

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD At KARACHI
DB-I

APPEAL NO. AT-99/2018

M/s. Habib Metropolitan Bank Limited Appellant

Versus

Assistant Commissioner-SRB, Karachi.....Respondent

Date of Filing: 26.10.2018

Date of hearing 10.09.2020

Date of Order 25.09.2020

Mr. Saud ul Hassan, Advocate, and Mr. Fahad Faruqi, Manager Tax for Appellant

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

ORDER

Intiaz Ahmed Barakzai: This appeal has been filed by the appellant 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 Appellant 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.

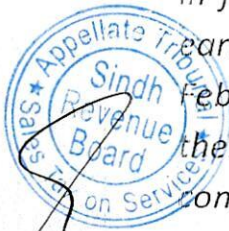
01. The facts of the case as mentioned in the OIO are that the Appellant was registered with SRB being a banking company engaged and providing services under the Tariff heading 98.13 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (herein after referred as the Act) subject to levy of Sindh Sales Tax (SST) at the rate of 16%.

02. It was alleged in the OIO that during the scrutiny of quarterly reconciliation statements of the appellant 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

03. The appellant 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.
04. The appellant filed reply on 24.10.2012 contesting the contents of the SCN explaining the nature of Income dealing in Foreign Currencies which was summarized as under:-

"The amount of Rs.462,787,804 pertaining to income from dealing in foreign currencies is not correct as it also includes the income earned by the bank during the tax periods of January, 2012 and February, 2012. For the purpose of levy of Sales tax under SSTSA there has to be a service which is rendered against a fee or consideration. Income from sales and purchase of foreign exchange is not earned against any service rendered by the bank rather it is part and parcel of day to day operations of bank's treasury department whereby it purchase and sales foreign currency in order to generate income due to fluctuation in exchange rates. As the bank uses its own funds to buy and sell foreign currencies, the transaction does not fall under Tariff Heading 9813.6000, 9813.9000 and 9819.2000 as provided in the



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Second Schedule. The sales tax is only liability against any service provided to customers by virtue of rule 30(4) of the Rule which states that sales tax shall be paid by the Banking Company on gross amount charged for service provided to its customers.

05. The appellant filed further reply on the 07.12.2012 stating therein that the other services were comprised of Trustee Fee, Reimbursement from Foreign Correspondent Banks and Visa Debit Card International Commission and stated as under:

***Trustee Fee:** It is combination of various streams of income which mainly comprises of "commission income" from syndicate financing, fund launching commission on sales of stocks and securities. A small sub-component also includes Initial Public Offerings (IPO) charges.*

***Reimbursement from other banks:** It is "commission income" earned by the bank from other banks on remittances made to these banks. The aforesaid revenue earned by the bank is in form of commission on Bank's funds the bank is not involved in rendition of any service. Hence, provision of SSTSA could not be invoked. For the purpose of levy of Sales tax under SSTSA there has to be a service which is rendered against a fee or consideration. In this case the bank is not involved in rendering any such taxable services. Hence the funds of the banks are involved in earning such "commission".*

06. The Assessing Officer (AO) after hearing passed OIO directing the appellant to deposit tax 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 appellant by way of filing appeal before the Commissioner (Appeals), who 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. However, he setaside 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. He also set aside the penalty imposed vide OIO. The said OIA has now been challenged before this forum. The respondent has also challenged the same OIA by filing separate Appeal No. AT-117/2018, which will be dealt separately.

08. The learned representative of the appellant Mr. Saudul Hasan, advocate submitted as under:-

- (i) The tax periods involved were from July, 2011 to December, 2011 whereas the SST was levied on the basis of quarterly returns filed by the appellant. However, the actual nature of services provided by the appellant were not determined nor its taxability was considered in view of the prevalent law.
- (ii) The services which were charged to SST were not listed in the Second Schedule under the Banking Services and for that reason no specific tariff heading was mentioned in the SCN and OIO. Unless the specific sub-tariff heading is identified in the SCN tax cannot be charged merely under tariff heading. 98.13.
- (iii) The Tariff heading 9813.4990 (other services, not specified elsewhere) was added to the Second Schedule vide Sindh Sales Tax on Services Amendment Ordinance 2011 effective from 01.11.2011. The same was not applicable to the tax periods July-2011 to October-2011.
- (iv) The original Tariff Heading was "other" and was sub-sub-heading of 9813.4910 (safe vaults).
- (v) The receipt of Reimbursement from Foreign Correspondent Bank was on account of referring the clients to foreign banks situated outside Pakistan. This reimbursement was not paid on account of any banking services provided by the appellant in Sindh and thus were not covered by any entry in the Second Schedule to the Act.
- (vi) Visa Debit/Card International Commission was in respect of services rendered by foreign banks outside Pakistan and in turn the appellant received share from the earning of foreign bank.



Such commission was not received against any services provided or rendered by the appellant in Sindh.

- (vii) The bank holds foreign currency and also deals in it by way of sale and purchase and as per the State Bank and SECP requirement. The banks have to declare such holding of foreign currency reserves in Pakistani Rupees. Therefore, the banks are required to submit weekly/monthly reports to State Bank of Pakistan in this regard. The earning was due to change in exchange rate and not in relation to providing or rendering any services. The earning was subject to market risk as the rates of foreign currency keep on fluctuating.
- (viii) He relied upon the following case laws.
- (a) 2012 PTD (Trib.) 954- Habib Metropolitan Bank
 - (b) Citibank NA Vs Commissioner Inland Revenue 2014 PTD 284.
 - (c) Pakistan Television Corp. Vs Commissioner Inland Revenue 2019 SCMR 282.

09. Mr. Zaheer Hussain, AC for respondent submitted asunder:-

- (i) The appellant deals with banks situated outside Pakistan and had opened a NOSTRO Account in foreign correspondent Bank and the foreign correspondent bank open VOSTRO account with local bank. Both banks function on the basis of Agreement in writing. The local banks do not charge any fee from the clients who use the services of foreign banks and the foreign banks pass on share from its income to the local bank.



(ii) The services of various natures were acquired by the clients from local banks without payment of any charges. The local banks received such charges/commission from foreign bank.

10. On subsequent date Mr. Vickey Dhingra, AC for respondent appeared and submitted as under:-

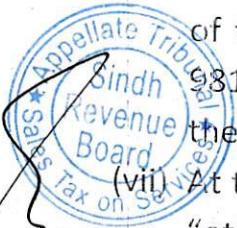
- (i) The appellant earned commission for providing services outside Pakistan. The ATM Card of the appellant were used by its customers on the ATM of other banks and the said other bank

charged commission for the use of its ATM and a portion of that commission was passed on to the appellant bank. The appellant charged certain percentage on the amount of international transactions on account of withdrawing cash from ATM.

- (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 placement of tariff heading in a group supports the contention of the department. The banking related services starts from sub Tariff Heading 9813.4000 (services provided or rendered by banking companies in relation to:) and have ended on Tariff Heading 9813.4990 (other services not specified elsewhere). However the last entry is applicable on the all sub-sub-headings of 9813.4000 in terms of the grouping decided by the Apex court in PTV case mentioned supra.
- (iv) 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.
- (v) 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 would also be subjected to tax by virtue of Tariff Heading 9813.4990.
- (vi) The case of Citibank mentioned supra is not applicable to the facts of the instant case having distinguishable facts. In Tariff Heading 9813.4000 word "services" was used as plural, and he relied upon the reported case of 2007 PTD 67 (Para 24-page 98).
- (vii) At the time when Citibank case was decided there was no entry of "others" in the Schedule of Federal Excise Act, 2005.

11. Mr. Saudul Hasan, advocate in rebuttal submitted as under:-

- (i) 9813.4990 is the sub-sub tariff heading of sub-heading 9813.4900 for the reason that in all sub-headings there were three zeros at the end. Whereas in sub-sub tariff heading there was only one zero. Thus 9813.4990 is the sub-sub heading of 9813.4900 and this



position could be understood while considering the amended Tariff Heading 9813.4990 added by Sindh Finance Act, 2019.

- (ii) Reimbursement was received on account of referring customers to foreign bank for obtaining services outside Pakistan and such economic activity had taken place outside Sindh thus the same was not taxable within Sindh.
- (iii) The services if any were rendered outside Sindh thus the same were not taxable in Sindh.
- (iv) On sale and purchase of foreign currencies the bank used its own funds and earned profit and thus the same was not commission against any service. Since purchase and sale of foreign currency by the bank was in normal course of banking business hence no sales tax was payable.

12. We have heard the learned representative of the parties and perused the record made available before us.

13. The dispute between the parties was whether the other services (Trustee Fee, Reimbursement from Foreign Correspondent Banks and Visa Debit Card International Commission) and income from dealing in foreign currency allegedly provided by appellant were covered under Tariff Heading 98.13 of the Second Schedule to the Act. The SCN was issued mentioning main Tariff Heading 98.13 without mentioning the specific tariff headings and the specific services provided or rendered by the appellant. However, from the reply to SCN submitted by the appellant it appears that "other services" comprised of trustee fee, reimbursement from other banks and visa debit card international commission.

14. We will first take up and decide the effect of non-mentioning of the relevant Tariff Heading of the Second Schedule to the Act in the SCN. The SCN was issued invoking main Tariff Heading 98.13 (services provided or rendered by banking companies) in relation to alleged service of "others" and "dealing in foreign currency". The main heading 98.13 of the Second Schedule to the Act covers services provided by



banking companies and others. The entries relating to services provided by banking companies commenced from Tariff Heading 9813.4000 and ended on to 9813.4990 and none of these sub-headings relates to services allegedly provided by the appellant. Main Tariff Heading 98.13 has no specific entry relating to alleged services provided by the appellant. Apparently at the time of issuance of SCN the officer was not sure under which Tariff heading these services fell and for that reason no specific tariff heading was invoked.

15. The AO in para 19.2 of the OIO has taken shelter under rule 30 (4) of the Sindh Sales Tax on Services Rules, 2011 (herein after referred as the Rules) by concluding that the "commission income was a taxable service as per rule 30 (4) of the Rules since the sales tax was charged from customers on gross amount. In para 20 of the OIO the AO concluded that "Hence all other services provided or rendered by banking companies are liable to 16% of SST on gross amount charged". Rule 30 of the rules was invoked which provides the mechanism for the collection of tax from the service providers mentioned in the main Tariff Heading 98.13. The scope of tax cannot be enlarged through framing of Rules under enactment. The Rules are sub-ordinate legislation which was framed by the executive under the delegated powers. The tax can only be levied by legislature under specific intendment and unambiguous provisions.

16. In para 20 of the OIO the AO further concluded that "there are numerous services provided/rendered by banking company and it is not possible to cover all services in the second schedule under a separate tariff heading so only some specific services are mentioned separately the rest are covered in the main heading i.e. 9813.0000". The main Tariff Heading 98.13 only relates to the service providers who have to provide or render services mentioned in the sub or sub-sub headings and have nothing to do with the services that were actually liable to tax. The attempt by learned AC to conclude from the enumeration of the persons that all the services provided by the appellant were included in Heading No.98.13 cannot be accepted and is against the specific listing of services in the Second Schedule to the Act and is also violative of law laid down



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by the Honorable Sindh High Court in the case of Citibank and the relevant portion is mentioned as under:-

"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".

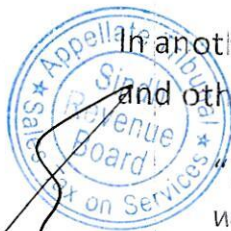
17. Furthermore it is now well settled that the ground not mentioned in the SCN cannot be adjudicated. In the SCN Tariff Heading 9813.4990 was not confronted to the appellant. This view gains support from the reported case of WAK Limited Lahore versus Customs, Central Excise and Sales Tax Appellate Tribunal,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

"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).*

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 since 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

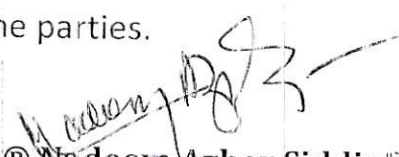
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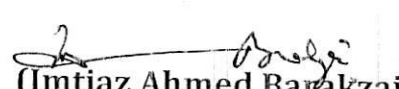

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and dealing in Foreign Exchange from November, 2011 onwards erroneously failed to consider the effect of non-mentioning of specific Tariff Heading under which the tax was charged. We have already held that for levying tax invoking specific Tariff Heading 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 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.

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


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN


(Intiaz Ahmed Barakzai)
TECHNICAL MEMBER

Karachi:

Dated: 25.09.2010

Certified to be True Copy

Copy Supplied for compliance:

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

Copy for information to:-

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


REGISTRAR
APPELLATE TRIBUNAL
SINBH REVENUE BOARD

Order issued on

09/10/2020


Registrar

Order Dispatched on

09/10/2020


Registrar