

(Guard file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

APPEAL NO. AT-20/2017

M/s MCB Bank Limited .....

Appellant

**Versus**

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

Respondents

Mr. Shabbar Zaidi, FCA, Mr. Muhammad Raza, FCA and  
Mr. Mahmood Bikiya , ACA .....

For the Appellant

Mr. Zohaib Athar, Assistant Commissioner, SRB, Karachi .....

For the Respondents

Date of hearing 07.03.2018

Date of Order 16.03.2018

**ORDER**

Razia Sultana Taher: This appeal has been filed by the appellant challenging the order in appeal No.34/2017 dated 15<sup>th</sup> March, 2017 passed by the Commissioner (Appeals) in appeal No.18/2015 who upheld the amount of tax and default surcharge. Further stating that lenient view was taken so far as penalties were concerned as the Respondent had not applied correct tariff headings. The same was made conditional, that if the appellant failed to pay the amount of tax and default surcharge within 15 days he shall be liable to pay the penalties. Thus confirmed the order in original No.793 of 2014 dated 1<sup>st</sup> January, 2015 passed by Assistant Commissioner as per modification detailed above.

2. In short, the facts of the case as stated in the order in original are that the appellant are engaged in providing or rendering banking services covered under tariff heading 9813.4000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as SSToS Act, 2011) and its aforesaid sub-headings, during the tax period July 2011 to September 2013. The respondent listed the following activities as taxable.

- a) Commission on Home Remittances
- b) Bank Life Insurance (Bancassurance)
- c) Interchange Reimbursement Fee IRF Visa
- d) Income from DCP Collection
- e) 'Custodial services non excisable'
- f) Miscellaneous recoveries

The concerned Assistant Commissioner in the order in original No.793 of 2014 dated 1<sup>st</sup> January, 2015 observed and concluded that the appellant had failed to deposit Sindh Sales Tax on the services amounting to Rs.437,330,000/-. The appellant was ordered to pay Sindh Sales Tax on the above mentioned services amounting to Rs.437,330,000/- along with the amount of default surcharge under Section 44 of the SSToS Act, 2011 and penalties imposed under 43(3) of the SSToS Act, 2011 and against S. No.11 of Section 43 of the SSToS Act, 2011 each of Rs.21,866,500/-.

3. The said order of the Assessing officer was challenged by way of filing of appeal before the Commissioner (Appeals) SRB who upheld the order in original with slight modifications as detailed in paragraph 1 of this appeal order.

4. During the course of hearing, the learned Appellant's counsel submitted that for the tax period July, 2011 to September, 2013 in appeal No.20/2017, there are 3 main issues. (i) First is alleged commission / reimbursement of home remittance. The State Bank reimburses the cost of expenses which are incurred by the Bank as nothing is charged from the customers referred to Circular of State Bank No.7174ECP/I/(85) dated 3<sup>rd</sup> October, 1985 – Latest Circular No.FE-40 dated 29.11.2000. Heading is reimbursement of TT charges against home remittances. It is not a consideration for service and was taken up at FED in case of Citi Bank in High Court Order 2014 PTD 284. These are not charges for FED.

On the issue of bancassurance, the learned counsel submitted that the issue has already been decided in case of M/s Habib Bank Limited in Appeal No.AT-66/2017.

The third issue pertains to chargeability of Sindh Sales Tax on IRF (Visa) Interchange Reimbursement Fee placed under tariff heading 9813.5000 (issuance, processing and operation of credit and debit card). The counsel submitted that IRF is not a service but it is an interest / mark up which is outside SST and relied upon Annexure 8- FEA No.29/KB/2013 dated 28.05.2014 paragraph 8 page 14. As regards the fourth issue it pertains to income Diner Card Programme Collection, fifth issue is regarding Reimbursement of CDC Charges paid on behalf of customers and sixth issue is Misc. recoveries.

All the above 3 incomes are not related to any taxable services under SST since it is primarily not on income but based on receipts in consideration of taxable services.

DCP – bad debt recovered, no services was given it was pertaining to activity prior to July 2011 but the amount was recovered thereafter. Custodial services Reimbursement of expenses incurred on behalf of customers to CDC. This represents reimbursement of expenses by the customers and do not represent any service rendered by the bank. As regards miscellaneous recoveries, it represent excess cash inadvertently received in bank. It is a windfull gain, it is an income but not services. Sale of obsolete items also fall under this head – goods are sold and income earned.

The last issue is consequential in nature being the penalty and default surcharge. As there is no mens rea or deliberate failure which is a prerequisite to attract penalty and default surcharge. Reliance is placed upon the Supreme Court judgment 2006 PTD 1132.



5. The learned appellant's Counsel in counter arguments submitted that in PRI Scheme (Pakistan Remittance Initiative) the amount is received from State Bank of Pakistan under PRI to subsidise the bank. The matter has been dealt at length by the Honorable High Court in 2014 PTD 284. Here no service has been rendered and explained that it is not a telegraphic transfer or a consideration for the transfer of money. It is an amount paid by State Bank as a subsidy under a Scheme by Government of Pakistan called PRI. In respect to DCP, the Appellant's counsel submitted that the services pertained to the period prior to 2011 and on the point for further verification they are willing to arrange the available relevant documents on Diners Club Cards program to be verified by the Assistant Commissioner, hence it may be remanded to the concerned Assistant Commissioner. In continuation to the counterargument, the counsel added if anything received by the bank on account of custodial services is in excess of charges prescribed in the schedule of fee / deposits of CDC is taxable. However, the amount which has been considered taxable does not represent the same. It is reimbursement from the customer not in excess of CDC charges. Default surcharge and penalty is consequential and hence not liable to penalty and default surcharge. The learned counsel explained in respect to miscellaneous recoveries, that firstly facts are to be determined what it represents on that point, complete detailed information was provided to the respondent, to identify the nature of receipt. If the nature of receipt appears to be excess amount on the counter than such excess is not a taxable receipt under the SSToS Act, 2011. He argued whether it is excess cash. What is meant by excess cash against service? Then excess cash has been received against excess service. The respondent is required to identify the service. The appellant stated that it is excess amount for deposits and withdrawals in the Bank.

6. The respondent submitted in reply to ground No.1, that as regards home remittances – the services are specifically mentioned in the 2<sup>nd</sup> Schedule under tariff heading 9813.4600. Here the issue raised by appellant is that the appellant have not received from the customer and the amount is reimbursed from State Bank through a circular No.12/2015 dated 1<sup>st</sup> June, 2015. The Assistant Commissioner argued that services have been rendered by appellant to its customers and it cannot be excluded from the taxable ambit by virtue of the fact that the consideration is not received from their customers directly. It is the quantum of consideration which has been received and not the taxability of services hence it cannot be excluded from ambit of taxability and referred to Circular letter No.21 (EPP-I(96)Poly-2000 dated 28<sup>th</sup> July, 2000, Circular letter No.06 dated October 19, 2009. Through FE circular No.06/2009 dated 19<sup>th</sup> October, 2009 it can be seen that the bank is providing services of marketing to State Bank of Pakistan, where bank acts as a promoter of the services and against which it is paid a decided amount therefore the services of promotion and marketing should be considered taxable under tariff heading 9813.4600 – Taking another aspect wherein the judgment of Honorable High Court of Sindh in the case of Citi Bank, the relevant paragraph is 14 – the charges received from State Bank were declared not liable to tax and it is highlighted that the tax chargeability has nowhere been stated as void. The respondent argued that to what amount should be considered as chargeable to tax if no amount is received from customer. He drew attention to section 5(1)(a)(iii) of the SSToS Act, 2011 wherein the value of services is defined and in case where a person provide service for no consideration, the value of service shall be an open market price.



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Therefore no amount has been received from the customer, the value of service shall be fetched from open market transaction freely entered between persons who are not associated.

Now since the amount of home remittances is set by State Bank of Pakistan therefore these should be considered as open market price. ✓

The respondent in respect to Bancassurance submitted that the issue has already been decided in appeal case of M/s Habib Bank Limited. ✓

As regards the third issue on 'Inter change reimbursement fees'. The respondent submitted that the amount is received by the bank in relation to processing debit / credit card payment. Under the credit card there is a specific limitation to withdrawal of the amount from the concerned bank. In this transaction five parties are involved firstly, the holder (customer), card issuing bank, card network (like visa, master card) No.4 is merchant (shop keeper – petrol pump) and the 5<sup>th</sup> one is merchant's bank. In order to settle the transaction, card issuing bank deducts a certain amount due to the merchant. The said deducted nominal amount is 'inter change fee' and this represents revenue to the card issuing bank. ✓

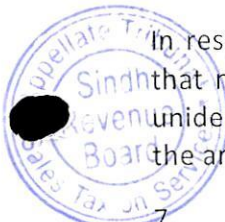
The respondent continued in respect to issue No.4, Diners Card collection it is used to facilitate payment Diner's Club International Limited is a direct banking and payment services company owned by Discover Financial services. ✓

The Assistant Commissioner in response to ground No.5 'custodial service non excisable' submitted the same are provided against CDC charges. These services are provided by the bank against CDC charges received by the bank. From the document provided it can be seen that the bank is charging for CDC eligible securities in excess of the charges ascertained by CDC therefore these cannot be seen reimbursement of charges. The bank is charging in excess to what the CDC is charging. If the bank is providing custodial service in relation to CDC eligible securities and charging the amount (fees) which is in excess of the fees shown against CDC schedule of fees and deposits and another is the schedule of bank charging fees. ✓

In respect to the issue No:6 Miscellaneous recoveries, the Assistant Commissioner submitted that no evidence have been provided by the appellant. The contention that excess cash and unidentifiable amount received from customer does not have any information on the receipt of the amount in the bank. ✓

7. We have heard the learned representatives of both sides.

As regards the issue of commission on Home Remittances, the appellant counsel submitted that the State bank reimburses the cost of expenses which are incurred by the bank as nothing is charged from the customers by the bank. It is a subsidy under Pakistan Remittance initiative Scheme, on the other side the departmental representative has treated the same as services and argued that it cannot be excluded from the ambit of taxability for the reason that consideration is not received by the bank from its customers. The quantum of consideration is subject to taxability and added that through FE circular No.6/2009 dated 19<sup>th</sup> October, 2009, the bank is providing services of marketing to State Bank of Pakistan. The respondent further





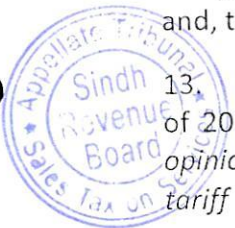
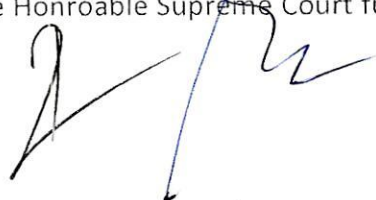
argued that the Honorable High Court of Sindh in the case of Citi Bank at paragraph 14 held that the charges received from State Bank were declared not liable to tax. The respondent provided copies of letters / circulars of State Bank of Pakistan FE Circular No.06 dated 19<sup>th</sup> October, 2009 going through the same the subject reads as Facilitation of Home Remittances which mentions the objective and the second paragraph reads as "In order to address this issue, it has been decided to encourage overseas entities, having specific Home Remittances related arrangements with banks in Pakistan".

It further states that performance based scheme has been developed to encourage overseas entities to enhance marketing efforts at origination and Government of Pakistan shall reimburse marketing expenses through State Bank of Pakistan and the said scheme has been subject to certain conditions laid therein. The purpose clearly shows is to encourage remittances through official banking channels. In view of the preceding discussions we do not find any reason to treat Home Remittances as a taxable service. The appeal on this issue is allowed.

8. As regards the second issue on bancassurance, the learned counsel of the appellant submitted that decision has been given in the case of M/s Habib Bank Limited in appeal No.AT-66/2017, the relevant paragraphs 12 to 15 are reproduced for ready reference:

"12. Having examined as above, we now take up the case of "bancassurance" which although not defined in the SSToS Act, 2011, is popularly understood and marketed as insurance services provided or rendered by banking companies in an arrangement in which a bank and an insurance company join hands so that insurance policies are sold, using the bank media, to the bank clients. The service tax on such insurance, where leviable, are invariably paid by the concerned insurance / assurance company in the manner prescribed under the Act and the banking company engaged in providing or rendering the bancassurance services earns certain commission on such of the bancassurance services as are provided or rendered by the bank. Such a commission is a charge for the bancassurance services provided or rendered by the banking company and, therefore, this constitutes the value of the taxable service in such case.

13. The judgment of the Honorable Supreme Court of Pakistan in Civil Appeal No.911 of 2015 is relevant in this case. The Honorable Supreme Court has held that "in our opinion it is not without significance that the tariff heading 98.13 unlike some other tariff headings in the Second Schedule stipulates 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 different from the general rate of tax mentioned in the tariff heading, the rate of tax prescribed in the subheading would apply on principle that the specific excludes general; reference in this regard may be made to the cases of State v. Zia ur Rehman (PLD 1973 Supreme Court 49, relevant at page 89w) and Neimat Ali Goraya v. Jaffar Abbas Inspector / Sereant Traffic (1996 SCMR 826 relevant at page 833B". The Honorable Supreme Court further held that "even if the



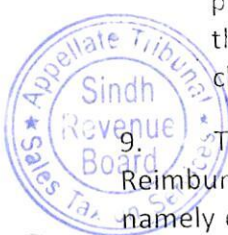
same were not mentioned therein it would not in itself exclude a person since the definition proceeds to state – but not limited to the services listed in the First Schedule”.

14. There is no doubt that the banking company, in providing or rendering bancassurance services, is providing or rendering a service which is peculiar and specific to bank and is receiving some consideration (in the name of commission or charge) for provision of such services. Accordingly, this bancassurance services is covered by the description “services provided or rendered by banking companies” of tariff heading 98.13 of the First and Second Schedules to the SSToS Act, 2011, whether classified under tariff heading 98.13 of the Second Schedule or under subheading 9813.4990 thereof, the bancassurance services by banking companies shall be covered by the terminology “taxable services” and levied to tax on the basis of commission or charges received by the banking companies in consideration of having provided or rendered such bancassurance services. It shall not be classified under tariff heading 9819.1300 under the description “Commission Agents” because 9819.1300 covers the general body of commission agents, while the commission or charges earned by the banking companies, specifically on account of provision or rendering of any service relatable to banks, shall be classified as under tariff heading 98.13 and / or the subheadings thereof. It is pertinent that even commission and brokerage of foreign exchange dealings is specified against subheadings 9813.6000.

15. For the reasons detailed in foregoing paragraphs and keeping in view the above cited judgment of the Honorable Supreme Court of Pakistan, we hold that bancassurance services provided or rendered by banking companies is a taxable services under the description specified against tariff heading 98.13 and that the appellant, providing or rendering such bancassurance services, is liable to pay Sindh Sales Tax on the taxable value of services i.e. the consideration (in the shape of commission or charges) received by the appellant for provision of such services.”

9. The third issue pertains to chargeability of Sindh Sales Tax on ‘Interchange Reimbursement Fee’. The respondent submitted that the transaction involves five parties namely card holder, card issuing bank, card network, merchant bank, merchant. The merchant bank (acquiring bank) submit the transaction to card network which processes the transaction information to issuing bank, the approval to the transaction is given if the card holder has sufficient amount of credit. The transaction is authorized through the network, the card issuing bank pays the acquiring bank after deducting ‘interchange fee’ and this represents revenue to the card issuing bank the amount is received by the acquiring bank of the merchant minus the interchange fee which is deducted, retained by the issuing bank. The acquiring bank then makes the payment to the merchant minus ‘interchange fee’.

The learned counsel of the appellant relied upon the judgment as Annexure 8. Appellate Tribunal Inland Revenue (Pakistan) Karachi FEA No.29/NB/2013 dated 25.05.2014, paragraph 8 page 14





'In the citation relied upon by the learned counsel, wherein it has been held that it is markup / interest and the same is exempt under Rule 48(4) of the Federal Excise Rules, 2005'.

- We first take the definition of Interchange fee-as given in - wikipedia <http://en.wikipedia.org/wiki/Interchange-fee> 'Interchange fee is a term used in the payment card industry to describe a fee paid between banks for the acceptance of card based transactions.

In a credit card or debit card transaction, the card issuing bank in a payment transaction deducts the interchange fee from the amount it pays the acquiring bank that handles a credit or debit card transaction for a merchant.

- Another definition <http://www.bycommerce.com/...what-are-interchange-fees-and-how-are-they-calculated> 'Interchange fees are transaction fees that the merchant's bank account must pay whenever a customer uses a credit / debit card to make a purchase from that store. The fees are paid to the card issuing bank to cover handling costs, fraud and bad debit costs and the risk involved in approving the payment.

The bulk of the fees goes to the issuing bank. Issuing bank's Interchange fees are extracted from the amount collected by the merchants when they submit credit or debit transactions for payment through their acquiring bank.

What are interchange fees and how are they calculated? <http://www.bycommerce.com/...what-are-interchange-fees-and-how-are-they-calculated>

How are interchange fees charged to businesses? Card issuing banks, payment processors (which may or may not be the issuing bank) credit card payment networks like master card and visa, payment gateways and the merchants own bank will all charge a percentage based fee on every transaction. With these definitions and explanations in the background and visit to the website of MCB showing Terms & Conditions of Credit Card we feel comfortable to conclude that 'interchange fee' is not an interest or markup but that the service pertains to the operation and processing of credit and debit cards and is chargeable to Sindh Sales Tax and covered under tariff heading 9813.5000 of the Second Schedule to the SSToS Act, 2011.

10. As regards fourth issue 'income from DCP collection', the appellant submitted that it was bad debts recovered and no services were given. It pertained to activity prior to July 2011 but the amount was recovered thereafter. In response, the respondent submitted that no document had been provided and the appellant contended that they are willing to arrange the available relevant documents to be verified by the AC.

Taking the argument of both sides, we, therefore, in exercise of powers vested in the Tribunal as provided under clause (b) of Subsection (5) of Section 62 of the SSToS Act, 2011, set aside the order by the AC (Unit-2) SRB, the Commissioner (Appeals) only to the extent of this fourth issue and remand the case to the concerned Assistant Commissioner. The Assessing Officer is directed to verify the document in coordination with the appellant.



11. Now coming to the fifth issue, i.e. 'Custodial service non excisable'. According to the appellants' counsel custodial services are reimbursement of expenses incurred on behalf of customers to CBC and do not represent any service rendered by the bank. As against this, the departmental representative submitted Schedule of Fees and Deposits of the Central Depository Company of Pakistan Limited and MCB Custodial services covering CDC eligible securities showing the items, rates and GL codes. The extract of the statement below shows the MCB custodial services and its rates

S.No.	Items	Rates	GL Codes
L	<b>CUSTODIAL SERVICES</b>		
1	For CDC eligible securities		
	i) Initial deposit fee (one time charge)	Upto Rs.0.04 per share deposit fee to be charged monthly.	3060601150
	ii) Transaction / settlement Fee	Upto Rs.0.05 per share upto 70,000 shares thereafter Rs.35,000 per settlement . CDC charges will be applicable.	3060601150
	iii) Custody / Position Fee	0.03% p.a. over month end market value of shares.	3060601150
	iv) Withdrawal Fee	Upto Rs.0.40 per share / script to be charged at the time of withdrawal.	3060601150
	vi) Documentation Fee for sub account	Upto Rs.1000/- one time fixed	3060601150
	viii) Requested statement Fee	Upto Rs.35/- per statement	3060601150

And the Central Depository Company of Pakistan Limited, schedule of Fees & Deposits. The schedule of Fees indicate the Name / Rate / Basis / Levied / Collection.

<b>SCHEDULE OF FEES</b>						
S.No.	Name	Rate	Basis	Levied on	Collection	
					When	Mode
1.	Initial Deposit Fee - For shares	Re.0.01	(Note 1) Per share deposited	Participant/ Account holder	Month end	P.O./Draft/ Cheque
2.	Transaction Fee - For shares	0.004%	(Note 2) Market value per transaction	Participant/ Account holder	Month end (calculated on daily basis)	P.O./Draft/ Cheque

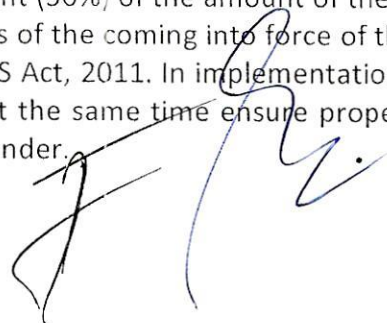
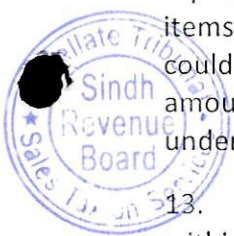


3.	Custody Fee - For shares	0.01125% p.a.	(Note 3) Market value	Participant/ Account holder	Month end (calculated on daily basis)	P.O./Draft/ Cheque
10.	Withdrawal Fee - For shares	Re.0.10	Per share	Participant/ Account holder	Month end	P.O./Draft/ Cheque
15.	Requested Fee / statement verification Fee	Rs.10	Per page	Participant / Account Holder	With application	P.O./Draft/ Cheque
16.	Requested statement Fee / Statement Verification Fee	Not Exceeding Rs.100	Per statement (Note 10)	Sub Account Holder	With application	P.O./Draft/ Cheque
17.	Sub-Account Opening Fee	Rs.250 p.a.	Per Sub- Account opened and maintained	Participant	Annuals in advance	P.O./Draft/ Cheque

Thus when the items and rates of MCB and CDC schedule of Fees and Deposits are compared, it is seen that the amount charged by the appellant is in addition to what CDC has shown in its Schedule of Fees and Deposits and no explanation to this effect has been submitted by the Appellant's counsel. Therefore, these cannot be considered as reimbursement. The excess amount is the service charges received by the appellant bank, hence the same are chargeable to Sindh Sales Tax.

12. As regards sixth issue i.e. miscellaneous recoveries, the appellant's counsel contended it represents excess cash inadvertently received in bank. It is an income also the sale of obsolete items fall under this head and the respondent has not identified the service. The respondent could not identify the exact service and in view of the aforesaid stance we hold that the excess amount received could not be co-related to any service and hence not liable to Sindh Sales Tax under SSToS Act, 2011.

13. 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 penalties 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 law 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.

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

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

(Muhammad Ashfaq Balouch)  
JUDICIAL MEMBER

*Razia Sultana Taher*  
(Razia Sultana Taher)  
TECHNICAL MEMBER

Karachi

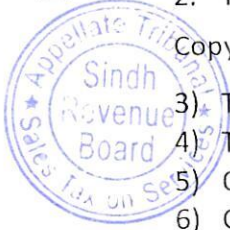
Dated:16.03.2018

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.





Honorable Chairman,

Respected Sir, in appeal no At-20/2017, M/s MCB Bank Ltd v/s Assistant commissioner SRB, there is difference of opinion between under signed and Learned Technical Member on following issue:-

- Whether, in presence of judgments of Honorable High Court of Sindh in case of Citi Bank v/s\* Commissioner Inland Revenue reported as 2014 PTD 284 and of this Tribunal AT-205/2015 m/s Allied bank Ltd v/s Assistant Commissioner SRB and AT-34/2017 M/s Silk Bank Ltd v/s Assistant Commissioner SRB, and relevant law. Whether "bancassurance" is taxable service?

It is requested that this matter may be referred to Learned Third Member.



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(Muhammad Ashfaq Balouch)

Judicial Member

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD

Appeal no: AT-20/2017

M/s MCB Bank LTD..... Appellant

**VERSUS**

Assistant Commissioner SRB..... Respondent

Mr. Syed Muhammad Shabbar Zaidi FCA..... For Appellant

Mr. Zohaib Akhtar A.C. SBR..... For Respondent

Date of hearing: 07-03-2018

Date of order: 03-04-2018

**ORDER**

Mr. Muhammad Ashfaq Balouch:

I have the privilege of going through the opinion recorded by the Learned Technical Member of the Tribunal. While I agree with the Learned Technical Member on all the issues taken up in this appeal, I beg to defer with her on issue of "bancassurance" for the reasons mentioned below. I do not subscribe the view taken by the Learned Technical Member regarding the issue of "bancassurance".

(2). The allegation against the appellant is that they are rendering along with other taxable service, service of bancassurance, which is taxable vide tariff heading No 98.13.

(3). The contention of appellant is that the tariff heading 98.13 does not cover "bancassurance" because it is not listed in second schedule and under the provision of section 2 and 8 of the Act. Reliance was placed on 2014 PTD 284 dated 30-10-2013 Citi Bank v/s Commissioner Inland Revenue.

(4). The plea of respondent was that the receipt of "bancassurance" is a commission earned by the Bank for promoting insurance for the





business which was taxable under heading 9813.4990 as this tariff heading cover all the services provided by the bank.

(5). I have considered the submission of both the parties and perused the record.

(6). It is admitted position that tariff heading 98.13 does not cover the bancassurance, further it is also observed by the Superior courts that the services liable to the tax under the Act must be listed in the second schedule as provided in section 3 and 8 of the Act. Reference is made to judgment of honorable High Court of Sindh in case of Citi Bank v/s Commissioner Inland Revenue, reported as 2014 PTD 284 dated 30-10-2013. Furthermore, it is decided issue at the level of this Tribunal. DB 1 of this Tribunal in AT-205/2015 M/S Allied Bank Ltd v/s Assistant Commissioner SRB dated 28/08/2017 and AT-34/2017 M/s Silk Bank Ltd v/s Assistant Commissioner dated 28/11/2017.

(7). In AT-34/2017 M/s Silk Bank Ltd v/s Assistant Commissioner SRB dated 28/11/2017 the DB-I of this Tribunal has discussed and decided along with other issues. The issue of "Bancassurance" issue the relevant portion of the said order is reproduces here as under:-

(8). "8.5.The Honorable High Court in the case of CITI Bank referred above has clearly held that it is the service listed specifically in the second Schedule that is taxable under the provisions of sections 3 and 8 of the Act. The Honorable Supreme Court of Pakistan in the case of Habib Safe Deposit Vault reported as 2016 (113) Tax 61 (Supreme Court of Pakistan) has also confirmed that if a service is specifically enlisted in 2<sup>nd</sup> Schedule, it is taxable even if the service provider is not a bank or an insurance company etc. So most important thing is the specific not vague or general mention of a service or services if there are to be taxed. The relevant part of the judgment of this Tribunal in appeal No.AT-205/2015 dated 28.08.2017 is reproduced hereunder.

"18. After going through the argument of both the sides our observations are as under:

“18.1. The Sindh Sales Tax is leviable on the services and not on to service provider. Section 3 puts the definition of taxable services as under.

*“A taxable service is a service listed in the Second Schedule of this Act”.*

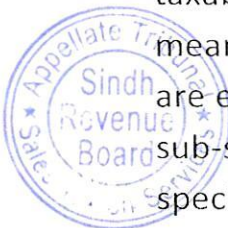
“18.2. Section 8 provides the scope of tax and is a charging provision, again with reference to the value of a taxable service at the rates specified in the Schedule in which the taxable service is listed.”

“18.3. Service or services, as defined under section 2 (79), means “anything which is not goods and shall include but not limited to the services listed in the First Schedule of this Act”.

“18.4. From the above it is clear that it is a service which is aimed to be taxed and covers under the scope of tax finds place in the definition chapter as well. It means that it is not the service provider who is taxable, without reference to any specific reference to a service. It is noted that in all the main headings of Second Schedule the names of service providers have been listed. It does not mean that a service provider such a bank would become taxable on all services rendered by it under H.S code 98.13. It also means that not all, but only such services fall under tax net which are enumerated under H.S. code 98.13 and under sub-headings and sub-sub-headings which are specific in nature. If there was no specific classification under general tariff headings it would be far more convenient for a taxation officer to tax all services rendered by a bank or any other service provider.

“18.5. In the judgment of Citi Bank the Honorable Sindh High Court has held as under:

*“The crux of the Tribunal’s findings has been emphasized. (The point with regard to Rule 40 was not pressed before us). It is to be noted that the Appellate Tribunal did not identify*



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any specific sub-heading to which "insurance commission" could be related. The key question is whether the relevant act, i.e., "facilitating the [appellant's] employees" to obtain insurance was a "non-fund banking services" that came within any of sub-headings of Heading No.98.13? It is clear that the sub-headings specifically in relation to insurance were all subordinate (sub-sub-) headings of a sub-heading (9813.1000) which related only to "an insurer, including a reinsurer". Since the applicant was neither, these headings obviously did not apply in relation to it. None of the other sub-headings were at all applicable to the putative service in question. 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 our 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. In our view therefore, "insurance commission" did not come within the ambit of any of the sub-headings of Heading No.98.13 and hence was not liable to excise duty in terms of Entry 8. In the circumstances, it is not necessary for us to consider whether or not this type of transaction was a "non-fund banking service".



In this case of Citi Bank the Revenue attempted to charge the service provider and ground that there was no specific service mentioned under code 98.13 (Emphasis supplied).

"18.6. The judgment of Supreme Court also confirms this point of view from a different angle. In the case of Habib Safe Deposit Vault, reported as 2016 (113) Tax 61 (S.C. Pak) the Apex court maintained

that Habib Safe Deposit Vault (emphasis supplied) was not a banking company and as such not specifically falling under code 98.13. However, since its services were being rendered as of Safe Deposit Lockers and Safe Vaults specifically fall under code 9813.4900 and 9813.4910, it was held that irrespective of the fact that Habib Safe Deposit Vault was not a banking company, only because Safe Deposit Lockers and Safe Vaults were taxable services under the provisions of Section 3 and 8 read with 2<sup>nd</sup> Schedule these were rightly taxed under Code 9813.4900 and 9813.4910.

"18.7. The learned AR has rightly argued that as held by the Supreme Court there should be a specific entry for the charge, whereas in these case (ABL) there is no specific entry for items that have been taxed. The code 9813.4000 applied by the AC-SRB is a sub-heading relating to the sub-sub-headings listed below 9813.4000.

*"9813.4000 Services provided or rendered by the banking companies in relation to":*

In the 2<sup>nd</sup> Schedule this phrase ends with the column (: ) and is followed by various sub-sub-headings and codes thereof. But the impugned order is silent about as to what services the AC is going to tax in relation to: And since as none of the three services under dispute is covered under code 98.13 or under sub-heading of 9813.4000 the order is itself redundant as it is silent after mention of functions of a services provider but not mention of any services even listed under 9813.4000. The concluding part of the impugned order in original is as under:

*"In the light o foregoing discussion it is held that the services amounting to Rs.285,018,976/- are liable to Sindh Sales Tax @ 16% under the provisions of Section 8 read with tariff heading 9813.4000 and its sub headings."*

"18.8. While the AC has not specified any services or sub-sub-headings of 9813.4000 and has left it open to the assumption of



any one about the specific headings it is noted that a sub-sub-heading 9813.4900 also relates to "Safe Deposit Vault", which is referred by AC-SRB in general remarks but not a word on its chargeability, if any.

"18.9 Our view, that it is the specified service enlisted in the 2<sup>nd</sup> Schedule which is necessary for taxability of any service and not the enlistment of service providers, finds strength from the judgment of the Honorable High Court in Citi Bank as it held that:

*"Para 8. The primary submission by the learned counsel for the department, namely that it was the description in the principal heading that was operation cannot be accepted. This description was in the following terms:*

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

*"It will be seen that this description only listed the persons who were to provide services enumerated under Heading No.98.13....."*

*"The attempt by the learned counsel to conclude from the enumeration of the persons that all the services provided by them were included in Heading No.98.13 cannot be accepted. This would render otiose the listing of specific services in the various sub-headings".*

"18.10. The case before the Honorable High Court of Sindh was identical with that of the present case of ABL before us. In the case of Citi Bank NA the department imposed F.E.D. under F.E. Act, 2005 on three services which were all "non-fund banking services" namely "insurance commission", "merchants discount on credit cards" and "commission received from SBP" on speedy cash home remittances. At least two of these services have been rendered by



ABL as well and are subject matter of this appeal. Since the HS code of Customs Tariff and subsequently of F.E. Act, 2005 has been adopted for Sindh Sales Tax 2011, the provisions of both law are mostly Para material, the cited judgment of the Honorable High Court of Sindh is on all fours with this case.

"18.11. With regard to the commission earned on providing reference or facilitation of insurance companies it was rightly argued by the learned AR that since the appellant is a banking company and incorporated as such it cannot indulge in the insurance business, nor it is an insurance company. Thus the Honorable High Court held that, *"in our view therefore "insurance commission" did not cover within the ambit of any of the sub-headings of Heading No.98.13, and hence not liable to excise duty in terms of entry 8."*

"18.12. With reference to commission on "speedy cash house remittance" the Honorable High Court has taken the same view and finally held that, *"we conclude that in respect of all three types of transactions the applicant had no liability to pay Federal Excise Duty in both the first and second periods."*

"18.13. The learned AC-SRB has cited the judgment of Honorable Supreme Court of Pakistan referred as (2016) (113) Tax 61 (S.C. Pak) in the case of Habib Safe Deposit Vault and has argued that in the light of the decision of the Honorable Supreme Court case of any service provider even if not specifically mentioned under any tariff heading would be subjected to tax, once the service is taxable. In its judgment the Supreme Court held that Habib Safe Deposit Vault, even if it was not a banking company, as discussed only at the stage of appeal before the Honorable Supreme Court, would have to pay S.S. Tax on the services rendered under the heading "Safe Deposit Locker" – Code 9813.4900 and "Safe Vault" code 9813.4910. In the said case initially the appellant Habib Safe Deposit Vault (Pvt.) Ltd. was held liable to pay SST as it was treated as a banking company. The





Honorable High Court the appellant has treated Habib Safe Deposit Vault as a banking company which it was not. However, during the hearing of appeal the Supreme Court held that it was not a banking company, yet it was covered under code 98.13 as, "other persons dealing in any such services". The services it referred were enumerated under heading 98.13 (9813.4900 and 9813.4910). These include the above two services rendered by this appellant (emphasis supplied).

"18.14. The learned AR on the other hand cited the judgment in support of his argument. It was argued that in the case of Citi Bank NA there was no dispute about the service provider which was a Bank and specifically covered under HS Code 98.13. The dispute was with regard to three non-fund banking services rendered by the bank and which did not find specific place in 2<sup>nd</sup> Schedule.

"18.15. In the case of Habib Safe Deposit Vault the Honorable Supreme Court has also endorsed the principle that it is the service which is taxable under sections 3 and 8 of the Act if it is listed in 2<sup>nd</sup> Schedule. So the two services namely Safe Deposit Lockers (9813.4900) and Safe Vaults (9813.4990) which are listed in the Second Schedule were held to be liable to tax, irrespective of the fact that the services provider was not a bank and was an ordinary private limited company. The core issue, whether service is taxable even if it is not listed in the Second Schedule and whether it is the service provider or the Service which is ultimately taxable, has been decided by both the courts in the same direction that it is the service is taxable if listed in 2<sup>nd</sup> Schedule.

"18.16. Here we agree with the learned AR that while the judgment of the High Court of Sindh in the case of Citi Bank NA is on all fours with the case of appellant, the judgment of the Supreme Court of Pakistan in the case of Habib Safe Deposit Vaults confirms to the same principal and is not in violation in any way as the departmental officer has argued from time to time.



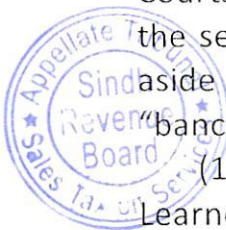
19. Thus following the judgment of the two Honorable Courts as discussed herein above, we hold that the three services which are the subject matter of this appeal were not liable to S.S.T during the period under appeal. The impugned order in appeal as well as order in appeal is set aside."

(9). It is worthwhile to mention here that the bank is not providing insurance service. The bank only introduces its client to Insurance Company and earned some commission. The service of issuance was provided by the insurance company and they charged/collect tax from the policy holder and depositing the same with SRB. The Sindh Sales Tax On Services was levied VAT mode and while issuing insurance policy the insurance companies passed on the tax burden to the policy holder. If the bank is liable for to pay tax on bancassurance. The bank will also pass the burden to its clients/policy holder and this amounts to double taxation.

(10). It is however pointed out that earlier the DB-I of this Tribunal in appeal no AT-205/2015 Allied Bank Ltd. v/s AC SRB passed order dated 28-08-2017 and Appeal No. AT-34/2017 M/s Silk Bank Ltd v/s AC SRB passed order dated 28-11-2017, decided that "Bancassurance" did not covered under tariff heading 98.13. The two orders are earlier in time and should be considered while delivering its order. However the Learned Technical Member in her wisdom did not consider the earlier two orders of this Tribunal the Learned Technical Member instead of passed the order in ignorance of earlier orders of this Tribunal.

(11). Thus, following the earlier decisions of Honorable Superior Courts and order of this Tribunal already mentioned above, in my opinion the service of "bancassurance" is not liable to be taxed, therefore, I set-aside the impugned order and allowed the appeal to the extent of "bancassurance".

(12). As there is difference of opinion between under signed and Learned Technical Member on the issue of "Bancassurance", therefore, it may be just and proper to place the matter before the Honorable Chairman for referring the matter to Learned Third Member.



  
(Muhammad Ashfaq Balouch)  
Judicial Member



APPEAL NO. AT-20/2017

Date of Hearing: 17.08.2018

Date of Order: 05.10.2018

Mr. Shabbar Zaidi, FCA, Mr. Muhammad Raza, FCA, <r. Mehmood Bikia, ACA for appellants.

Mr. Zaheer Hussain- AC, Mr. Mehrab Khan-AC and Mr. Naheed-Mirani-AC for respondent.

ORDER.

**Justice (Retired) Nadeem Azhar Siddiqi, Chairman:** There is a difference of opinion between the learned Judicial Member (Mr. Muhammad Ashfaq) and learned Technical Member (Ms. Razia Sultana Taher) on following issue, which was referred to me by the learned Judicial Member for decision:-

Whether, in presence of judgments of Honorable High Court of Sindh in Citi Bank Versus Commissioner Inland Revenue reported as 2014 PTD 284 and of this Tribunal in AT-205/2015 M/s Allied Bank Limited versus Assistant Commissioner SRB and AT- 34/2017 M/s Silk Bank Limited Versus Assistant COMMISSIONER, SRB and relevant law. Whether "bancainsurance" is taxable service?

After receiving the reference notice to both the parties was issued and they were heard on 30.07.2018 and 17.08.2018.

Mr. Shabbar Zaidi FCA, Mr. Muhammad Raza FCA, Mr. Mehmood Bilial ACA, appeared for appellants.

Mr. Zaheer Hussain Ac, Mr. Mehrab Khan Ac and Mr. Naheed Mirani AC appeared for respondent.

1. On 30.07.2018 Mr. Shabbar Zaidi the learned representative of the appellant submitted that there is a mechanism of coding of goods and services for levy of taxes and duties under the Custom Act and Chapter 1 to 97 deals with the goods and Chapter 98 deals with the services and 98.13 deals with services rendered by specific sectors mentioned therein. He then submitted that 98 denote Chapter and 13 denotes the person/institution rendering services. The next four digits represent the specific services which are to be taxed. However, within the next four digits there is also a mechanism e.g.9813.4000 relates to services provided by banking company as against 9813.1000 related to insurance companies. He then submitted that the tax has been levied under tariff heading 9813.4990 which is a sub-sub-heading of tariff heading 9813.4900 (Safe Deposits Lockers) and that the tax has been wrongly levied under wrong tariff heading. Mr. Shabbar Zaidi also place on record reported order of this Tribunal in the case of M/s Allied Bank Limited vs. SRB [(2018) 117 Tax 167 (Trib.SRB)]
  
2. on 17.08.2018 Mr. Shabbar Zaidi submitted that the order of DB-1 in Allied Bank case was announced on 28.08.2017 and order in Silk Bank was announced on 28.11.2017 by a Division Bench (DB-1) of this Tribunal and was prior in time and that the order of Division Bench-II in Habib Bank Limited case was announced on 07.02.2018 and the order in Standard Chartered Bank case was announced on 09.02.2018 and the D.B. erroneously ignored/omitted the earlier order in Allied Bank case and Silk Bank case. He then submitted that once the matter was resolved in the case of Citi Bank by the Honorable High Court of Sindh and then by the DB-1 of this Tribunal in the Allied Bank case and Silk Bank case the learned Member Technical cannot take a different view. He then submitted that the order of High Court and DB-1 of the Tribunal is binding upon the learned Technical Member and earlier decisions cannot be ignored or omitted. He then submitted that the order of Double Bench-I of the Tribunal was already in field at the time of decision of Habib Bank Limited and Standard Chartered Bank and that in case there was a difference of opinion between the

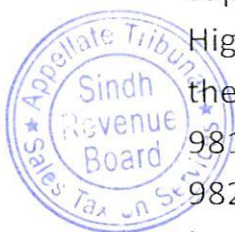


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two benches, either the subsequent Bench should follow the earlier decision or to refer the matter to the Chairman for constituting the Larger Bench.

3. Mr. Shabbar Zaidi also argued that in HS Code there is a mechanism laid down in the International Harmonized System of World Customs Organization, that has been adopted in the Sindh Sales Tax on Services Act, 2011 and the concept laid down in the HS Code has been confirmed in the Citi Bank case.
4. Mr. Shabbar Zaidi then submitted that bancassurance is not a listed service and is not chargeable to Sindh Sales Tax. He then submitted that by introducing its customers/clients to an insurance company who issued insurance policy and charged tax from the clients and deposited the same with SRB and pay some commission to the Bank from the policy amount upon which Sindh sales tax was already paid the appellant had not performed any listed banking service. He then submitted that services of insurance agent are not specifically chargeable to SST under relevant tariff headings 9813.4000 to 9813.9000. The heading 98.13 or 9813.4000 or sub-heading 9813.4990 (effective November 1, 2011) or Rule 30, cannot be treated as all inclusive as otherwise the other headings would become redundant. In support of his arguments re relied upon the judgment of Sindh High Court in the case Citi Bank, reported as 2014 PTD 284. He then submitted that Commission Agents (Tariff heading 9819.1300) and General Insurance Agents (tariff heading 9824.0000) are specifically mentioned in the First Schedule, however, the same has not been specified in the Second Schedule (Taxable Services) during relevant period.
5. Mr. Shabbar Zaidi in relation to mechanism of HS Code submitted "98" represents Chapter 98 on Services under the First Schedule to the Customs Act, 1969 and "13" represents financial services and "4000" represents banking services.



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6. Mr. Shabbar Zaidi place on record photo copy of Rule 6 of the Explanatory Notes of the "Harmonized Commodity Description and Coding System", Sixth Edition (2017), Volume 1. Rule 6 and Explanatory Note (III) thereof are reproduced as under:

*"For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."*

Explanatory Note (III)

"The scope of a two-dash subheading shall not extend beyond that of the one-dash subheading to which the two-dash subheading belongs; and the scope of a one-dash subheading shall not extend beyond that of the heading to which the one-dash subheading belongs."(Emphasis supplied).

7. He then submitted that to conclude if we consider the heading "9813.4000", the digits "98" represent services and "13" represent financial services; whereas "4000" in subheading "9813.4000" is for banking services. Applying the rule and explanation of interpretation of subheading, it is clear that:



- (i) the scope of every digit after the subheading digit ".4" [i.e. X in 9813.4X00] does not extend beyond the subheading series with the digits ".4"; and  
(ii) the scope of every second digit after ".4" [i.e. Y in 9813.4XY0] does not extend beyond the first digit after ".4" [i.e. X in 9813.4XY0].

This means that the subheadings "9813.4990" and "9813.4910" are subheadings of the subheading "9813.4900" cannot extend beyond the specific scope of "4990".

8. Mr. Zaheer Hussain the learned AC submitted that the orders in the case of Allied bank and Silk Bank were challenged before the Honorable High Court in referential jurisdiction and request that this matter may be kept pending till the decision of the references.



This appeal was filed on 18.03.2017 and keeping the same pending till decision of the High Court is not possible. The Tribunal under sub-section (3) of section 62 is required to decide the appeal within six months.

9. Mr. Zaheer Hussain then submitted that Divisional Bench-II comprised of (Muhammad Ashfaq Balouch, Judicial Member and Ms. Razia Sultana Taher, Technical Member) has adjudicated the issue of bancassurance service and uphold the departmental stance vide order in appeal No.AT-66/2017 dated 07.02.2018 (Habib Bank Case). Besides, Divisional Bench-I (Mr. Nadeem Azhar Siddiqi and Mr. Agha Kafeel Barik) has also decided the issue of bancassurance against the department in the case of M/s Allied Bank Limited. Thus all the existing members of this honorable forum have already given their opinions on the same matter and requested that the Chairman of the Appellate Tribunal to refer the matter for hearing on disputed point to one or more other members of the Tribunal (for an independent opinion i.e. to a member who has not already given an opinion) and further requested that the Government of Sindh may be requested to appoint more members and referred to sub-section (12), (13) & (14) of the section 60 of Sindh Act XII of 2011.

Sub-section (12) of section 60 of the Act deals with the difference in opinion between the learned members of the Bench and the point has to be decided according to the opinion of majority. In this case the DB comprised of two learned members differed with each other and the matter has been referred to the undersigned under sub-section (13) of section 60 of the Act. Sub-section (14) of the Act deals with the power of Government to appoint an additional member for the purpose of deciding the case on which there is a difference of opinion. The Tribunal was constituted with three members and the composition is complete and there is no other member to whom the matter can be referred. I am afraid I have no powers to request the Government



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of Sindh to appoint another member for the sole purpose of hearing this appeal.

10. Mr. Zaheer Hussain, AC on merits submitted that all services provided by a bank are taxable under Tariff Heading 98.13 and those services provided by a bank not specifically listed in the schedule are covered under Tariff Heading 9813.4990. In the context he referred to the order of High Court of Sindh in the case of JS Bank vs. Assistant Commissioner-2, SRB CPD No.D-4420/2014 dated 11<sup>th</sup> June, 2015 and referred the following :-

*"Sub-Sub Heading 9813.4990 clearly stated "other services not specified else". The sub-sub tariff heading is to be interpreted in the light of above referred judgment of Honorable Supreme Court. Hence, any service which the petitioner provides but is not specifically mentioned under any sub-sub tariff heading f sub-tariff heading 9813.4000 would also be subject to sales tax by virtue of sub-sub tariff heading 9813.4990."*

11. Mr. Zaheer Hussain, AC with regard to the contention of the appellant regarding HS Code scheme submitted that the tariff heading 9813.4990 is subservient to 9813.4900 hence cannot be treated to be subservient to 9813.4000 and submitted that it appears appropriate to discuss the HS Code in the light of Honorable High Court's judgment in the case of CITI Bank Limited 2014 PTD 284 as the appellant also relied on the same.

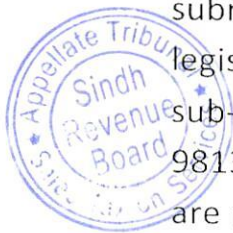


12. Mr. Zaheer Hussain further submitted that since the Honorable High Court, while perusing the Entry-8 of the Federal Excise Act found that the term "Other" have been used in the HS Code System abundantly and such in its nature is a sub-sub-heading of a subheading. The matter of interpretation under the Honorable High Court's consideration was about Entry-8 of the Federal Excise Act. Whereas the scheme of the heading 98.13 as contained in the 2<sup>nd</sup> Schedule of the Sindh Sales on Services Act, 2011 is different and has introduced many amendment to that basic structure given in the Federal Excise Act, which was borrowed from the Pakistan Customs Tariff and submitted that after careful and thorough reading of the judgment, it is safe to conclude that

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Judgment has not given any findings on the issue where it could be drawn that if there was any tariff heading "others" which in its nature was a subheading to any main heading. It is so, because there was no such issue involving any question in relations to it before the Honorable Court. Moreover, the scheme of such list of services in the Federal Excise Act is much different to that of the Act, 2011. The Honorable High Court's finding that all the "Others" heading 98.13 of PCT are subordinate headings of preceding headings was a general finding of the Honorable Court on heading 98.13 of Pakistan Custom Tariff, where it was held that all the "Others" in PCT heading 98.13 are subordinate to preceding subheadings. He then submitted that it becomes abundantly clear that tariff heading 9813.4990 cannot be the sub-sub-heading of the 9813.4900. It is also that in such a case the tariff heading 9813.4990 shall become redundant and no services mentioned therein shall be liable to any tax other than listed services under the heading 98.13 and no purpose of 9813.4990 shall remain. Thus, it is established beyond any doubt that 9813.4990 is subheading to main heading 9813.4000 and it amply refers to the other services provided by the banking companies. He then submitted that without prejudice to the above argument if the legislature intended to make the tariff heading 9813.4990 as the sub-heading of 9813.4900 than they should use heading 9813.4920 rather 9813.4990. And it is settled law that legislature are never short of words. Hence the contention of the appellant is beyond the correct interpretation of law.



13. Mr. Shabbar Zaidi in rebuttal submitted that the J.S. Bank was not on the same issues and has not over ruled the reported judgment in the case of Citi Bank that has discussed the concept of tariff heading specified in 98.13 in detail.

I have heard the learned representatives of both the parties, perused the record made available before us and has also perused the written arguments filed by them.

14. The question referred to me is read as under:

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*"Whether, in presence of judgments of Honorable High Court of Sindh in Citi Bank versus Commissioner Inland Revenue reported as 2014 PTD 284 and of this Tribunal in AT-205/2015 M/s Allied Bank Limited versus Assistant Commissioner SRB and AT- 34/2017 M/s Silk Bank Limited versus Assistant COMMISSIONER, SRB and relevant law. Whether "bancainsurance" is taxable service"?*

15. While going through the order in original and order in appeal I have noticed that the Assessing Officer used the phrase Commission Income-Banca (Life Assurance) and the Commissioner (Appeals) used the phrase Commission Income Banca Life Insurance instead of bancassurance. For the purpose of convenience I used the word "bancassurance".
16. At the relevant time when order in this case was passed this Tribunal had two benches. DB-1 comprising of Justice Retired Nadeem Azhar Siddiqi Member Judicial /Chairman and Mr. Agha Kafeel Barik, Member Technical and DB-II comprising of Mr. Muhammad Ashfaq, Member Judicial and Ms. Razia Sultana Taher, Member Technical. The DB-1 has heard the case of Allied Bank and pronounced the Order on 28.08.2017. Thereafter DB-1 heard the case of Silk Bank Limited and pronounced the order on 28.11.2017. After the orders of DB-1 it appears that DB-II comprising of Mr. Muhammad Ashfaq, Member Judicial and Ms. Razia Sultana Taher, Member Technical heard the case of Habib Bank Limited and Standard Chartered Bank and pronounced the orders on 07.02.2018 and 09.02.2018 respectively taking a different view without referring the matter for constitution of a larger bench.
17. Thereafter the Bench II comprising of Mr. Muhammad Ashfaq, Member Judicial and Ms. Razia Sultana Taher, Member Technical heard this appeal on 06.03.2018 and reserved the appeal for order. The Technical Member recorded findings on 16.03.2018 and the Judicial Member has recorded separate findings taking different view contrary to the case of Citi Bank (2014 PTD 284,



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Judgment of High Court of Sindh) and the earlier two orders of this Tribunal in the case of Allied Bank and Silk Bank.

18. The learned Technical Member relied upon the earlier decision in the case of Habib Bank limited Appeal No. AT-66/2017 has held as under:

"12. There is no doubt that the banking company, in providing or rendering bancassurance services, is providing or rendering a service which is peculiar and specific to bank and is receiving some consideration (in the name of commission or charge) for provision of such services. Accordingly, this bancassurance services is covered by the description "services provided or rendered by banking companies" of tariff heading 98.13 of the First and Second Schedules to the SSToS Act, 2011. Whether classified under tariff heading 98.13 of the Second Schedule or under subheading 9813.4990 thereof, the bancassurance services by banking companies shall be covered by the terminology "taxable services" and levied to tax on the basis of commission or charges received by the banking companies in consideration of having provided or rendered such bancassurance services. It shall not be classified under tariff heading 9819.1300 under the description "Commission Agents" because 9819.1300 covers the general body of commission agents, while the commission or charges earned by the banking companies, specifically on account of provision or rendering of any service relatable to banks, shall be classified as under tariff heading 98.13 and / or the subheadings thereof. It is pertinent that even commission and brokerage of foreign exchange dealings is specified against subheadings 9813.6000".



19. The learned Judicial Member though earlier agreed with the Technical Member in the case of Habib Bank Limited and Standard Chartered Bank, this time take a different view and has held as under:

"9. It is worthwhile to mention here that the bank is not providing insurance service. The bank only introduces its client to insurance company and earned some commission. The service of insurance was provided by the insurance company and they charged / collect tax from the policy holder and depositing the same with SRB. The Sindh Sales Tax on Services was levied VAT mode and while issuing insurance policy the insurance companies passed on the tax burden to the policy holder. If the bank is liable for to pay tax on bancassurance. The bank will also pass the burden to its clients / policy holder and these amounts to double taxation.

10. It is however pointed out that earlier the DB-I of this Tribunal in appeal No. AT-205/2015 M/s Allied Bank Limited v/s AC-SRB passed order dated

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Warid Telecom (Pvt) Ltd. Versus Federation of Pakistan (2014 PTD 752 at 765-B) it has been held by the Islamabad High Court that “.....it is not disputed that there can be double taxation if the legislature has distinctly and expressly enacted it however in the absence of such enactment where there are general words of taxation then the court has to interpret the provisions in a manner where they cannot be so interpreted as to tax, the subject twice over to the same.....” In another reported judgment in the case of Federation of Pakistan versus Durrani Ceramics (2014 PTD 2016 at page 2038-K)) the honorable Supreme has held that “.....As held in the above cited judgment, double taxation can be imposed only by clear and specific language and not by implication.....”

21. As per section 3 of the Act of 2011 a taxable service is service listed in the second schedule to the Act. Admittedly the bancassurance is not a listed service. The contention of the learned AC that all services provided or rendered by the bank are taxable has no force and if the same is accepted the listing of specific services in the second schedule of the Act becomes redundant. If the intention of the legislature is to tax all services provided or rendered by the bank the listing of specific services in second schedule are not necessary and one liner “all services provided or rendered by the bank” is sufficient to tax the services. The above questions was considered by a learned DB of High Court of Sindh in the reported case of Citibank NA versus Commissioner Inland Revenue and another, 2014 PTD 284, Justice Munib Akhtar, as he then was (now elevated to Supreme Court of Pakistan) speaking for the bench held as under:



“16. The shape that Entry 8 took during the second period has been reproduced in para 7 above. It will be recalled that excise duty can only be levied if the service is specified in the First Schedule to the FE Act. When the definition of “services” in section 2(23) is kept in mind, it is clear that a service can be specified in the schedule in one of three ways. Firstly, it can be specified by description (whether in terms of a definition contained in section 2 or otherwise) and without any reference to Chapter 98 of the Pakistan Customs Tariff. Secondly, it can be specified by simply referring to (i.e., listing) a heading or sub-heading of Chapter 98 without anything more. Thirdly, it can

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be specified by a combination of the first two possibilities. If the third possibility is used, then the service in question must both conform to the description (whether in terms of a definition contained in section 2 or otherwise) and also appear in Chapter 98. It is clear that during the second period, the services in Entry 8 were specified in terms of the third possibility. It will be necessary therefore to look at both the definition given in section 2(16a) and Heading No.98.13 of Chapter 98.

The above reported case deals with FED on bancassurance. This case is related to Sindh Sales Tax on services. Excise duty can only be levied if the service is specified in the First Schedule to the FE Act. Whereas in case of Sindh Sales Tax on Services sales tax can only be levied if the service is listed in the Second Schedule of the Act.

17. ....

18. In our view, when the foregoing points are kept in mind, the primary submission by learned counsel for the Department, namely that it was the description in the principal heading that was operative cannot be accepted. This description was in the following terms:-

*"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".*

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 banking companies and NBFIs were listed in the description. However, this had nothing to do with the services 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 in 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 Customs 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 an international convention and which is regulated by the World Customs Organization. The HS System is of course concerned with goods, and it comprises of 97 chapters (with one chapter, 77, being left "blank" for possible future use) whether all manner of goods are listed and categorized. The Pakistan Customs Tariff faithfully reproduces and gives effect to this system.



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In addition, the HS System allows two final chapters (i.e., 98 and 99) to be used for national purposes and Pakistan has utilized Chapter 98 for "services". Even a quick glance shows that Chapter 98 replicates the system of classification adopted for goods under the HS System. Now, the chapters of the HS System are preceded by certain "General Rules for the interpretation of the Harmonized System" ("General Rules"). These rules are incorporated in the Pakistan Customs Tariff and therefore have the force of law. Although the rules are concerned with goods, in our view they may, subject to suitable adaptation, also be used for the purposes of Chapter 98. This is so because of the close correspondence between the classification system under the HS System and that used in Chapter 98. Rule 6 of the General Rules has been understood to mean, inter alia, that in those headings under which sub-headings are to be found, the classification is to be on the basis and in terms of the sub-headings. Applying this rule to Heading No.98.13 leads to the result that it is the sub-headings thereof that are to be applied. This would be in conformity with the HS System, and is therefore, in our view, the correct approach to applying Chapter 98. It follows that the submission by learned counsel for the Department, which would lead to the contrary result, is not tenable and cannot, with respect, be accepted.

19.....

20. The crux of the Tribunal's findings has been emphasized. (The point with regard to Rule 40 was not pressed before us). It is to be noted that the Appellate Tribunal did not identify any specific sub-headings to which "insurance commission" could be related. The key question is whether the relevant act, i.e., "facilitating the [applicant's] employees" to obtain insurance was a "non-fund banking services" that came within any of sub-headings of Heading No.98.13? It is clear that the sub-headings specifically in relation to insurance were all subordinate (sub-sub-) headings of a sub-headings (9813.1000) which related only to "an insurer, including a reinsurer". Since the applicant was neither, these headings obviously did not apply in relation to it. None of the other sub-headings were at all applicable to the putative service in question. 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 our 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. In our view therefore, "insurance commission" did not come within



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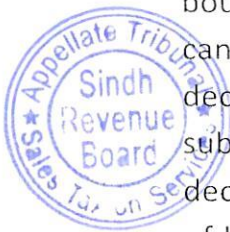


the ambit of any of the sub-headings of Heading No.98.13 and hence was not liable to excise duty in terms of Entry 8. In the circumstances, it is not necessary for us to consider whether or not this type of transaction was a "non-fund banking service".

The result of the above discussion is that the view expressed by the learned Judicial Member that bancassurance is not a service is in consonance with the judgment of Citi Bank supra and is a correct view.

22. As far as difference of opinion between two benches is concerned, they have every right to differ with each other. Difference of opinion is necessary for development of law and for proper interpretation of law. Presently the law is that the earlier order of equal number bench is binding upon the subsequent equal number bench. When an earlier order of equal number bench is in field proprietary demand that the subsequent bench of equal number instead of taking a different view shall refer the matter to the Chairman for constitution of a larger bench, which has not been done in the earlier two cases decided by DB-II of this Tribunal. There is much case law relating to the High Courts and Supreme Court on the point that the decision of one DB is binding upon the other DB. The same principal is also applicable to the two benches of this Tribunal. The principle of consistency and certainty occupy a very prominent position in the law of precedence which has to be adhered to in order to maintain discipline in the administration of justice. Conflict of view by different benches of the same forum is bound to create confusion and ultimately chaos. The subsequent bench can take a different view but cannot totally ignore the earlier decisions/orders of the Tribunal. The question as to whether the subsequent bench of same tribunal should have referred the matter for decisions to a larger bench in view of earlier decision of equal number of bench came for decision came up for hearing before the Honorable Lahore High Court in the reported case of Government Employees Cooperative Housing Society Versus Income Tax Officer reported as 2004 PTD 63. A learned DB of Lahore High Court relying upon the reported decisions in the case of Province of East Pakistan Versus Dr. Aziz Islam. PLD 1963 SC 296 and Multi Line Associates versus Ardeshir Cowasjee, PLD 1985 SC 223 in para 9 have decided as under:

"9. ....it has been held that where a different or contrary rule was reached by an equal Bench in co-equal jurisdiction from an earlier



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judgment of the same Court, the matter should normally be referred to a larger Bench for decision or should be left to be raised in appeal before the Hon'ble Supreme Court of Pakistan. The ratio of these judgments is that when a Bench of co-equal jurisdiction adopts a view different or contrary to the view earlier expressed on principles by a Bench of equal jurisdiction, the legal propriety demands reference of the case for constitution of a larger Bench or be left to be settled in appeal by the higher Court".

23. The controversy regarding conflict of opinion between two benches of same tribunal was also considered by a full bench of Income Tax Appellate Tribunal reported as 1997 PTD (Trib.) 879. Mr. Mujeebullah Siddiqi the then Chairman of the Tribunal (thereafter elevated as Judge High Court of Sindh) in para 16 held as under:

"16. ....The above discussion leaves no scintilla of doubt that in view of the law as laid down by the superior courts the decision of a Division Bench is binding on the other Division Benches of the same judicial institution. As already held by the Honorable High Court and Honorable Supreme Court it is absolutely necessary to observe this principle in order to avoid the conflicting decisions by the Benches of equal strength which is bound to create complications, confusion and chaos which will result in uncertainty and would be ultimately disastrous to the administration of justice.

"17. Consequent to the above-conclusion we are of the considered opinion that a mistake of law has taken place whereby the earlier decision of Division Bench of the Tribunal has been ignored and a different view has been taken by the learned Accountant Member sitting in the Division and the learned third Member to whom the difference of opinion was referred. It appears that the learned third Member was not assisted properly on this aspect of the legal decision and consequently a different view was taken whereby the earlier view taken by the Division Bench was dissented and contrary view was taken instead of making reference to the Chairman for constitution of larger Bench. The order of this Tribunal, dated 24.12.1992 is, therefore, hereby recalled. The rectification application is allowed accordingly".




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24. In view of the above it is held that the decision of equal number bench is binding upon another equal number bench and in case of difference of opinion constitution of larger bench is necessary.
25. In view of the above discussion I agree with the Judicial Member allow the appeal.
26. The copy of the order may be provided to the learned representatives of the parties.

Karachi. Dated: 05.09.2018

  
(Justice® Nadeem Azhar Siddiqi)  
CHAIRMAN

Copies supplied to:-

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, SRB, Karachi.

Copy for information to:-

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

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