

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

APPEAL NO. AT-178/2015

M/s Invest Capital Markets Limited ..... Appellant

**Versus**

1/ Commissioner (Appeals), SRB, Karachi  
2/ Assistant Commissioner (Unit-3), SRB, Karachi ..... Respondents

Mr. Adnan Zaman, FCA ..... For the Appellant

Mr. Tarique Ali Assistant Commissioner, SRB, and  
Ms. Umi Rubab, Assistant Commissioner, SRB, Karachi ..... For the Respondents

Date of hearing 26.03.2018

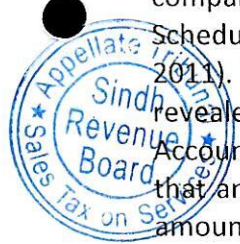
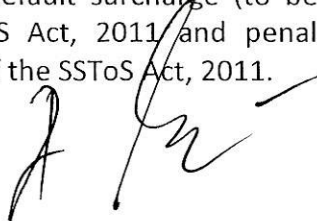
Date of Order 29.03.2018

**ORDER**

**Razia Sultana Taher:** This appeal has been filed by the appellant challenging the order in appeal No.117/2015 dated 22<sup>nd</sup> May, 2015 passed by the Commissioner (Appeals) in appeal No.49 of 2014 dated 14.06.2014 confirming the order in original No.261 of 2014 dated 14<sup>th</sup> May, 2014 passed by the Assistant Commissioner, SRB.

2. In short, the facts of the case as stated in the order in original are that the appellant are engaged in providing / rendering taxable services of Stock Brokers, Commissions and brokerage of foreign exchange dealings, and services provided or rendered by non-banking finance companies falling under tariff heading 9819.1000, 9813.6000 and 9813.8100 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as SSToS Act, 2011). The scrutiny of monthly sales tax returns for the tax periods from July 2011 to June 2012 revealed that an amount of Rs.8,440,517/- was paid as Sindh Sales Tax. The Profit & Loss Account of M/s Invest Capital Markets Limited for the period ended 30<sup>th</sup> June, 2012 showed that an amount of Rs.88,236,810/- was earned from taxable services involving Sindh Sales Tax amount of Rs.14,117,890/-. Thus the differential amount for the tax periods July 2011 to June 2012 stands at Rs.5,677,373/-

3. The concerned Assistant Commissioner in the order in original No.261/2014 dated 14<sup>th</sup> May, 2014 concluded that the appellant received consideration in respect of brokerage from foreign exchange dealings (ii) Discounting Commission (iii) Underwriting Commission (iv) Arrangement fee (advisory fee) and others. The appellant was ordered to pay Sindh Sales Tax amounting to Rs.4,436,572/- along with default surcharge (to be calculated at the time of payment) under Section 44 of the SSToS Act, 2011 and penalty imposed amounting to Rs.221,829/- under clause 3 of Section 43 of the SSToS Act, 2011.



4. The said order of the Assessing Officer was challenged by way of filing of appeal before the Commissioner (Appeals) SRB who dismissed the appeal and upheld the order in original.

5. During the course of hearing the appellant's counsel submitted that the present appeal case involves 4 issues. That the Respondent / Department had taxed under heading 9813.6000, 9813.8100, 'Forex Market' and 'others'. Both the tariff headings are not applicable to the appellant for the reason that the appellant is a stock broker falling under tariff heading 9819.1000 and is not a financial institution as defined by Companies Ordinance. Wherein under the said Ordinance, the stock brokerage is not included as a financial institution and hence not taxable under tariff heading 9813.8100 as it is not a financial institution. The learned counsel contended that the word 'others' pertains to services and not service providers. The other services of the appellant have been classified under heading 9813.6000 & 9813.8100 whereas, the appellant is outside the scope of 9813.6000 and 9813.8100 and is thus not taxable under these services.

As regards the second issue, it is 'arrangement fee' given in the financial statement of the company. At the time of agreement in 2009, SRB was not in existence, the payment for the service was received in 2011-2012. For the third issue, submitted that service of under writing was through an agreement in July 2011-2012 then the service of under writing was not taxable. It became taxable since 01.07.2015 the services rendered prior to July 2015 are not taxable. The Appellant in counter argument submitted that 'arrangement fee' pertains to period when Sindh Sales Tax was not leviable. Secondly, copy of agreement had been produced between ICIBL & ICML (Invest Capital Market) – it is a demerger agreement, certain business laws were transferred to ICML from ICIBL. The advisory fee which pertains to the period of 2009 was received by the new entity ICML in 2011.

The Appellant counsel defined Under-Writing Commission stating that when a company issues shares to the public there is a requirement of the law that before it issues shares to the public it has to obtain guarantee from a third party that in case the public does not subscribe to those shares the under writer will buy those shares and for this guarantee / contract, the under writer receives remuneration / consideration which is known as Under Writing Commission and stated that Discounting commission is when any institution buys any movable asset e.g. receivables at a discount – the difference between the amount paid and the amount received is the discounting commission. According to appellant it is not a service but commission.

6. In response to the arguments of the appellant, the respondent represented by Mr. Tarique Ali, Assistant Commissioner submitted that on first issue, the services of foreign exchange are taxable under tariff heading 9813.6000 as any service which is made taxable in the Second Schedule under SSToS Act, 2011. The same is to be charged and paid by the service provider. Likewise, the main heading 98.13 shows that other persons dealing in such services besides the eight persons listed in the given head are also taxable. That M/s Invest Capital falls under the definition of (other persons dealing in such services) in this regard innumerable orders have been passed by Appellate Tribunal of Sindh Revenue Board on the said issue and cited M/s Global Securities Ltd. v/s SRB, M/s Elixir Securities Ltd. v/s SRB, Icon Securities v/s SRB, KASB Securities Limited.

The respondent representative taking up the second issue argued that as the explanation provided in the aforesaid 1<sup>st</sup> issue that any service provided by the service provider which falls under the tariff heading of the Second Schedule of SSToS Act, 2011 is taxable likewise the

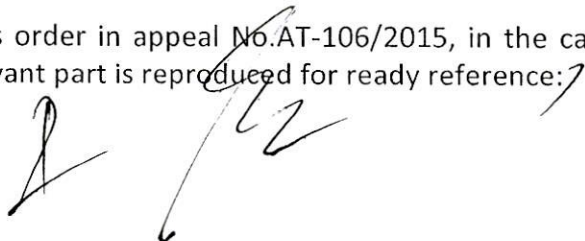
'arrangement fee' is also part of 'advisory services' and is taxable under the tariff heading 9813.8100. The appellant's argument that agreement provided pertained to the subject tax period (July 2011 – June 2012) is irrelevant. The respondent added that in the instant case, the agreement is irrelevant as the copy of contract (agreement) by appellant pertains to the fiscal period 2009 and their further contention that the master business transfer agreement between the M/s Invest Capital Investment Bank and M/s Invest Capital Markets Ltd. has no relevance in the instant case as the Annual Accounts prepared, audited by the aforesaid entities i.e M/s Invest Capital Investment Bank and M/s Invest Capital Market Ltd. are separate and independent. Thus there is no relation of the master business transfer agreement in the instant case, so far the tax assessment of M/s Invest Capital Markets Ltd. is concerned.

The respondent submitted in respect to issue No.3: Commission and others, that there are two types of Commissions which are being taxed. One is Under-Writing Commission and the other is Discounting Commission. Service provided by Stock Brokers are so varied in nomenclature as the services of underwriting and discounting commission are similar in nature to that of commission of primary stockbrokerage activities. Thus, getting the benefit of nomenclature, Sindh Sales Tax should not be ignored. Hence the services should be taxed as primary Stock Brokerage Services. As regards the penalty, the respondent continued that the non-payment of Sindh Sales Tax invokes clause / offence 3 of Section 43 of SSToS Act, 2011. The appellant had submitted during the proceedings before the assessing officer that such services assessed are not taxable even through the respondent had given sufficient explanation and made the appellant aware that such services are taxable and decision of the Appellate Tribunal, SRB are also available on the same ground. Failure to make payment of Sindh Sales Tax which is collected by Sindh Revenue Board from other stock brokers itself creates the element of mens rea, thus penalty has been rightly imposed.

Furthermore Ms. Umi Rubab Assistant Commissioner submitted that the amount of Rs.16.6 million appears in the Financial Accounts of M/s Invest Capital Market Ltd. The master agreement submitted pertains to March 2012 and the period taxed by SRB is 2011-2012. As regards the old agreement of 2009 of Sindh Bank the respondent clarified that it is not relevant and the argument presented by the appellant is irrelevant. The Assistant Commissioner added that appellant has earned arrangement fee (advisory fee) amounting to Rs.16.6 million and the same is chargeable under tariff heading 9813.8100 of the SSToS Act, 2011. As regards under writing and discounting commission the appellant falls under tariff heading 9813.8100.

We have heard the learned representative of both sides and perused the record of the case made available to us. The learned counsel presented his argument that both tariff headings 9813.6000 and 9813.8100 are not applicable to the appellant for the reason that the appellant is a stock broker and not a financial institution. On the other side, the respondent vehemently opposed the stance of the appellant and submitted that Commission and brokerage of foreign exchange are taxable under tariff heading 9813.6000 of the Second Schedule to the SSToS Act, 2011 and placed reliance on the orders of the Appellate Tribunal, Sindh Revenue Board given on the said issue in case of M/s Global Securities Limited Appeal No.AT-106/2015, M/s Elixir Securities (Pvt.) Ltd. appeal No.AT-206/2015, M/s Icon Securities, KASB Securities Limited Appeal No.AT-161/2015, M/s BMA Capital Management appeal No.AT-107/2015.

The Appellate Tribunal SRB in its order in appeal No.AT-106/2015, in the case of M/s Global Securities held as under, the relevant part is reproduced for ready reference:



"We have gone through the arguments of both the sides and our considered opinion is that the case of the appellant squarely falls under the tariff code of 9813.6000 as earning Commission and Brokerage of Foreign Exchange dealings and under the definition of "other persons dealing in any such services", as services provided or rendered by such persons as falling under main tariff code 98.13. The reasons for our reaching at such decision are as under.

- i) "It may be noted that all the persons listed under Tariff code 98.13 are those persons who are engaged in business in the financial market. The phrase used here generalizing the rest, "other persons dealing in any such services", also relates to persons doing business in financial market. It is on record that the appellant is member of the Pakistan Financial Market Association. All these persons deal in currency, Pakistani or foreign currency, at the retail level or higher level or brokering foreign exchange. Thus, while some persons have been specified and some are generalized in 98.13 the specific sub-tariff code 9813.6000 further specifies the services rendered by all these persons.
- ii) "The appellant claims that it is not dealing in foreign exchange. It also claims that it is an inter-bank foreign currency broker. In the written arguments submitted during the hearing of the appeal it has explained its business as under:  
"That the appellant is licensed to operate as an inter-bank foreign exchange broker and is intermediary between Foreign Exchange Dealers (Authorized Dealers) in buying and selling of foreign exchange, enabling authorized dealers to maintained deal among themselves rather than directly providing such services". Being an intermediary is nothing but brokering and facilitating a particular business activity. In this case the business is foreign exchange dealing. Even if the appellant is not dealing in foreign exchange at the retail level it is part of the same business at a higher level, and is a broker of the brokers engaged in the business of foreign exchange. He is as such member of the financial market of PMFA.
- iii) "The judgment of the Supreme Court in the above cited case of Habib Safe Vault (Pvt.) Ltd. in Civil Appeal No.911 of 2015 is squarely relevant on this issue. It is of particular reference as it has decided the interpretation of general and special, with specific reference to Tariff code 98.13. It has further made it clear as to who are the other persons in this Tariff code and that all services falling below main tariff head and being rendered by other persons are taxable in the similar manner as other specifically mentioned institutions under Tariff heading 98.13.
- iv) "Thus following the discussion of the D.B. of Appellate Tribunal in the case of Icon Securities (Pvt.) Ltd. in Appeal No.AT/129/2015 cited supra and being enlightened with the judgment of the Supreme Court in the case of Habib Safe Vault (Pvt.) Ltd. cited shown, we hold that sales tax levied @ 16% on the appellant's foreign currency trading of Rs.7,002,650/- is correct, and legal".



With the comprehensive decisions in the cited orders of the Appellate Tribunal, we uphold the impugned order on this issue.

8. Next, the appellant counsel held that arrangement fee given in the financial statement pertained to a consultancy service agreement year 2009. The respondent / department held that reference to consultancy service agreement was entered between the Finance Department of Government of Sindh and M/s Invest Capital Investment Bank Limited for carrying out feasibility studies in respect of 'Sindh Bank Limited'. Both the appellant and M/s Invest Capital Investment Bank Limited are separate and distinct entities. Furthermore, the respondent

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explained that the respective Financial Statements state that the same have been prepared on an accrual basis, that appellant earned arrangement fee chargeable to Sindh Sales Tax under tariff heading 9813.8100 of the Second Schedule to the SSToS Act, 2011. The argument presented by the learned counsel of the appellant is far from convincing in view of the above explanation and the judgment of Appellate Tribunal in appeal No.AT-161/2015 on advisory and consultancy services taxed under tariff heading 9813.8100 of the Second Schedule to the SSToS Act, 2011. Taking the third issue 'Underwriting Commission' the appellant's counsel submitted that the service of Underwriting was not then taxable, it became taxable since 01.07.2015. No reply has been received from the respondent. We uphold the appeal on this issue that service provided by underwriter became taxable on 01.07.2015. So far as issue on Discounting Commission is concerned no plausible argument has been forwarded by both the parties. In view of our observation we remand the case on issue of 'discounting commission' to the assessing officer with directives to thoroughly re-examine the relevant documents after providing opportunity of hearing to the appellant, thereafter determine the exact nature of the services and classify the same accordingly.

9. However, if the appellant deposits the principal amount of Sindh Sales Tax involved within 30 days of the receipt of the said order, extreme leniency will be shown as a special case and penalty imposed would not be required to be paid by the appellant. In so far, as the amount of default surcharge is concerned, we recommend that SRB may kindly consider exempting at least fifty percent (50%) of the amount of the default surcharge as special case, as it pertains to the initial stages of the coming into force of the new laws by exercising the powers under section 45 of the SSToS Act, 2011. In implementation of the Act and Rules, the purpose is not to create hardship but at the same time ensure proper and timely implementation of the laws and rules framed thereunder.

10. The impugned order in appeal is modified to the above extent as detailed in the preceding paragraphs.

11. The appeal is disposed of in the above terms.

  
(Muhammad Ashfaq Balouch)  
JUDICIAL MEMBER

  
(Razia Sultana Taher)  
TECHNICAL MEMBER

Karachi

Dated: 29.03.2018

Certified to be True Copy

Copies supplied for compliance:-

1. The Appellant through authorized Representative.
2. The Assistant Commissioner (Unit- ), SRB, Karachi.

Copy for information to :-

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

  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD