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BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, KARACHI

**1. APPEAL NO. AT-45/2017**

M/s Arif Habib Limited ..... Appellant

**Versus**

Assistant Commissioner SRB, Karachi ..... Respondent

**2. APPEAL NO. AT-47/2017**

Assistant Commissioner, SRB, Karachi ..... Appellant

**Versus**

M/s Arif Habib Limited ..... Respondent

Mr. Riazuddin, Advocate and Mr. Abdul Samad ITP for the Registered Person

Mr. Zohaib Athar, Assistant Commissioner, SRB, Karachi for the Department

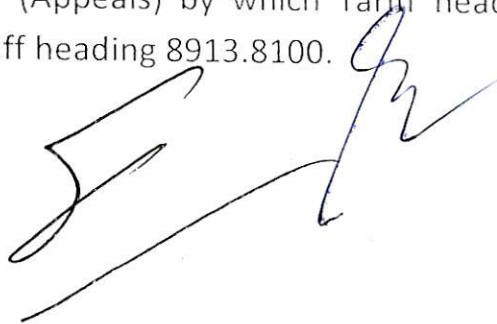
Date of hearing 01.08.2018

Date of Order 13.08.2018

**ORDER**

**Mr. Agha Kafeel Barik:** These are two appeals filed in this case against the order in appeal No. 90/2017 of the Commissioner (Appeals) dated 18.07.2017; one filed by the department and the other filed by the registered person Arif Habib Limited.

1. The department has filed appeal aggrieved of the portion of decision of Commissioner (Appeals) by which Tariff heading 9819.1000 was applied instead of Tariff heading 8913.8100.



2. The AC-SRB, has assessed all the services rendered by the registered person as well as late payment charged under tariff code 9813.8100 <sup>2</sup>[Others, including the services provided or rendered by non-banking finance companies, modaraba and musharika companies and other financial institutions]
3. The Commissioner (Appeals) although confirmed the assessment order in as much as all the receipts of the registered person, including "Advisory & Consultancy" and "late payment charges" were held to be taxable, yet he directed that tariff code 9819.1000 instead of tariff code 9813.8100 shall be applied on all taxable services of the registered person.

4. Facts of the case are as under:

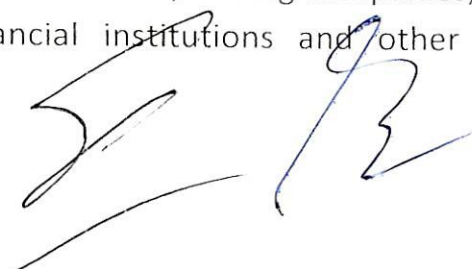
4.1. The registered person is a stock broker registered under tariff code 9819.1000.

4.2. During the scrutiny of Sales Tax Returns of the registered person, for the periods from July 2011 to December, 2013, it was revealed to the AC Unit-III, SRB that while the said registered person had paid SST at Rs. 48,698,806/- it was actually liable to pay SST @ 16% at Rs. 94,334,413/- for the said tax periods of 30 months. The AC SRB has elaborately placed these figures in a table in his order in original, total amount of payable tax was calculated by him on the value of various services including:

i.	Brokerage and Operating Revenue	Rs. 224,382,178/-
ii.	Advisory and Consultancy	Rs. 34,864,012/-
iii.	Late Payment Charges	Rs. 208,034,732/-
iv.	Others	<u>Rs. 1,127,551/-</u>
		<u>Rs.589, 571,334/-</u>
	SST @ 16%	94,331,413
	Less Tax paid	<u>48,698,806</u>
	Balance Payable	<u>45,631,607</u>

- 4.3. Thus the AC-SRB issued a show cause notice dated 16.04.2014 confronting the registered person as to why receipts on accounts of 'advisory and consultancy' and also 'late payment charges' may not be subjected to SST @ 16% under tariff Code 9819.1000 and 9813.8100, there was, however, no dispute regarding receipts from brokerage and operating revenue on which tax was also fully paid. The said show cause notice was rectified on 17.04.2014.
- 4.4. Finding the explanation not acceptable the AC-SRB finalized assessment under section 23 creating demand of SST at Rs. 43,256,676/-, beside penalty of Rs. 2,162,334/- under section 43(3), as well as default surcharge to be calculated at the time of payment of tax.
- 4.5. The Commissioner (Appeals) initially dismissed appeal of the registered person on the point of limitation. His order was, however, challenged before this Tribunal and the Appellate Tribunal by consensus remanded it to the Commissioner (Appeals) after condonation of delay with the direction to decide it on merits. However in its order No. AT-87/2014 dated 11.01.2016 the Appellate Tribunal also decided that tariff code 9813.8100 was not relevant and it was 9819.1000 which was applicable in the case of a stock broker.
- 4.6. The Tribunal in its order dated 11.01.2016 observed as under:

"Furthermore the tax has been levied invoking tariff heading 9813.8100 (Others, including the services provided or rendered by non-banking finance banking, modaraba and muhsarika companies and other financial institutions). The said tariff heading is the sub- sub-heading of sub heading of 9813.8000 (Services provided as banker to an issue). By no stretch of imagination the services provided or rendered by the appellant come within ambit of 'banker to an issue' it is also pertinent to mention here that the main heading 98.13 (Services provided or rendered by banking companies, insurance companies, co-operative financing societies, modarabas, musharikas, leasing companies, foreign exchange dealers, non-banking financial institutions and other persons dealing in any such





services) had nothing to do with the business or the services provided or rendered by the appellant. All the services which are subject to tax under this tariff heading (98.13) have been mentioned in the sub heading and the sub-sub headings. From the perusal of Order-in-Original it appears that the tax was levied on following services:-

Head	Amount in PKR
Brokerage & Operating Revenue	331,745,511
Advisory & Consultancy	39,213,713
Late Payment Charges on client's Balances	208,034,732
Total	578,993,956
SST @ 16%	92,639,033
Less: SST paid	(48,698,806)
Less: Input Tax Claimed	(1,596,465)
Total	42,343,762
Add, Inadmissible Input Tax	912,914

None of the above services come within the ambit of services mentioned in the tariff heading 98.13. It may be noted that the tax can be levied on the value of services provided or rendered and not on the income of registered person. The approach of the department in this regard is not proper and cannot be approved."

4.7. In second round of appeal by the registered person, the Commissioner (Appeals) confirmed the order in original on the issue of taxability of "advisory and consultancy" services as well as "late payment charges". But he changed the tariff code from 9813.8100 to 9819.1000; in line with the order of the Appellate Tribunal in this very case in appeal No.AT-87/2014 dated 11.01.2016.

5. The departmental has taken following grounds of appeal.

"2. That Commissioner (Appeals) in paragraph of the OIA 7, 8, 11, 14 states that advisory consultancy services are taxable under the tariff heading

9819.1000 instead of 9813.8100 of the Second Schedule of the Act, 2011 is against the principle of law as such services are rightly being taxed under the tariff heading 9813.8100 of the Second Schedule of the Act-11, whose justification is clearly established into the ONO No. 483/2014.

“3. That Commissioner (Appeals) in paragraph of the OIA 7, 8, 11, 14 states late Payment Charges are taxable under the tariff heading 9819.1000 instead of 9813.8100 of the Second Schedule of the Act-2011 is against the principle of law as such services are rightly being taxed under the tariff heading 9813.8100 of the Second Schedule of the Act-2011, whose justification is clearly established into the ONO No. 483/2014.”

6. Since this issue raised in the departmental appeal has been settled by this Tribunal in its earlier order dated 11.02.2016 in this very case in AT-87/2014 while deciding the issue of condonatin of appeal filed before the Commissioner (Appeals) which was not challenged and attained finality, we are of the considered opinion that there is no need of any further arguments on this issue.

7. Accordingly the Departmental appeal No. AT-47-2017 is hereby dismissed.



8. The appeal of the registered person No. AT-45/2017 against order of Commissioner (Appeals) is focused on the main issue of taxability of “advisory and consulting service” and “late payment charges”, which the appellatant has challenged as not taxable during the period under reference.

9. The learned AR argued that the ‘advisory and consultancy service’ which would be otherwise taxable under tariff Code 9819.1000 was not treated as taxable as per rule 41 of the Sindh Sales Tax on Services Rules, 2011 until 01.07.2014 when an amendment was inserted in rule 41 (3) as under.

(a).....

(b) Advisory and Consultancy Service

(c).....

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(d).....

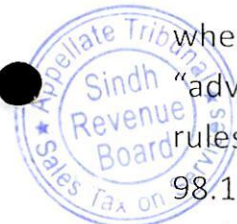
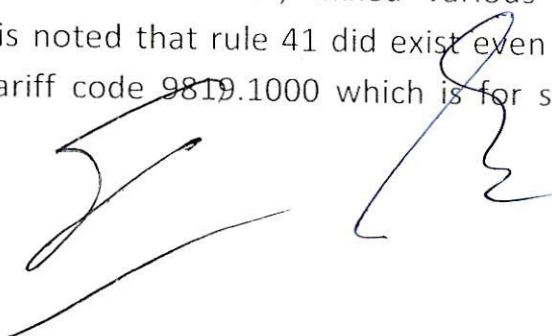
10. The learned AR further submitted that since the assessment under appeal pertains to the periods from July, 2011 to Dec, 2013, it is not hit by the amendment of 01.07.2014 because the amendment has no retrospective effect, and also because it cannot be assessed under general rules.
11. On the Second issue that is of taxability of "late payment fee" the learned AR claimed that it is not taxable with the argument that it is not a service, not declared as such under the Second Schedule of S.S.T Act. 2011. Further, the Tribunal has already decided the issue in favour of the tax payer and against the Revenue in Appeals No: AT 161/2015 and AT-78/2014, both in the case of KASB Securities Ltd. Decided on 28.08.2017. In AT-78/ it is held as under:

"In respect of late payment charges we agree with the AR, following the decision of Single Bench of Appellate Tribunal SRB in J.S. Investment in Appeal No. AT-82/2014 decided on 14.03.2016, that it is not service and not taxable. Hence we set aside the impugned order in this issue".

12. The learned AC-SRB submitted as under:

- 12.1. That "advisory service" are taxable under tariff 9813.8100 of 2ndh Schedule and that it is settled law that any service listed in 2<sup>nd</sup> Schedule is taxable, whereas rules are made to provide procedure to pay tax. He submitted that "advisory services" was clarified in the definition of Stock Brokers through rules (rule 41) w.e.f. 1<sup>st</sup> July, 2014, which were covered under tariff code 98.13 of Second Schedule under the definition of "other persons dealing in such services". Thus he argued that other services of stock brokers, beside their primary services, were made taxable under the definition of "other persons" which were later on clarified in rule 41 that advisory services come under definition of stock broker.

The learned AC-SRB however, mixed various provision of law in his argument. It is noted that rule 41 did exist even before 01.07.2014 and is relevant to tariff code 9819.1000 which is for stock brokers. Even if the



amendment of 1<sup>st</sup> July, 2014 was of clarificatory nature, as he has opined, it is relevant to 9819.1000 and not in any way to tariff code 9813.8100.

12.2. The learned AC-SRB has referred to departmental appeal against order of Commissioner (Appeals) regarding code 9819.1000 to be applied in case of taxable services of stock brokers and not 9813.8100 which is a general classification. He also cited earlier judgments of this Tribunal No. AT-78/2014 and AT-161/2015 in the case of KASB Securities (Pvt.) Limited, stating that in this judgment the Tribunal has held that advisory services are taxable under code 9813.8100. He also referred to the High Court judgment reported as 2014 PTD 284 in the case of Citi Bank N.A.

13. After hearing both the sides our observations are as under:

13.1. Two issues, which are inter related emerge out of the arguments of both the sides, which are as under:

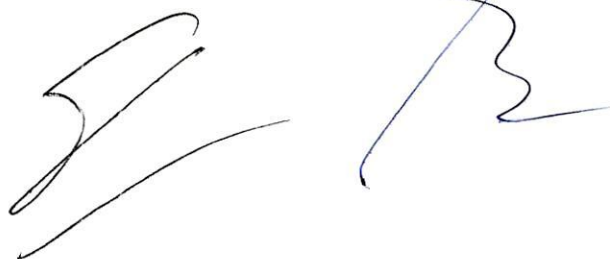
(a) Whether the "advisory and consultancy services", rendered by M/s Arif Habib, a stock broker, are to be assessed under sub tariff code 9813.8100, (main tariff code 98.13) or under sub tariff 9819.1000 (main tariff heading 98.19)?

(b) Whether the late payment charges is a service and are to be assessed under tariff heading 9813.8100.

The department has assessed the value of advisory services of the appellant under tariff heading 9813.8100 under main heading 98.13, which is specified as below in the 2<sup>nd</sup> Schedule.

98.13

"Services 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". (emphasis supplied by us).





9813.8100 others, Including the services provided or rendered by non-banking finance companies, modaraba and musharika companies and other financial institutions]”

13.2. Since M/s Arif Habib is not a bank, nor an insurance company, nor a modaraba, musharika or a leasing company, nor a foreign exchange dealer or a N.B.F.I it has been categorised by the Department under: Other persons dealing in any such services. (emphasis supplied by us).

13.3. On the other hand the A.R. has argued that while it is vaguely categorised under the class of “other persons” under tariff code 98.13, M/s Arif Habib being a stock broker, and registered by the SRB as such, falls under sub-tariff heading 9819.1000 (stock brokers, future brokers, and commodity brokers) and not under main heading 98.19 (services provided or rendered by specified persons or businesses.) which is a specific class.

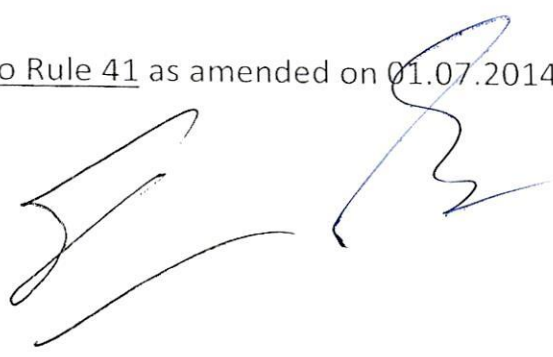
13.4. It was argued that when a service provider is specifically categorized under a tariff code it would be a fallacy to place it under general clause of a sub-heading which is otherwise very vague.

13.5. The taxability of the services of a stock broker falling under tariff code 9819.1000 and the manner in which these are to be taxed is laid down in Rule 41, which is amended from year to year, providing as under:

A. Sub-rule (3) to rule 41 prior to 01.07.2014

“The value of taxable services for the purpose of sales tax shall be gross commission, fee and other amounts charged by a stock broker or a commodity broker from his clients in respect of purchase or sale of shares in a stock exchange or in respect of purchase or sale or commodity contracts including futures, options and similar financial derivations in a commodity exchange as defined in the Securities & Exchange ordinance 1969”

B. Sub rule (3) to Rule 41 as amended on 01.07.2014





"The value of taxable services for the purpose of levy of sales tax shall be the gross commission, fee, remuneration and charges received by a stockbroker or a commodity broker from his clients, customers, or service recipients in respect of:-

- (a) Purchase or subscription of securities in an exchange or over the counter market / deal
- (b) Advisory or consultancy
- (c) Research services, and
- (d) Other such identical or similar services.

C. Clause (b) of sub- rule (3) of tax rule 41 was further amended on 01.07.2015, as under:


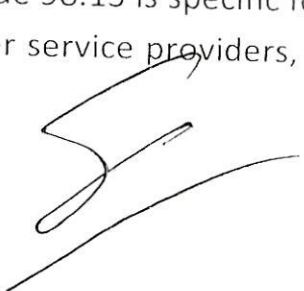
(c) "advisory services including securities advisor services or consultancy services and securities manager services"

13.6. The above evolution of Rule 41 clearly shows that although advisory services of a stock broker were not taxable prior to 01.07.2014, these are now taxable with effect from 01.07.2014. It also amply proves that its taxability, from whatever date it was brought to tax, would be under the tariff code 9819.1000 which is specific code for stock brokers. Had it been already taxable under tariff code 98.13 and 9813.8100 the legislature would not require to make amendment in 2014 that too in Rule 41 which is relevant to "services provided or rendered by stock brokers".

13.7. The other issue which is inter related with the above main issue is the date from which "advisory services" should be taxed. The learned A.R. argued that once it is decided that advisory services of a stock broker fall under tariff code 9819.1000, these will be taxable with effect 01.07.2014 under Rule 41 (3) (b) of the Rules.

14. Our findings on the issues are as under.

01. Tariff code 98.13 is specific for banks etc. (as detailed above) and placing any other service providers, such as stock brokers under clause/ phrase



“others”..... is a fallacy particularly when a specific sub-tariff code 9819.1000 is available for stock brokers from the very beginning i.e. from 01.07.2011.

02. While several service providers such as banks, insurance companies etc have been specifically listed under tariff code 98.13, an effort to categorise an unspecific service provider under the clause “others” would require us to follow the principle of ejusdem generis - which means persons of the same kind /class treated together. Obviously, M/s Arif Habib a stock broker does not fit in the class of service providers enlisted under 98.13 such as banks etc.

03. The very act of the legislature of adding “advisory service” in Rule 41 by amendment with effect 01.07.2014 proves two things; that it fell out of the tax net by mistake (or otherwise) prior to 01.07.2014 and also that when it was made taxable with effect 01.07.2014 it found place under tariff code 9819.1000 read with Rule 41 (3) (b) and nowhere else.

04. The earlier order of this Tribunal in this very case, in Appeal No. A.T-87/2014 M/s Arif Habib V/s Commissioner-II also supports the instance of the appellant as the Appellate Tribunal has clearly decided that any service by a stock broker would fall under 9819.1000, and not 9813.8100. Subsequently, the Commissioner (Appeals), SRB also decided the issue against AC-SRB, following the order of the Tribunal.

15. In view of the above findings we hold that since advisory services of a stock broker fall under tariff code 9819.1000 read with Rule 41 and since, these were not made taxable till 01.07.2014 by the legislature, the receipts of the appellant relevant to the periods, July, 2011 to December, 2013 are not taxable. Hence the appeal of the registered person is allowed on this issue.

16. Regarding late payment charges the Assessing officer has treated the same as part of “gross commission charged from clients” in respect of sale or purchase of share. Rule 41 was substituted by Notification dated 1<sup>st</sup> July, 2013 and then by Notification dated 1<sup>st</sup> July, 2014. Before substitution, Rule 41 (1) provides that the value of taxable service for the purpose of levy of





sales tax shall be the gross commission charged from client in respect of purchase or sale of shares in a stock exchange. Rule 41 (3) as substituted vide Notification dated 01.07.2013 provides that the value of taxable services for the purpose of levy of sales tax shall be the gross commission, fee and other amounts charged by a stockbroker or a commodity broker from his clients in respect of purchase or sale of shares in a stock exchange or in respect of purchase or sale commodity contracts including futures, options and similar financial derivatives in a commodity exchange as defined in the Securities and Exchange Ordinance, 1969. Till 1<sup>st</sup> July, 2014 could only be levied on the gross commission, fee and other amounts charged by a stockbroker from his client in respect of purchase or sale of shares in a stock exchange and not on other amount. Late payment charges received by the appellant are not against providing or rendering any service. It is kind of reimbursement of expenses incurred by the appellant on obtaining financial facilities from its bankers for clients.

17. In the earlier order of this Tribunal in At- No.78/2014 (KASB Securities versus Commissioner (Appeals), SRB) and At-161/2014 this Tribunal relying upon the reported judgment of the Honourable Supreme Court in the case of Habib Safe Vault CP 911/2015 (2016 SCMR 484) has upheld the imposition of tax on financial advisory services under tariff heading 9813.8100.



17.1. In its judgment the Honorable Supreme Court has held that the appellant (Habib Safe Vault) comes within the phrase "other persons" as mentioned in 98.13 and provides services of safe deposit/lockers/ safe vault to its customers.

17.2. It is noted that the financial advisory services is not part of 98.13 and is not a listed service. The appellant also does not come within the phrase of "other persons" for the reason that the appellant is not a person or institution dealing in the services listed under 98.13 and the service rendered by the appellant is also not covered within phrase "dealing in any such services" as the financial advisory service is not a listed service under

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heading 98.13. The phrase "dealing in any such services" used in main heading 98.13 mean the services listed in the sub-headings and sub-sub-heading of 98.13.

The principle laid down by the Honorable High Court in the reported case of "Citibank NA versus Commissioner Inland Revenue and another 2014 284" (DB Judgment of High Court of Sindh) is fully applicable in this case. The case relates to the imposition of Federal Excise Duty on the services provided or rendered by banking companies. The Honorable High Court has held as under:

*"Section 3 of the FE Act provides, as presently relevant, that services provided in Pakistan are liable to excise duty at the rate of 15% ad valorem, except the services specified in the first schedule, "which shall be charged to Federal excise duty as, and at the rates, set-forth therein". At the same time section 16 provides, in nits sub-section (1), that all services provided or rendered in Pakistan are exempt from the whole of the excise duty, except those as are specified in the First Schedule. The combined effect of these provisions therefore is that it is only those services as are specified in the First Schedule that are liable to excise duty. If any services is not specified in this schedule, it is exempt from excise duty even if it comes within the definition contained in section 2(23) (Page 288-289). The Court in para 18 on page No. 296 further held that "It will be seen that this description only listed the persons who were to provide the services enumerated under heading No. 98.13. This would satisfy only the first requirement of the definition in section 2 (16a), since the banking companies and NBFIs were listed in the description. However, this had nothing to do with the service that was 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 in the Heading 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 Customs Tariff. As is well known, this is based on (and is almost entirely identical with the) Harmonized Commodity Description and coding system*



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(HS System), which has been agreed upon under the international convention and which is regulated by the World Customs Organizations”.

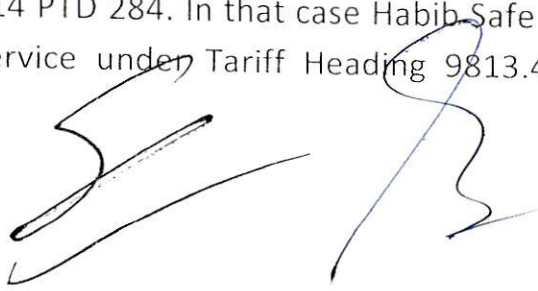
17.3. In terms of section 3 of the Act, 2011 the services listed in the Second Schedule are taxable services. The service under heading 98.13 has to meet two requirements. Firstly the service is to be provided or rendered by the person/institutions mentioned in Heading 98.13 or the persons dealing in such services. Secondly the services are listed in the sub-headings and sub-sub-headings under the main heading 98.13.

In the same judgment in para 21 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.....”.

17.4. The financial advisory service and late payment charges are not listed in the Second Schedule. The same are also not listed under any of the sub-heading or sub-sub-heading of 98.13. The appellant also does not come within the list of institutions mentioned in 98.13 and is also does not come within the definition of “other persons dealing in such services”.


17.5. In the case of KASB Securities (Appeal No. AT-78/2014) the Financial Advisory Services was taxed 9813.8100. The Tribunal relying upon the Judgment of Supreme Court in the case of Habib Safe Vault (CP No. 91/2015) has confirmed the imposition of tax under tariff heading 9813.8100. Instead the Tribunal should rely upon the reported case of Citi Bank NA 2014 PTD 284. In that case Habib Safe Vault was not a bank but is providing service under Tariff Heading 9813.4910 (safe vaults) and has





come within the definition of "other persons dealing in any such services". The tax under tariff case 9813.8100 can be levied on fulfilment of two conditions. First the service provider comes within the specified institutions mentioned in Tariff 98.13 or other persons dealing in such services and secondly the services which were provided are listed under Tariff Heading 98.13. Admittedly the Advisory and Consultancy service and late payment charges not mentioned under tariff heading 98.13 and a service of stock broker cannot be taxed under other tariff heading. The Honorable High Court in the Judgment of Citi Bank Supra very clearly stated that any those services specified in the Schedule are taxable and if any service is not specified in the Schedule it is exempt from excise duty even if it comes within the definition of contained in Section 2(23) of the Federal Excise Act. The position is clear as both the alleged services "advisory and consultancy" and "late payment charges" are not a listed service in the Second Schedule of the Act of 2011.

18. In view of above discussion, rule 41 (3) (b) as amended will not apply to the advisory service of the appellant for the period under reference, hence not taxable. The impugned order is accordingly set aside and appeal is hereby allowed.

  
(Justice<sup>®</sup> Nadeem Azhar Siddiqi)  
CHAIRMAN

  
(Agha Kafeel Barik)  
TECHNICAL MEMBER

Karachi

Dated :13.08.2018

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) Office Copy. 5)  Guard File.

  
**REGISTRAR**  
**APPELLATE TRIBUNAL**  
**SINDH REVENUE BOARD**