

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD At KARACHI

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APPEAL NO. AT-117/2018

Assistant Commissioner-SRB, KarachiAppellant

Versus

M/s Habib Metropolitan Bank Ltd.....Respondent

Date of Filing: 12.12.2018

Date of hearing 10.09.2020

Date of Order 05.10.2020

Mr. Zaheer Hussain, AC, Mr. Vickey Dhingra, AC, Mr. Tehzeeb Ahmad, AC and Ms. Uzma Ghory, AC-DR for Appellant.

Mr. Saud ul Hassan, Advocate and Mr. Fahad Faruqui, Manager Tax for Respondent.

ORDER:

Intiaz Ahmed Barakzai: This appeal has been filed by the appellant/department challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.204/2018 dated 22.10.2018 passed by the Commissioner (Appeals) in Appeal NO. 43/2012 filed by the respondent against the Order in Original (hereinafter referred to as the OIO) No. 33/2013 dated 25.03.2013 passed by the Assistant Commissioner (Ms. Umi Rabbab) SRB, Karachi.

02.The facts of the case as mentioned in the OIO are that the respondent was registered with SRB being a banking company engaged and providing services under the Tariff heading 98.13 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (herein



after referred as the Act) subject to levy of Sindh Sales Tax (SST) at the rate of 16%.

03. It was alleged in the OIO that during the scrutiny of quarterly reconciliation statements of the respondent for the quarters ending September, 2011 and December, 2011 (six tax periods) it was revealed that they have failed to make payment of SST as detailed below:

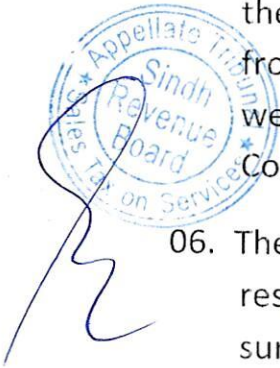
S. No.	Particulars of services	Amount charged (Rs.)	Amount of 16% Sindh Sales Tax.
1.	Other services	136,246,160	21,799,385
3	Income dealing in relation to foreign currency	462,787,804	74,046,049
Total			95,845,434

04. The respondent was served with Show-Cause Notice (SCN) dated 25.09.2012 calling upon it to explain as to why the above mentioned SST should not be recovered along with default surcharge under section 44 of the Said Act and as to why of penalty under Serial No. 3 and 12 of Table under section 43 of the Act should not be imposed.

05. The respondent filed reply on 24.10.2012 and 07.12.2012 contesting the contents of the SCN and explained the nature of Income earned from dealing in Foreign Currencies and submitted that other services were comprised of Trustee Fee, Reimbursement from Foreign Correspondent Banks and Visa Debit Card International Commission.

06. The Assessing Officer (AO) after hearing passed OIO directing the respondent to deposit SST of Rs.95,845,434/= alongwith default surcharge and penalty of Rs.4,792,271/= under Serial No. 3 of Table under section 43 of the Act.

07. The said OIO was challenged by the respondent by way of filing appeal before the Commissioner (Appeals), who upheld to OIO to the extent of levying SST on i) reimbursement from the foreign correspondent



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bank, ii) visa/debit card international commission and iii) dealing in foreign exchange from 01.11.2011 onwards and setaside the OIO in respect of tax levied on trustee fee on the ground that the same were not banking services and are taxable from 01.01.2012 and the penalty imposed vide OIO was also setaside. The said OIA has now been challenged before this forum by the department.

08. The learned representative of the appellant submitted as under:-

- (i) The Commissioner Appeals was not justified in holding that the Tariff Heading 9813.4990 was added effective from 01.11.2011.
- (ii) The dealing in foreign exchange is a service covered under Tariff Heading 98.13. The appellant dealt in the sale and purchase of foreign currency and earned commission covered under Tariff Heading 98.13 read with sub-tariff heading 9813.4990.
- (iii) The purpose of tariff heading 9813.4990 (other) was to bring all the service not specifically listed but provided or rendered by the banks into tax net.
- (iv) As per rule 30 (4) of the Sindh Sales Tax and Services Rules, 2011 (hereinafter referred to as the Rule) the SST is to be charged from its customers on gross amount hence all other services provided or rendered by banking companies are liable to SST.

In the unreported case No. CPD No.4420/2014 (JS Bank Limited V/s SRB) it was held that any services not specifically mentioned under any sub tariff heading of 9813-4000 could also be taxed by virtue of Tariff Heading 9813.4990.

09. The learned representative of the respondent submitted as under:-

- (i) The tax periods involved were from July, 2011 to December, 2011. Whereas the Tariff Heading 9813.4990 (other services, not specified elsewhere) was added effective from 01.11.2011 and in absence of Tariff Heading in the Second Schedule to the Act no tax could be charged.



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(ii) The Commissioner Appeals has rightly deleted the tax levied on Trustee Fees and also rightly held that Tariff Heading was added effective from 01.11.2011.

10. We have heard the learned representatives of the parties and perused the record made available before us.

11. The appellant had challenged the portion of OIA in which the Commissioner (Appeals) had upheld the OIO to the extent of levying SST on i) reimbursement from the foreign correspondent bank, ii) visa/debit card international commission and iii) dealing in foreign exchange from 01.11.2011 onwards. He set aside the OIO in respect of tax levied on trustee fee on the ground that the same were not banking services and were taxable from 01.01.2012 onwards and the penalty imposed vide OIO was also set aside.

12. The respondent had also challenged the same AIO No. 204/2018 dated 22.10.2018 before us in connected Appeal No. 99/2018 which was decided vide our Order Dated 25.09.2020 in which we held as under:-

"17. Furthermore it is now well settled that the ground not mentioned in the SCN cannot be adjudicated. In the SCN Tariff Heading 9813.4990 was not confronted to the appellant. This view gains support from the reported case of WAK Limited Lahore versus Customs, Central Excise and Sales Tax Appellate Tribunal, 2018 PTD 253 Lahore High Court, wherein in para 8 it was held as under:-

"Jurisprudence is now pretty settled on the point that show cause-notice is a serious business and is not a casual correspondence. Its purpose is to put the person on notice about the allegations for which the authorities intend to proceed against him and to give an opportunity to explain his position. This principle is rooted in the principles of natural justice and fair trial.

In another reported case of Collector Central Excise and Land Customs and others versus Rahim Din, 1987 SCMR 1840 it was held as under:-

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"The order of the adjudication being ultimately based on a ground which was not mentioned in the show cause notice, the order was palpably illegal and void on the face of it".

18. *The initiation of proceedings without confronting the tax payer with the specific Tariff Heading is against the listing of taxable services in the Second Schedule to the Act. The same being unlawful cannot be allowed.*

19. *In view of the above discussions we hold that for levying tax invoking specific Tariff Heading, it is necessary that it should be listed under main Tariff Heading and without invoking specific Tariff Heading the tax cannot be levied.*

20. *The other point under consideration is whether the services allegedly provided by the appellant were covered under Tariff Heading 9813.4990 (other services not specified elsewhere) as existed now. Such services were added to the Second Schedule to the Act vide Sindh Sales Tax on Services Amendment Ordinance 2011 effective from 01.11.2011. This amendment has no application during the tax periods July-2011 to October-2011 and no SST can be levied. Thus the findings of the learned Commissioner (Appeals) were correct.*

21. *The Commissioner Appeals in respect of trustee fee in para 10.1.3 of the OIA held that "these services are hereby held as the services of asset and fund management, those classified under Tariff Heading 9825.000 of the Second Schedule of the Act of 2011. And OIO to this extent needs to be altered since the services were covered in description "other services not specified elsewhere" classified against tariff heading 9813.4990 of the Second Schedule of the Act, 2011". In para 13 of the OIA the Commissioner (Appeals) concluded that "The OIO is set aside to the extent of Trustee Fee against the services of 'fund and asset management' and it is accordingly held that those are not banking services and that the same are taxable from 1st January, 2012". The Commissioner (Appeals) had rightly held that "trustee fee" is not part of banking services" and rightly treated the same as part of management services including fund and assets management, Tariff Heading 9825.000 of the Second Schedule to the Act was brought to the tax net effective from 01.01.2012 and we do not find any infirmity on this account in the Order of Commissioner (Appeals).*



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22. However we do not agree with the findings of the learned Commissioner (Appeals) relating to earnings from foreign exchange dealings. It is apparent that the earnings were from sale and purchase of foreign currency due to fluctuation of currency rate. Some times when rates go down the bank also suffers loss. The sale and purchase of shares do not have any element of service and was not a taxable service.

23. The Commissioner (Appeals) while taxing the Reimbursement from Foreign Correspondent Banks, Visa Debit Card International Commission and dealing in Foreign Exchange from November, 2011 onwards erroneously failed to consider the effect of non-mentioning of specific Tariff Heading under which the tax was charged. We have already held that for levying tax invoking specific Tariff Heading listed under main Tariff Heading is necessary and without invoking specific Tariff Heading the tax cannot be levied.

24. In view of the above discussions the Appeal having no merits is allowed and the OIO and OIA are annulled and set aside. However, since the OIO and OIA are set aside for the reason that Specific Tariff Heading was not mentioned in SCN and OIO the SRB is at liberty to issue fresh SCN (if available under law) to the appellant only in respect of Reimbursement from Foreign Correspondent Banks and Visa Debit Card International Commission for the tax periods November and December, 2011.

13. In the light of our above Order dated 25.09.2010 in connected Appeal No. AT- 99/2018 and in view of the discussions reproduced supra this appeal is dismissed having no merits.

14. The copy of the order may be provided to the learned representatives of the parties.

(Justice® Nadeem Azhar Siddiqi)
Chairman

(Imtiaz Ahmed Barakzai)
Technical Member

Karachi:
Dated: 05.10.2010

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APPELLATE TRIBUNAL
SINDH REVENUE BOARD

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Order Dispatched on

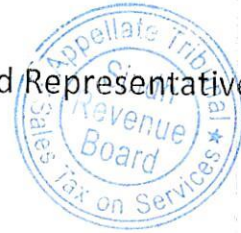
Order issued on

Registrar

Registrar

Copy Supplied for compliance:

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



Copy for information to:-

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