

BEFORE THE APPELATE TRIBUNAL SINDH REVENUE BOARD

APPEAL NO. AT-24/2019

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

VERSUS

M/S Telenor Pakistan Ltd.....Respondent

Date of Filing of Appeal: 18.03.2019

Date of Hearing: 06.05.2019

Date of Order: 14.05.2019

Mr. Vickey Dhingra, SRB for Appellant.

Mr. Arsalan Siddiqui ACMA, Tax Manager and Mr. Junaid Siddiqui,
Assistant Manager Tax for Respondent

ORDER

Justice (R) Nadeem Azhar Siddiqi. This appeal has been filed by the appellant/department challenging the Order-in-appeal No. 47/2019 dated 23.05.2019 passed by the Commissioner (Appeals-1) in Appeal No. 29/2015 filed by the respondent against the Order-in-Original No. 36/2015 dated 16.01.2015 passed by the Assistant Commissioner (Ms. Nida Noor), SRB,

1. In short, the facts of the case as stated in Order in-Original are that the respondent is a registered person and engaged in providing and

rendering Telecommunication Services, which are chargeable to Sindh Sales Tax at the rate of 19.5% under section 8 of Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) read with tariff heading 98.12 of the Second Schedule of the Act and rule 35 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) for the Tax Periods from July, 2011 to March, 2014.

2. The allegations against the respondent are that perusal of Annexure 'C' of sales tax returns SST-3 filed by the respondent shows that they have charged the Sindh Sales Tax on some of the telecommunication services at the rate of 16% and 17% on the value of taxable services. It was further alleged that telecommunication services provided or rendered by the respondent are liable to Sindh sales tax @ 19.5% on the value of taxable services w.e.f. July, 2011.
3. The appellant served show-cause notice dated 20.06.2014 to the respondent as to why the short paid amount of SST amounting to Rs.85,781,781/= may not be assessed and recovered u/s 23 and 47 (IA) (a) of the Act along with default surcharge u/s 44 and penalty u/s 43 (3) of the Act.
4. The respondent submitted written reply dated 11.07.2014 in which it was stated that *"Telenor in addition to the Telecommunication Services which are subject to 19.5% under the tariff heading 98.12 of the Second Schedule of the Act is also involved in rendering Branchless Banking Services (BBS) which are regulated under the Branchless Banking Regulation (BBR) issued by the State Bank of Pakistan (SBP)"*. It was further stated in the reply that *"In addition to the above we would inform you that during the tax periods from July, 2011 to January, 2012 as the Sindh Sales Tax Special Procedure (withholding), Rules, 2011 were new introduced at that time and there was a lack of procedural clarity on the manner of payment of tax withheld from suppliers therefore Telenor for the purpose of disposing its sales tax withholding liability has also paid the withholding amount in respect*



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of such tax periods through Annexure C of the monthly sales tax returns”.

5. After hearing the parties the Assistant Commissioner passed order-in-original. The Assessing Officer was of the view that the registered person/respondent provides its telecommunication services to Tameer Bank and is also receiving payment/commission fee for the provision, hence, was required to deposit 19.5% of the said fee/commission by declaring it against annexure 'C' of their sales tax return. In the order-in-original the Assessing Officer held that *'the appellant (respondent herein) had deposited a total sum of Rs.85,781,780/= on account of SST on some of the telecommunication services at 16% & 17% on the taxable services. It was further held by the Assessing Officer that the appellant (respondent herein) has also deposited sales tax at 16% on telecommunication services provided to cell phone users. The appellant (respondent herein) also deposited sales tax @ 19.5% on the same service under the head of cell phone users'*. Assessing Officer directed the respondent to deposit Rs.85,781,780/= under section 23 of the Act along with penalty of Rs.4,289,089/= together with default surcharge to be calculated at the time of payment.

6. Against the order in original the respondent earlier filed appeal before Commissioner (Appeals) who dismissed the appeal and upheld the order-in-original. The Commissioner (Appeals) in para 63 of its order held that *"the appellant is registered as service provider for telecom services and is not registered with any regulator as service provider of banking services"*. The Commissioner (Appeals) in the same para further held that *'as per the BBR (Branchless Banking Regulations) issued by SBP, the Government did not grant mobile network operators or any other non-banking entity the privilege of account management and fund's safe keeping. Therefore, a licensed commercial bank or microfinance institution could alone provide BBS (Branchless Banking Services) to customers'*. In para 72 of the order the Commissioner (Appeals) further held that *"Thus, having perused the SBP letter cited supra it is clear that, the appellant cannot provide*



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banking services and their contention that, AC-SRB, was unjustified in declaring banking services rendered by the appellant to be telecommunication services, also is rejected being devoid of merit, far from facts and being infructuous".

7. The said order in appeal was challenged by the respondent before this Tribunal by way of filing of Appeal No. At-210/2015 which was allowed and the appeal was remanded to Commissioner (Appeals) to determine the value of service and then to determine the amount of tax payable by the appellant. The Commissioner (Appeals-1) passed fresh order, which is being challenged by the department in this appeal.
8. On 27.03.2019 Mr. Vicky Dhingra, AC referred para 19 of order of Tribunal in Appeal No. AT-210/2015 and submitted that the Tribunal has only set aside the order in appeal and remanded the case for fresh decision, whereas the order in original was remained in field and has not been set aside which provides that the tax is to be paid @ 19.5% as provided under 98.12. He submitted that despite the fact that the Tribunal has directed to provide right of hearing to both the parties the Commissioner (Appeals) only called upon a report from the Appellant about of value of services and tax amount and the same was duly filed on 12th February, 2019. He also submitted that since the right of hearing was not provided despite the fact that appeal remained pending before Commissioner (Appeals) for long time the facts relating to the case could not be brought before Commissioner (Appeals).
9. On a question from the Tribunal Mr. Vicky submitted that earlier order of Tribunal was not challenged before High Court in Referential Jurisdiction as the order in original was intact and not set aside by the Tribunal.
10. On a question from the Tribunal Mr. Vicky submitted that the Commissioner (Appeals) erroneously calculated the tax @16% instead

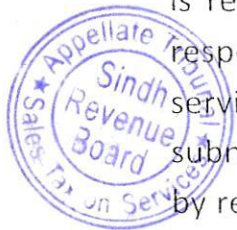


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of 19.5% as provided under tariff heading 98.12 and its related services. He then submitted that the services provided by respondent is related to telecommunication and not banking service and is liable to be taxed @ 19.5%.

11. Mr. Vicky referred to para 5 and 6 of the Order in Appeal and submitted that the Commissioner (Appeals) has committed an error in holding that the earlier agreement i.e. Branch Less Banking Agency Agreement was not discussed instead of the Cooperation Agreement was discussed, which is not correct. He also submitted that Banking Agency Agreement was dated 21.11.2018 whereas the Cooperation Agreement was dated 15.06.2010 and referred to the recital of the Agency Agreement which provides that the Agency Agreement Supersede and replaced the Cooperation Agreement.

12. On 06.05 2019 Mr. Vicky Dhingra submitted that as per the cooperation Agreement the respondent is under mandatory obligation to provide telecom services to effect/execute branchless banking transactions for which a mobile phone connection and Telenor active S.I.M and connection of point of sale terminal with Tameer Banking System is mandatory. He then submitted that clause showing definition of point of sale which clearly shows the purpose i.e. electronic fund transfer which is the job of Tameer Bank, but same is required to be done by Telephony infrastructure provided by the respondent, this show that the respondent is providing telecom services and not services relating to banks. Mr. Vicky further submitted that there are two services one is banking service provided by respondent through its telephony infrastructure and is liable to pay tax at the rate on which the other telecom services has charged to tax @19.5%. He then submitted that according to clause 1.2, and 1.5 of Terms & Conditions of Easy Paisa respondent is providing data and network services for the purpose branchless banking transactions and the same may not be mixed with SMS sent or received by a consumer using network of respondent. He referred to Ground No.14 of the Appeal under the heading "Section D" and submitted that the



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respondent despite requests have not produced Service Level Agreement as mentioned in clause 8.2. of Cooperation Agreement. He then referred to para 18 of grounds of appeal and submitted that according to study of CGAP Tameer bank is authorized to maintain normal as well as mobile accounts and in branchless banking service Tameer was first to outsource the operation of mobile accounts to respondent.

13. Mr. Arsalan Siddiqui supported the order of Commissioner (Appeals-1) and submitted that the respondent in the earlier order of the Tribunal dated 24.03.2016 in Appeal No.AT-210/2015 all these grounds argued by the learned AC have been duly considered and the Tribunal has held that the funds transfer services are banking services provided by the respondent on behalf of Tameer Bank under Cooperation Agreement and Branchless Banking Regulations of State Bank of Pakistan.

14. He then submitted that the earlier order of the Tribunal was specific and the remand was to determine the value of funds transfer services and then to determine the tax. He then submitted that the Services Level Agreement was provided to the learned AC and the same was acknowledged in para 16 of the order in original. He also referred to the reported judgment of the Honorable Supreme Court of Pakistan in the case of Habib Safe Deposit Vault and submitted that sales tax is levied on services and not on institution or person and tax has to be levied on the basis of services provided or rendered and referred to para 15 to 17 of the earlier order of the Tribunal. He then submitted that all these arguments were also placed before the Commissioner (Appeals) by the learned AC and the Commissioner (Appeals) has provided full opportunity to the AC to present his case. He then submitted that in the earlier order the Tribunal in para 17 has clearly decided that the appellant is liable to pay sales tax at such rate on the services that it provided and the department has not challenged the findings before the High Court in referential jurisdiction and the findings had attained finality and cannot be reopened at this stage.



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15. Mr. Vicky referred to para 19 of the earlier order of the Tribunal and submitted that the arguments advanced today are not beyond the scope of the earlier order of the Tribunal. He then submitted that the Commissioner (Appeals) unnecessarily kept the appeal pending for almost three years for a reconciliation which was already available on page 30 para 20 of order in original and the details are also available as Annexure "A" to the show cause notice.
16. We have heard the learned representatives of the parties and perused the record made available before us.
17. The question in the appeal is whether the branchless banking services provided by the respondent to M/s Tameer Bank is a banking service covered under Tariff heading 98.13 or is a telecommunication service under Tariff Heading 98.12. In our earlier decision in Appeal No. AT-210/2015 We have held as under:-

"12. The appellant entered into an Agreement dated 15.06.2010 with Tameer Bank. Clause 4.1 of the Agreement provides that "Tameer hereby appoints Telenor to be its agent to provide Branchless Banking Services to the customers and the Telenor hereby accept such appointment". Clause 4.2 of the said Agreement provides that "Branchless Banking Services will be offered and provided by Telenor as Tameer's agent at certain Telenor outlets as agreed to between the parties". clause 4.5 of the said Agreement provides that "without prejudice to clause 3.4 the following activities which are currently permissible activities under the BBR are contemplated and the same will be undertaken by Telenor for and on behalf of Tameer:

- (a) Opening and maintain a BBA (Basic Bank Account)
- (b) Account to account fund transfer
- (c) Person to Person fund transfer
- (d) Cash in and cash out
- (e) Utility bill payments
- (f) Merchant payments
- (g) Loan disbursements/payments
- (h) Remittances"

M. S.



Apart from above services the appellant may also provide other Branchless Banking Services as provided under sub-paras of Clause 4.5 of the Agreement. From the above quoted clauses of the Agreement it appears that the appellant being agent (of Telenor typing error) is providing funds transfer service falling under tariff heading 9813.4600 to the customers of Tameer Bank on behalf of Tameer Bank under a valid agency agreement dated 15.06.2010 entered into between the appellant and Tameer Bank.

18. From the above quoted portion from the earlier order it is clear that this Tribunal has already decided that the nature of services provided by the respondent is banking service covered under Tariff Heading 9813.460. None of the parties have challenged the earlier order before the High Court in referential jurisdiction and the earlier order has attained finality and cannot be reopened now.

19. From the facts of the case it appears that appellant is providing two type of service. One is its normal telecommunication services upon which undisputedly Sindh sales has been paid and the other is providing funds transfer services (branchless banking services). The Assessing Officer in the order in original has held that *"The appellant (respondent herein) also deposited sales tax @ 19.5% on the same service under the head of cell phone users"*. From this it is clear that the respondent has deposited sales tax on the service of telecommunication at the applicable rate of 19.5%.

20. In the earlier order in Appeal No. AT-210/2015 this Tribunal also held as under:-

"The Issue before the Honorable Supreme Court in Appeal No. 911/2015 (Habib Safe Deposit Vault (Private) Limited versus The Province of Sindh and Sindh Revenue Board) was that Habib Safe Deposit Vault was not a banking Company and cannot be made taxable under the tariff heading 98.13. The contention of the Habib Safe Deposit Vault before the Honorable Supreme Court was that the business of Habib Safe Deposit Vault was to provide safe deposit lockers to customers, but as it is not a banking company the provision of such services is not liable to sales tax. The Honorable Supreme Court in para 10 of the judgment has held that "10. The appellant comes within the phrase "other persons" as mentioned in tariff heading 98.13 and

provides services of safe deposit lockers / safe deposit vault to its customers. The said tariff heading 98.13 also prescribes a rate of tax (15%). Therefore, the appellant is liable to pay sales tax at such rate on the services that it provides". From the above it appears that the sales tax is payable on the basis of actual services provided or rendered or on the basis of nature of service and not on the basis of registration or nature of business".

21. The Sindh sales tax on services has not been levied on institutions, or persons or service providers but the tax has been levied on the services listed in the second schedule of the Act. The tax has to be on the basis of nature of service. The respondent being a service provider of telecommunication services is also providing funds transfer services falling under Tariff heading 9813.4600 of the second schedule and is liable to pay Sindh sales tax at the applicable rate which was undisputedly deposited. From the order in original it is clear that the Assessing Officer has only quoted main heading 98.12 and has failed to mention the specific tariff heading under which the transfer of fund/branchless services falls.

22. As far as the complaint of the AC regarding not providing proper right of hearing is concerned we noted that from the order in appeal it appears that Mr. Javed Ali, AC was present and his arguments/submissions were recorded in para 3 of the order in appeal. The Commissioner (Appeals) also discussed the arguments/submissions of the AC in para 6 and 7 of order in appeal. In our view proper right of hearing was provided to the department through the AC appeared and Mr. Vicky Dhingra is unnecessarily complaining/agitating the same and maligning a senior officer.

23. As far as the complaint of the AC that the respondent has not produced Service Level Agreement is concerned Mr. Arsalan Siddiqui submitted that the Services Level Agreement was provided to the learned AC and the same was acknowledged in para 16 of the order in original. The Assessing Officer has referred the said agreement in para 16 and has not stated that copy has not been supplied. Mr. Vicky



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Dhingra is in habit of making such complaints. In another Appeal No. AT-01/2019 similar complaint was made despite the fact that documents were provided to him.

24. The Commissioner (Appeals-1) in reaching to the conclusion that the respondent is discharged from the liability created under OIO rightly relied upon the earlier decision of the Tribunal. In view of the above discussion we do not find any reason to interfere with the order in appeal. The appeal is dismissed having no merits. The copy of the order may be provided to the representatives of the parties.


(Agha Kafeel Barik)
Member Technical


(Justice (R) Nadeem Azhar Siddiqi)
Chairman

Karachi. Dated. 14. 05. 2019

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Copies Supplied to:

- 1) The Appellant through Authorized Representative
- 2) The Assistant Commissioner, SRB for compliance
Copy for Information
- 3) The Commissioner Appeals, SRB
- 4) Guard File
- 5) Office File


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

20/5/19


Registrar

Order Dispatched on

20/5/19

Registrar