

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD
KARACHI

APPEAL NO. 191/2015

Central Depository Company Pakistan
Limited.....Appellant

Versus

The Commissioner I, SRB and another.....Respondent

Mr. Asif Haroon FCA and Mr. Arqam Ansari ACA for appellant

Ms. Lubna Najmi AC, SRB for Respondent

Date of hearing: 03.11.2015

Date of Order: ~~16.11.2015~~
12-01-2016

ORDER

Justice (R) Nadeem Azhar Siddiqi This appeal has been filed by the appellant challenging the Order-in-appeal No. 157/2015 dated 30.05.2015 passed by the Commissioner (Appeals) in Appeal No. No. 159/2015 confirming Order-in-Original No. 113/2015 dated 03.03.2015 passed by the Assistant Commissioner (Mr. Vickey Dhingra), SRB, Karachi.



1. In short, the facts of the case as stated in Order-in-Original are that the services provided or rendered in respect of "others including services provided or rendered by non-banking finance companies and other financial institutions" are chargeable to the Sindh Sales Tax under section 8 read with Tariff heading No. 9813.8100 of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) at the rate of 16% of the value

Was

A large, stylized handwritten signature or scribble in black ink, extending from the bottom of the first paragraph down towards the bottom of the page.

of the service w.e.f. July 01, 2011 and at the rate of 15% with effect from July 01, 2014:

2. The allegations against the appellant are that during the scrutiny of the financial statements of appellant for the years ended June, 2013 and June, 2012 revealed, that as per Note I of the financial statements, the appellant are engaged in providing taxable services valued at Rs.293,244,473/= but had declared only Rs.216,195,301/= for rendering services in respect of trusteeship, custodian, depository of securities and other services under non-banking finance companies and Notified Entities Regulations 2008. It was further alleged that the appellant have received the consideration to the tune of Rs.936,851,190/= and Rs.828,492,097/= for the tax periods from July, 2012 to June, 2013 and from July, 2011 to June, 2012 respectively which are chargeable to Sindh Sales Tax under aforesaid tariff heading that involves Sindh Sales tax amounting to Rs.282,454,926/=.



3. The appellant was served with a Show Cause Notice Dated 12.01.2015. for recovery of Tax, payment of default surcharge under section 44 of the Act and penalties in terms of Entry No. 3, 6, and 11 of Section 43 of the Act. The appellant filed reply to the show-cause notice dated 21.01.15. The thrust of the reply of the appellant is as under:

"CDC is not engaged in providing services provided by non-banking finance companies and other financial institutions. The appellant is only a depository company and handles the electronic (paperless) settlement of transactions carried out at the three stock exchanges of the country. The appellant is regulated by the SECP and the relevant legislations are Companies Ordinance 1984; Central Depositories Act, 1997 and Central Depository Company of Pakistan Limited Regulations. The appellant is neither registered under the Banking Companies Ordinance, 1962 nor under Non-Banking Finance Companies (Establishment and Regulation) Rules, 2003. It was also stated in the reply that the services provided by the appellant do not fall within

Kos

A large, stylized handwritten signature in black ink, appearing to be a cursive name.

2

the ambit of Tariff Heading 9813.8100. In reply it was also stated that the appellant got registration with SRB with effect from August 22, 2014 under Tariff heading 9805.9000 (services provided by share transfer agents) and 9819.9500 (services provided or rendered by a registrar to an issue)".

4. Finally after hearing, the Order-in-Original dated 03.03.2015 was passed levying sales tax amounting to Rs.282,454,926/= along with payment of default surcharge and penalty of Rs.14,362,746/=. In para 13.27 on page 34 of the order-in-original the Assessing Officer held as under

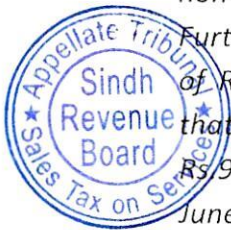
"to put it succinctly, the services provided or rendered in respect of non-banking finance companies are chargeable to the SST under section 8 read with tariff heading 9813.8100 of the Second Schedule of the Act with effect from July 01, 2011".

5. The Respondent challenged the Order-in-Original by way of filing of Appeal No.59/2015 before the Commissioner (Appeals) who dismissed the Appeal, vide Order dated 30.06.2015 confirming the Order-in-original. The learned Commissioner (Appeals) in paragraph 50 of the Order-in-Appeal has held as under:

"The learned Respondent has taken up the case of the appellant on account of non-payment of SST on Services provided and rendered in respect of NBF. Further the learned Respondent has established upon the appellant an amount of Rs.282,454,926/= by considering the financial statements which revealed that, the appellant have received the consideration to the tune of Rs.936,851,190/= and Rs.828,492,097/= for the tax periods from July, 2012 to June, 2013 and from July, 2011 to June, 2012 respectively".

The Learned Commissioner Appeals in para 51 of the order-in-appeal held as under:

"It is decided that, the plain perusal of OIO specifically para 3 to para 13.27 ibidum provide strong grounds that, the services provided by the learned appellant fall within the ambit of tariff heading 9813.8100. The learned respondent has justifiably established vide the aforementioned paras of the OIO, the rendition of the services prescribed against tariff heading 9813.8100. The learned Respondent has not only justifiably established the rendition of services by the learned appellant but has sufficiently defended his contention during the appeal proceedings. His logic and rationality, in support of his contention and duly cited supra has persuaded this forum to firm their judgment and arrive on the finality that, the learned appellant is indeed found



102

A large, stylized handwritten signature in black ink, appearing to be a cursive name.

engaged in rendering and providing the taxable services reflected against the tariff activity code of 9813.8100. Therefore, in short, rendition of taxable services by the learned appellant is vivid and vivacious and they cannot redeem themselves from the ambit of the taxability of services on any plea or pretext".

6. Mr. Asif Haroon the learned representative of the appellant states that the appellant is a Central Depository Company and is neither come under Tariff heading 98.13 nor is providing or rendering any services mentioned in the Second Schedule under Tariff heading 98.13. He submits that both the forums below passed the orders on wrong notion that the services provided by the appellant are in the nature of those provided by Non-Banking Finance Company (NBFC) merely on the basis that the as per their opinion the trusteeship/custodial services provided by appellant resemble to those provided by NBFC. He then submits that CDC is not a NBFC because NBFC is a defined/license entity and SECP in its letter dated June 5, 2014 addressed to AC Vickey Dhingra on his request (suppressed by the Said AC) confirmed that CDC is not a NBFC and that for acting as NBFC one must have license from SECP to act as such. He then submits that share transfer service provided by appellant was brought to tax net w.e.f. July 1, 2014 under Tariff heading 9805.9000 (share transfer agent) and Tariff heading 9819.9500 (services provided or rendered by a registrar to an issue) and its other services including depository services, investor account services and trustee and custodial services have been made taxable w.e.f. July, 2015 by enlarging the definition of the term "Share Transfer Agent" in section 2(79A). He then submits that both the forums below wrongly construed that the appellant is covered by the expression "other persons dealing in any such service" used in the main tariff heading 98.13 and "others, including the services provided or rendered by non-banking finance companies, modaraba and musharika companies and other financial institutions" used in the sub-sub-heading 9813.8100 added by ordinance effective from 1st November, 2011. He then submits that the main heading is not relevant for taxing a service if



102

A large, stylized handwritten signature in black ink, written over the bottom portion of the text.

4

sub-headings and sub-sub-headings are given under main heading and "others" in a sub-sub heading are subordinate to the sub-heading. The learned representative of the appellant also challenged imposing of penalty under section 43 Item No. 2 and 3 amounting to Rs.14,362,746/= and default surcharge on the ground that there was no willful or intentional default on the part of the appellant and that the respondent failed to prove mens rea, willful non-compliance of statutory provisions of law and malafide on the part of the appellant. The learned representative of the appellant heavily relied upon the reported case of M/s Citi Bank NA versus Commissioner Inland Revenue and others 2014 PTD 284 and submits that the reported judgment is the complete reply of the issues involved in this case.

7. The learned AC Ms. Lubna Najmi for the Respondent supported both orders. She submits that the appellant being CDC is engaged in providing services of depository of securities, shares transfer agent, registrar to an issue as well as trustee ship and custodial-ship services in relation to open-end funds and close-ended schemes managed by non-banking finance companies under the Non-Banking Finance Companies and Notified Entities Regulations, 2008. She then submits that services provided by share transfer agents under tariff heading 9805.9000 and registrar to an issue under tariff heading 9819.9500 were made part of 2nd Schedule to the Act with effect from 1st July, 2014, however trusteeship and custodial services have been made taxable under tariff heading 9813.8100 w.e.f. November, 2011. She further submits that the appellant is not a NBFC, but this fact is not sufficient to conclude that its services (excluding share registrar services) were not subject to Sindh Sales Tax during the tax periods assessed vide order-in-original dated 3rd March, 2015. She pointed out that the appellant obtained certificate of registration to act as a trustee of open end and closed end schemes under Regulation 40B of NBFC Regulations, 2008. She then submits that tariff heading 98.13 describe the services provided by banking



MOS

5

companies, insurance companies, cooperative financing societies, modaraba, muşharika, leasing companies, foreign exchange dealers, non-banking financial institutions and other persons dealings in any such service and the words "other persons" and "dealing in any such services", make it evident that the main tariff heading 98.13 does not only include the above mentioned specific service providers but all other persons who provide similar services. She then points out that tariff heading 9813.8100 applied to all persons who provide services similar to those rendered by non-banking financial institutions.

We have heard Mr. Asif Haroon the learned Representative of the Appellant, Ms. Lubna Najmi, the learned Ac, SRB, perused the record made available before us and the comments and written synopsis filed by the learned representatives of the parties.

8. It is not disputed by any of the parties that appellant is registered as a CDC Company and providing services as mentioned in clause 1, 2, 3 and 4 of its Memorandum of Association which includes to act as (i) central depository for securities (ii) to act as custodian, agents trustee, representative, advisors, managers or nominee of member/brokers and agent of stock exchanges and (iii) to act as registrar of securities. It is also not disputed that appellant is not a non-banking financial company as admitted by the respondent in the comments filed on 10.11.2015 and confirmed by SECP in its letter addressed to Mr. Vickey Dhingra, which was for obvious reasons to wrongly tax the appellant has been suppressed..



9. As per the Appellant the Share Transfer Services were made taxable with effect from July 1, 2014 under tariff heading 9805.9500 and its other services (including depository services, investor account services and trustee and custodial services) have been made taxable with effect from July 1, 2015 by enlarging the definition of the term "Share Transfer Agent" in section 2 (79) of the Act. Further contention of the appellant is that tariff heading 9819.9500 (Services provided or rendered by a registrar to issue) was brought to tax net w.e.f. 1st July, 2014 and after

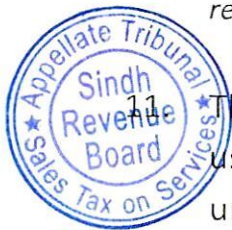
Mos

A large, stylized handwritten signature in black ink, appearing to be a cursive name, located at the bottom right of the page.

obtaining voluntarily registration the appellant is paying tax and regarding tariff heading 9805.9000 (Share Transfer Agents) the appellant submit that this service was brought to tax net w.e.f. 1st July, 2015 and the appellant is liable to tax on this services w.e.f. 1st July, 2015. The contention of the learned AC is that services provided by appellant as Share Transfer Agents falls under tariff heading 9805.9000 and registrar to an issue under tariff heading 9819.9500 were made part of 2nd Schedule to the Act with effect from 1st July, 2014, however trusteeship and custodial services have been taxable under tariff heading 9813.8100 (others) w.e.f. November 2011. She further submits that said tariff heading 9813.8100 was substituted by an ordinance of 2011 effective from November, 2011 and the tax was rightly levied on these services.

10. Initially the Share Transfer Agent was not defined in the Act of 2011. First time the definition of Share Transfer Agent was added to the Act of 2011 effective from 7th July 2014, which read as under:

"(79A) Share Transfer Agent means a person who maintains the record of holders of securities, and deals with all matters connected with the transfer or redemption of securities or activities incidental thereto".



The above provision was amended effective from July 2015 and by using word "includes" the definition was enlarged, which read as under:

"(79A) share transfer agent includes a person known as share depository agent and also includes persons providing or rendering transfer or redemption or depository services including the services provided through manual or electronic book entry system used to record and maintain record of holders of securities, and also of the securities and derivatives (including investor accounts services, trustee or custodial services, share registrar services and similar, allied or connected services.)

12. The learned AC has levied tax on the appellant under tariff heading 9813.8100 (Others) treating that the appellant is providing services similar to services provided by NBFC without considering that the appellant was registered for a specific purpose for providing services as central depository for securities. At no stretch of imagination the

11/05

6

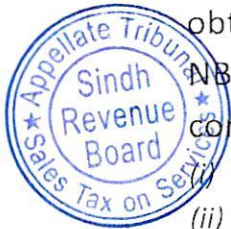
appellant can be considered as a non-banking finance company. The SECP which is the regulatory authority of the appellant in its letter dated June 5, 2014 address to Mr. Vickey Dhingra AC, SRB confirmed that appellant is not an NBFC and that for acting as NBFC one must have licensed from SECP to act as such which is lacking in this case. The tariff heading 9813.8100 is of general nature and effective from 1st November, 2011 and the said heading read as under:-

"Others, including the services provided or rendered by non-banking finance companies, modaraba and musharika companies and other financial institutions".

13. From bare reading of the above tariff heading clearly reflect that the same deals with others services provided by specific institutions mentioned therein and since appellant is not an institution mentioned in the said tariff heading it cannot be taxed for the periods from July, 2011 to June, 2013. The tax under the above tariff heading can only be levied if either the appellant is come within the ambit of the specific institutions mentioned in the said tariff heading or is providing such services which are similar to the services provided by the said institutions. Admittedly the appellant has not obtained any license from the SECP which is necessary for acting as NBFC. A company can only be registered as NBFC by SECP for conducting the following business:-

- (i) Investment Finance Services;
- (ii) Leasing;
- (iii) House Finance Services;
- (iv) Venture Capital Investment; Discounting Services;
- (v) Investment Advisory Services; Asset Management Services; and
- (vi) any other form of business which the Federal Government may, by notification in the official gazette specify from time to time; and

14. No NBFC can be incorporated without prior approval of the commission. Section 282 J of the Companies Ordinance 1984 provides penalty for failure, refusal to comply with, or contravention of any provision, which is punishable with fine the amount of which shall not exceed Fifty Million Rupees. It is not the case of the respondent that the appellant has contravene the provisions of



102

A large, stylized handwritten signature in black ink.

Companies Ordinance 1984 and any penal action was taken against appellant.

15. It is now well settled principle of law that tax cannot be levied on the basis of presumption or assumption but with the clear intendment of the legislature. The insertion of the definition of Share Transfer Agent effective from 7th July, 2014 and its further enlargement of the definition of Share Transfer Agent is a clear proof of intendment of the legislature and no tax can be levied on the basis of amendments made in the rules and the tax can only be levied effective from July 7th, 2014 when the definition of share transfer agent was inserted in the Act, 2011. On enlargement of definition clause (79A) some other services rendered or provided by the appellant were brought to tax net and the tax can be charged prospectively.

16. The learned Representative of the appellant relied upon a DB Judgment of High Court of Sindh reported as M/s Citibank NA Versus Commissioner Inland Revenue and another 2014 PTD 284 and submits that the said judgment is the complete reply of the pleas raised by the Respondent. This case relates to Federal Excise Act (VII of 2015). Under discussion was the tariff heading 98.13 of the said Act. Tariff heading 98.13 of the Sindh Sales Tax Act is similar to tariff heading 98.13 of Federal Excise Act. The view taken by the Hon'ble Court in para 18 of the judgment is reproduced below:-

".....it will be seen that this description, only listed the person who word to provide the services enumerated under heading 98.13. This would satisfy only the 1st definition in section 2 (16a), Sindh Banking Companies and NBFIs were listed in the description. However, this had nothing to do with the service that were actually liable to duty. The attempt by Learned Counsel to conclude from the enumeration of the persons that all the services provided by them were included heading No. 98.13 cannot be accepted. This would render otiose the listing of specific services in the various sub headings. Furthermore, this submission runs counter to the structure of the Pakistan Custom Tariff. As is well known, this is based on (and is almost entirely identical with) the Harmonized Commodity Description and Coding System (HS System), which has been agreed upon under N International Convention and which is regulated by the World Custom Organization....."



Handwritten signature/initials.

Large handwritten signature.

In the same judgment in para 22 the court has held as under:-

".....It may also be noted that some of the sub headings, in heading No. 98.13 were described as "other". This is in fact a common device, to be found abundantly in the HS System in its various Chapters. Some of these are independent sub headings, which operate in their own right, but others are merely subordinate to other sub headings. As Learned counsel for the applicant pointed out (correctly in over view) all the "other" sub headings in heading No. 98.13 were in fact subordinate (i.e. sub-sub-) headings, which were linked to various sub headings, none of which was relevant for present purposes.....".

17. It may be pertinent to mention here that the word "other" used in tariff heading 9813.1000 is a general word followed by a list of specific institutions and the services provided by those institutions and the said word "other" is to be interpreted to include only the words/items of the same class as those specified after the general word "other". The word "other" are not to be understood or to be read independent of the earlier category of entries as any isolated independent interpretation will be misleading and will frustrate the very intention of the legislature. The doctrine of *ejusdem generis* was considered by the Honb. Supreme Court of Pakistan in the reported case of *Jamat-Islami Pakistan Versus Federation of Pakistan* PLD 2000 SC 111 in the following words.

"The doctrine of "ejusdem generis" is well settled. It means that where general words follow an enumeration of persons or things; by words of a particular and specific meaning such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned".

18. The legal maxims *ejusdem generis* means that the special words that immediately followed or were closely associated with general words, their meaning are limited to the preceding words. The word "other" is a general expression and in view of the above explanation the general expression is to be read as comprehending only things of the same kind as that designated by the preceding particular expressions, unless there is something to show that a wider sense was intended.



Handwritten signature and scribbles at the bottom of the page.

19. From the above doctrine it is clear that the specific words used after the word "other" has no wide scope or meaning and the same has to be interpreted to include only the words of the same class as those specified.

20. The sales tax can only be levied if the service is specified in the 2nd Schedule to the Act read with the definition clause of the Act. Admittedly the services provided by the appellant i.e. Share Transfer Agent was added in the definition clause vide 2(79A) of the Act effective from 7th July, 2014 and was enlarged effective from 1st July, 2015. Some of the services which the appellant were provided and rendered can be taxed effective from 07 July, 2014 and some from 1st July, 2015. This case pertains to the tax periods from July, 2011 to July 2013 when the services provided or rendered by the appellant was not part of the tax net and tax cannot be levied treating the appellant as non-banking financial company.

21. In view of the above we are satisfied that both the Order-in-Original and Order-in-Appeal are suffering from legal infirmities and are not sustainable in law, consequently the Order-in-Original and Order-in-Appeal are set aside and the appeal is allowed.

22. The appeal is disposed of as above.

23. Before parting with this order we deem necessary to point out the conduct of Mr. Vickey Dhingra Assistant Commissioner SRB, who by deliberately suppressing a letter received from SECP on his own request is unbecoming of a responsible officer of SRB and by doing this has bring bad name to the entire department. The copy of this order may be forwarded to the Chairman, SRB for his perusal and initiating proper disciplinary action if any against Mr. Vickey Dhingra in accordance with the law.

(Razia Sultana Taher)
TECHNICAL MEMBER

(Justice[®] Nadeem Azhar Siddiqi)
Chairman



Karachi

Dated: 11.01.2016

Copies supplied to:-

1. The Appellant through authorized Representative.
2. The Assistant Commissioner, SRB, Karachi.

Copy for information to:-

- 3) The Chairman SRB, Karachi.
- 4) The Commissioner (Appeals), SRB, Karachi.
- 5) Office copy.
- 6) Guard file.



[Handwritten signature]

- 1 - AT/191/2015

Ms. Razia Sultana Taher, Member (Technical)- I have the privilege to record my finding, as in the paragraphs followings. while differing with the findings, observations and decision of the learned Member (Judicial)/ Chairman.

2. In the case of appeal against the Commissioner (Appeals), SRB's Order-in-Appeal No. 156/2015 relating to show cause Notice No. SRB-COM-I/AC-III/NBFC/CDC/769/2014 dated 13.05.2014 and the Order-in-Order No.20/2015 dated 12.01.2015, the issue involved is non-compliance of the provisions relating to registration and the consequent impositions of penalty of Rs.14,122,746/- (being 5% of the amount of SST of Rs.282,454,926/-) on M/s Central Depository Company (Pakistan) Ltd (hereinafter called "M/s CDC").

3. In the case of appeal against the Commissioner (Appeals), SRB's Order-in-Appeal No.157/2015 relating to show cause notice No.SRB-COM-I/AC-III/NBFC/CDC/8072014 dated 12.01.2014 and Order-in-Original No.113/2015 03.03.2015, the issue involved is whether M/s CDC are liable to pay any sales tax under the main tariff heading 98.13 or its sub-heading 9813.8100 the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter called "the 2011 Act") on the services provided or rendered by them during the period from July,2011 to June, 2013, and, if so, whether the Sindh Sales tax (hereinafter called "SST") liability of Rs.282,454,926/- for the above said tax period is correct.



Although the registration profile of M/s CDC shows that they got themselves registered on 22.08.2014, I will take the second case (i.e. the appeal against Commissioner Appeals' Order-Appeal No.157/2015) first mainly because the question of registration under section 24 of the 2011-Act is dependent on the taxability of the services under the Second Schedule to the 2011-Act.

5. for this purpose, I find it necessary to reproduce, as hereinafter, the tariff heading 98.13, sub-heading 9813.8100 and the descriptions of the taxable services mentioned there against in the Second Schedule to the Sindh Sales Tax on Services Act, 2011.

[Handwritten signature]

2

"98.13. Service provided or rendered by banking companies, insurance companies, cooperative financing societies, modarabas, musharikas, leasing companies, foreign exchange dealers, non-banking financial institutions and other persons dealing in any such services"

9813.8100 other services not specified elsewhere Issuance, processing and operation of credit and debit cards".

6. Section 2(28) (c) of the 2011-Act specifies "a non-banking finance company (NBFC) and the notified entities as specified in section 282A of the Companies Ordinance, 1984 (Ordinance No. XLVII of 1984), read with the non-banking Finance Companies (Establishment and Regulation) Rules, 2003" to be a "company" and, therefore, to be covered by the terminology "person" within the meaning of section 2(63) (c) of the said 2011-Act. Section 282A of the Companies Ordinance, 1984, defines the services of a NBFC to include various services as specified therein, including the service of investment finance services and, investment advisory services. Again clauses (viii), (xvii) and (xlv) of rule 2(1) of the NBFCs (Establishment & Regulations) Rules, 2003, need attention which are

reproduced as hereunder:-



(vi) "central depository company" means central depository as defined under the Securities and Exchange Ordinance, 1969 (XVII of 1969).

(xvii) "custodian" includes a bank licensed under the Banking Companies Ordinance, 1962 (LVII of 1962) or a trust company which is subsidiary of such bank or a central depository company approved by the Commission or NBFC carrying out investment finance services provided it has been approved by the Commission to act as custodian or such other company as may be approved by the Commission to act as custodian.

(xlv) "trustee" includes a bank licensed under the Banking companies Ordinance, 1962 (LVII of 1962) or a trust company which is a subsidiary of such a bank or a central depository company approved by the Commission or a NBFC carrying out investment finance services provided it has been approved by the

-3-

Commission to act as trustee for such other company or trust as may be approved by the Commission to act as trustee.

7. The aforesaid provisions of clauses (xvii) and (xlv) of rule 2(1) of the NBFCs (Establishment & Regulations) Rules, make it abundantly clear that the services of custodianship and trusteeship as provided by M/s CDC are similar to the custodianship and trusteeship services provided by any banking company or by NBFC and, therefore, these services of M/s CDC are covered by the terminology "other persons dealing in any such services" as mentioned against tariff heading 98.13 and the also covered by the terminology of services specified as "others, including the services provided or rendered by non-banking finance companies, modaraba and musharika companies and other financial institutions" against the tariff sub-heading 9813.8100. In the SCN No.SRB-COM-I/AC-III/NBFC/CDC/1807/2014 dated 12th January, 2014, the Assistant Commissioner had quoted the Note 1 of the Financial Statement of M/s CDC which stated that they are engaged in the businesses of depository of securities, opener of securities accounts and registrar to the issuer of securities and further that they also act as **trustee** of various open-end fund and closed-end schemes under the Non-Banking Finance Corporation and Notified Entities Regulations, 2008, and also provide **custodialship** to close-end fund formed under he said Regulations.

For the reasons specified in the foregoing paragraphs, I have no doubt that the trusteeship services and custodianship services provided or rendered by M/s CDC are similar to some of those services as are provided or rendered by any banking company or by any NBFC. In its judgment in the Civil Appeal No. 911 of 2015 (Habib Safe Deposit Vault Pvt. Ltd *versus* the Province of Sindh through Secretary Finance and other), the Honourable Supreme Court of Pakistan held as follows:-

"7. In our opinion it is not without significance that tariff heading 98.13, unlike some other tariff heading in the Second Schedule, stipules a rate of tax. The appellant's learned counsel's contention that, confusion would occur if the said tariff heading and any tariff subheading prescribed different tax rates, is not correct. because, if a particular rate of tax is prescribed under a specific subheading, which is/



14



different from the general rate of tax mentioned in the tariff heading, the rate of tax prescribed in the subheading would apply on the principle that the specific excludes the general; reference in this regard may be made to cases of State v zia-ur-Rahman (PLD 1973 Supreme Court 49, relevant at page 89W) and Neimat Ali Gooraya v Jaffar Abbas Inspector/Sargent Traffic (1996 SCMR 826, relevant at page 833B).

8. The next question which requires our consideration is whether the appellant is required to pay sales tax on the provision of safe deposit lockers (even if it is not a banking company) under the tariff heading 98.13 which also to "other persons". The learned counsel for the appellant could not advance any argument that could possibly exclude the appellant from other persons, nor can we think of a reason to do so. Section 3 of the Act sets out what is a "taxable service" and section 5 explains how the same is valued. Section 8 of the Act is the charging section and states that sales tax is levied, "on the value of taxable service at the rate specified in the Schedule in which the taxable service is listed.

9. Since the appellant undoubtedly comes within the phrase "other persons" therefore the next question to be determined is whether it provides "services" in terms of the Act. The definition of 'services', and its further explanation, is contained in clause (79) of section 2 of the Act, as under:



"service" or "services" means anything which is not goods or providing of which is not a supply of goods and shall include but not limited to the services listed in the First Schedule of this Act.

Explanation: A service shall remain and continue to be treated as service regardless whether or not the providing thereof involves any use, supply or consumption of any goods either as an essential or as an incidental aspect of such providing of service.

Safe deposit locker and safe vaults are mentioned in subheading 9813.4900 and 9813.4910 respectively of the abovementioned First Schedule; however, even if the same were not mentioned therein it would not in itself exclude a person since the

[Handwritten signature]
15

-5-

definition proceeds to state – but not limited to the services listed in the First Schedule.

10. The appellant comes within the phrase- “other persons” as mentioned in tariff heading 98.13 and provides services of safe deposit lockers/safe vault to its customers. The said tariff heading 98.13 also prescribes a rate of tax (15%). Therefore, the appellant is liable to pay sales tax at such rate on the services that it provides.”

9. It appears that the aforesaid judgment of the Honourable Supreme Court has escaped the attention of the learned Member (Judicial) Chairman and he has relied heavily on Sindh High Court’s judgment in a case of Federal Excise Reference Application No D-152 of 2012 decided on 30th October, 2013 (2014 PTD 284). Firstly, the said judgment of the Honourable High Court is in relation to Federal Excise Act, 2005, while the case under appeal before us relates to Sindh Sales Tax on Services Act, 2011. Secondly, the said reference application was in relation to liability of FED on transactions of (a) insurance commission, (b) merchant discount, and (c) speedy cash home remittance by the appellant bank in that case while, in the appeal case before us, the point of determination is whether the services (similar to the services of a banking company or NBFC or a financial institutions) as are provided or rendered by “other persons”, shall attract Sindh sales tax under tariff heading 98.13 or not. In my opinion, there is no justification to rely on the Honourable High Court’s judgment in the Federal Excise Reference Application case No. D-152 of 2012 (2014 PTD 284) in the presence of a direct precedent available as the Honourable Supreme Court’s judgment in Civil Appeal No. 911 of 2015. Accordingly, I hold that the appellant (CDC)’s services, as involved in this case under appeal, were liable to Sindh sales tax under tariff heading 98.13 during the tax periods of FY 2011-12 and 2012-13 (i.e. the tax periods involved in the case under appeal). The appeal against Commissioner (Appeals)’s Order-in-Appeal No.157/2015 relating to Order-in-Original No. 113/2015 is accordingly rejected.

10. Now, I shall turn to the legislative amendment made in section 2(79A) of the 2011-Act through the Sindh Finance Act, 2015. Firstly, section 2(79A) did not exist in the statute



- 6 -

book during FY 2011-12 or 2012-13 (i.e. the periods involved in this case) as it was first inserted through the Sindh Finance Act, 2014, and was later substituted (as it exists now) through the Sindh Finance Act, 2015. While I have no doubt that these insertion and substitution of clause (79A) in section 2 of the 2011-Act do not affect the tax liability of the services of the appellant M/s CDC during the tax periods (of FY 2011-12 and 2012-13) as are involved in this case, I am un-ambiguously clear that these services (provided or rendered during the tax periods of FY 2011-12 and 2012-13, as are involved in this case) are covered by the description against tariff heading 98.13 as it existed during the said period and it will be only from 01.07.2015 that these CDC services shall pay Sindh sales tax under tariff heading 9805.9000. The said amendment made in section 2(79A) does not apply retrospectively but simply changes the tariff heading of this service, effective from the date of such insertion and substitution from the date of said 2(79A), from tariff heading 98.13 to tariff heading 9805.9000.

11. As regards the issue of reliance on SECP's Certificate, this is out of place. M/s CDC are registered under the Companies Ordinance, 1984, and have been providing or rendering the trusteeship services and custodianship services, (as are also provided or rendered by banking companies, NBFCs, and financial institutions) in terms of the NBFCs, (Establishment and regulation) Rules, 2003, and the NBFCs and Notified Entities Regulations, 2008. SECP and any other organization or their opinion can be considered on merits but cannot make the provisions of Sindh Sales Tax on Services Act, 2011, subservient to their opinions or their licensing/registration requirements. As regard the learned Member (Judicial)/Chairman's observations about the conduct of AC Mr. Vicky Dhingra in this regard, I do not find myself in agreement to his observations/remarks. There is no evidence that Mr. Vicky Dhingra suppressed the SECP letter and that too deliberately. We, as Appellate Tribunal, have not provided him the opportunity to explain and defend his act. However, it shall be open to the Chairman, SRB, to satisfy for himself, if he so desires, whether the act of AC Mr. Vicky Dhingra in this regard was an act of suppression of the related documents, whether deliberately or otherwise, and, if so, whether it calls for any disciplinary action in terms of SRB's rules and policies in this regard.

 17



7

2. Lastly, I find that m/s CDC was not compulsorily registered by SRB. M/s CDC voluntarily registered with SRB on 22.08.2014 i.e. well before the date of Order-in-Original No.20/2015 dated 12.01.2015 and also well before the determination / assessment of tax liability under Order-in-Original No.113/2015 dated 03.03.2015. In such a situation, the imposition of penalty (for the act of non-registration) equal to 5% of the amount of SST (not yet assessed/adjudged) is neither proper nor lawful. I, accordingly, reduce the penalty of Rs.14,122,746/-, imposed on M/s CDC under Order-in-Original No.20/2015, to an amount of Rs.10,000/-.

13. The appeal case No.AT191/2015 and No.AT192/2015 are disposed of accordingly.



Razia Sultana Taher
(RAZIA SULTANA TAHIER)
MEMBER (TECHNICAL)
07/02/16

A large, stylized handwritten signature in black ink, consisting of a long, sweeping curve that loops back and ends in a wavy tail.

ORDER OF THE TRIBUNAL

There appears difference of opinion between the Chairman and the Technical Member of the Appellate Tribunal.

The Chairman is of the opinion that the case pertains to the tax periods from July 2011, to June 2013, when the services provided or rendered by the appellant was not part of tax net and tax cannot be levied treating the appellant as non-banking financial company.

The Technical Member is of the opinion that the services provided or rendered by the appellant during the tax periods of 2011-12 and 2012-13 are covered by the tariff heading 98.13 as it existed during the said tax periods and are liable to Sindh Sales Tax.

The matter is referred to the Third learned Member of the Tribunal for hearing the following point:-

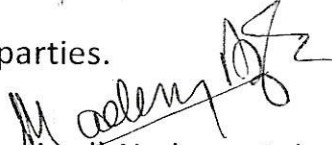
Whether or not the services provided or rendered by the appellant during the tax periods from July, 2011 to June, 2013 come within ambit of tariff heading 98.13?

Presently there is no third Member of the Appellate Tribunal is available. The matter will be placed before him as and when the appointment is made.

Copy of the Order may be issued to the parties.


Razia Sultana Taher

Member


Justice (retired) Nadeem Azhar Siddiqi

Chairman

Karachi

Dated:15.02.2016



19

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD

✓ **Appeal no: AT-191/2015**

Central Depository Company Pakistan LtdAppellant

VERSUS

The Commissioner-I, SRB and another.....Respondent

Mr. Asif Haroon FCA.....For Appellant

Mr. Tariq Ali Sheikh AC. S.R.B.....For Respondent

Appeal no: AT-192/2015

Central Depository Company Pakistan LtdAppellant

VERSUS

The Commissioner-I, SRB and another.....Respondent

Mr. Asif Haroon FCA.....For Appellant

Mr. Tariq Ali Sheikh AC. S.R.B.....For Respondent

ORDER

Muhammad Ashfaq Balouch:

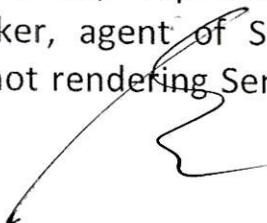
I have the Honor to go through the opinion rendered in appeals bearing A.T. No191/2015 and A.T. No 192/2015 Central Deposit Pakistan Ltd v/s Commissioner SRB of the Honorable Chairman and of my Learned Technical Member.

I have heard Mr. Asif Haroon FCA for the appellant, Mr. Tariq Ali Sheikh AC. S.R.B, and perused the record.

With profound respect of Learned Technical Member, I do not agree with the views expressed by Learned Technical member.

Reasons:-

It was the case of the appellant that appellant is registered as a CDC company, involved in activity of (i), Act as registrar of security, act as custodian, agents, trustee, representative, advisor, manager, nominee of member/broker, agent of Stock Exchange and Central depository for securities, not rendering Services as NBFC. This fact was



confirmed by the SCEP vide letter dated June 5, 2014 addressed to Mr. Vicky Dhangra A.C S.R.B.

The other contention of appellant was that share transfer services were made taxable from July 1, 2014 under Tariff Heading 9805.9500 and its other services were brought into tax net from July 1, 2015, when the definition of term "Share Transfer Agent in section 2(79) of Act was enlarged.

To proceed further I have the benefits to reproduce the definition of term "share Transfer Agent as mentioned in Sec 2(79-A) of SST Act".

"(79A) Share Transfer Agent means a person who maintains the record of holders of securities, and deals with all matters connected with the transfer or redemption of securities or activities incidental thereto".

It is also fact that above provision was amended in July 2015 and by using word include "the definition was enlarged; it's now read as under

"(79A) share transfer agent includes a person known as share depository agent and also includes persons providing or rendering transfer or redemption or depository services including the services provided through manual or electronic book entry system used to record and maintain record of holders of securities, and also of the securities and derivatives (including investor accounts services, trustee or custodial services, share registrar services and similar, allied or connected services)".

The perusal of OIO shows that Assessing Officer taxed the appellant under tariff heading 9813.8100 (others). Observing that appellant is rendering the service provided by NBFC. But Assessing

Officer has ignored the fact that appellant was registered for rendering as Central Depository for Securities and not as a NBFC as treated by the Assessing Officer. As it is mentioned supra that SECP which is Regulatory Authority of NBFC, already informed Assessing Officer that appellant is not a NBFC. The appellant cannot Act NBFC without proper license of SECP

It is worthwhile to mention here that the appellant was taxed under tariff heading 9813.8100 which is reproduced here as under:-

“Others, including the services provided or rendered by non-banking finance companies, Modarba and Musharqa companies and other financial institutions”

The perusal of above tariff shows that only above referred institution can be taxed under this tariff heading, as the appellant does not come within the ambit of institution specified in above definition. Further the appellant does not fulfill the condition specified for NBFC so also not claimed to be a NBFC. The SECP the regularity authority of NBFC informed the Assessing Officer that appellant is not NBFC.

The Honorable Chairman in Para 16 and 17 of his order has referred the case of Citi bank 2014 PTD 284 of Honorable High Court of Sindh, which is fully applicable in the facts and circumstances of case in hand.

In view of above when it is settled position that a tax can be levied only when the service is specified in 2nd schedule, coupled with the definition clause. It is also admitted position that appellant provided or rendered the services of “share Transfer Agent” which were made part of definition of Clause 2(79 A) of Act from 7th July 2014, it was further enlarged from 1st July 2015. As the tax period involved in present case is from July 2011 to June 2013, when services provided by the appellant was not part of taxable service.

Therefore, I agree with the findings of Honorable Chairman recorded in A.T. 191/2015, Central Depository Company Pakistan Ltd v/s Commissioner SRB and A.T.192/2015 Central Depository Company Ltd v/s Commissioner-I SRB that appellant cannot be taxed during this tax period as Non-Banking financial Company.

This order is submitted to Hon'ble Chairman, AT-SRB for disposal of appeals.



Date: 28-02-2018

A handwritten signature in black ink, appearing to read "M. Ashfaq Balouch".

(Muhammad Ashfaq Balouch)
Judicial Member

ORDER OF THE TRIBUNAL

There was a difference of opinion between the Chairman and the Technical Member of the Appellate Tribunal.

The Chairman was of the opinion that the case pertains to the tax periods from July 2011, to June 2013, when the services provided or rendered by the appellant was not part of tax net and tax cannot be levied treating the appellant as non-banking financial company.

The Technical Member was of the opinion that the services provided or rendered by the appellant during the tax periods of 2011-12 and 2012-13 are covered by the tariff heading 98.13 as it existed during the said tax periods and are liable to Sindh Sales Tax.

The matter was referred to the learned Judicial Member of the Tribunal for hearing the following point:-

Whether or not the services provided or rendered by the appellant during the tax periods from July, 2011 to June, 2013 come within ambit of tariff heading 98.13?

The learned Judicial Member after hearing the parties concluded that the appellant cannot be taxed during the tax periods as Non-Banking Financial Company.

The appeal is allowed.

Copy of the Order may be issued to the parties.



Muhammad Ashfaq Balouch

Judicial Member


Justice (retired) Nadeem Azhar Siddiqi

Chairman

Karachi

Certified to be True Copy

Dated 28.02.2018


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

24