name 'technical fee' or 'fee for technical assistance' are mere convenient labels and no more. For instance, Huawei or Nokia Siemens charge technical fee for telecom network support activities to mobile companies, software companies charge technical fee for customized software deployed in networks, a maintenance and operations service provider charges technical fee to, say, solar power projects, but none of these are franchise relationships, and to infer a franchise as defined in section 2(12a) based on the label given in a company's accounts to the fee received for services is tantamount to rewriting section 2(12a) in its entirety.

17 For the foregoing reasons, we find that ATV channel was not a franchised service and is not caught by section 2(12a) of the Act. Resultantly, the question of law number 4 is answered for the Applicant and against the Respondents, and with that answer the other questions of law stand answered accordingly for the Applicant. The Application is **allowed**.

(Chief Justice) **(Sardar Ejaz Ishaq Khan)**
Judge

Imran

Announced in open Court on 25.05.2022

Judge **Judge**

Approved for reporting.