BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD At KARACHI

DB-I

APPEAL NO. AT-36/2019

M/s. Summit Bank Limited .....Appellant

Versus

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

Date of Filing: 01.04.2019
Date of hearing 19.02.2020
Date of Order 24.03.2020

Mr. Saud ul Hassan, Advocate, Mr. Arsalan Siddiqui, ACMA and Mr. Fahad Faruqui, Manager Tax for Appellant

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

Sindh Revenue Board Appellate Tribunal Sales Tax on Services

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.67/2019 dated 14.03.2019 passed by the Commissioner (Appeals) in Appeal NO. 149/2016 filed by the Appellant against the Order in Original (hereinafter referred to as the OIO) No. 225/2016 dated 07.04.2016 passed by the Assistant Commissioner (Ms. Lubna Najmi) SRB, Karachi.

01. The facts of the case as mentioned in the OIO are that the Appellant was voluntarily registered with SRB under the Tariff heading 9813.4000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (herein after referred as the Act) and was engaged in providing or rendering banking services under the Tariff Heading 98.13 of the Second Schedule to the Act chargeable to Sindh Sales Tax (SST) at the rate of 16%.

02. It was alleged in the OIO that from the scrutiny of the available record it was observed that the appellant declared services of Bancassurance amounting to Rs.**14,213,000/=** for the quarter ended December, 2013, and Rs.7,184,000/= for the quarter ended September, 2013 as exempt services. Whereas, under the provisions of Rule 30 of the Sindh Sales Tax on Service Rules, 2011 (herein after referred as the Rules) every banking company shall pay the sales tax leviable on all services rendered or provided to any person except the services of utility collection, umrah, haj services, cheque book, musharika and modaraba financing thus the appellant had made short payment of SST amounting to Rs.3,423,520/=.

03. A Show-Cause Notice dated 23.06.2014 was served upon the appellant for assessment under section 23 of the Act with default surcharge and imposition of penalties under serial No. 3 and 11 of the Table under section 43 of the Act. The appellant submitted replies dated 25.07.2014 and 11.03.2016 contending as under:-

(i) The impugned service does not come within the bracket of section 3 read with section 2 (79) of the Act.

(ii) The impugned service does not fall under any of the sub-heading of the main Tariff Heading 9813.4000 of the Second Schedule to the Act. He placed reliance on reported case of Citibank Limited versus Commissioner Inland Revenue, 2014 PTD, 284.

(iii) Tariff Heading 9813.4990 was subservient to sub-heading 9813.4900 and not to sub-heading 9813.4000.

04. The Assessing Officer (AO) had passed OIO for the sum of Rs.3,423,520/= under section 23 (1) of the act invoking Tariff Heading No. 9813.4990 treating it as sub-heading 9813.4000 along with default surcharge and penalty of Rs.171,176/= under serial No. 3 of Table under section 43 of the Act and of Rs.171,176/= under serial No. 11 of Table under section 43 of the Act.

05. The appellant challenged the said OIO by way of filing appeal before the Commissioner (Appeals) who after keeping the appeal pending for nearly 2 years and 10 months dismissed the same for non-prosecution, hence this appeal.

06. Mr. Arsalan Siddiqi the learned representative of the appellant challenged the OIA and submitted that appeal was filed in 2016 and the Commissioner (Appeals) after keeping the appeal pending for about three years dismissed the same for non-prosecution despite the fact that written submissions were sent through e-mail as well as hard copy was sent through post. In support of his claim he placed on record copy of e-mail. He also submitted that the Commissioner (Appeals) erroneously counted all the adjournments on account of the appellant instead of excluding only those adjournments which were specifically obtained by the appellant. He also submitted that sufficient material was available before the Commissioner (Appeals) including two orders of the Tribunal on the same subject but instead of deciding the appeal on merits the same was erroneously dismissed for non-prosecution.

07. Mr. Arsalan Siddiqui further submitted that the Bancassurance service is not specifically mentioned in the Second Schedule to the Act and submitted that this Tribunal relying upon the reported Judgment in the case of Citi Bank 2014 PTD (284) rendered orders in the case of Allied Bank Limited and Muslim Commercial Bank Limited holding that Bancassurance is not a taxable service. He submitted his written synopsis submitted as under:-

(i) Bancassurance was not a taxable service under Second Schedule to the Act.

(ii) The Commissioner (Appeals) SRB and AC-SRB did not consider the above judgments of the Tribunal and went on to pass the orders in disregard of the order of the Tribunal, which were binding upon them.

(iii) In view of SECP guideline as agreed by AC-SRB, under bancassurance services, insurance company appoints the Banks as its agents for marketing of insurance products to its customers and the Bank acted as an insurance agent.

(iv) The services of Insurance agent have recently been introduced to Sindh Sales Tax vide the Sindh Finance Act, 2019 through Tariff Heading 9855.0000 of the Second Schedule to the Act. Thus tax on bancassurance services prior to July, 2019 was not taxable.

(v) The AC-SRB in the SCN has classified bancassurance services under main Tariff Heading ~~of~~ 98.13 ("services provided or rendered by banking companies.....") without mentioning the specific sub-heading under which the alleged bancassurance service is liable to tax.

(vi) The AC-SRB at the stage of OIO erroneously invoked Tariff Heading 9813.4990 (Other services, not specified elsewhere). The Tariff Heading not mentioned in the SCN cannot be made basis for passing OIO.

(vii) The AC-SRB clearly did not consider the judgment of High Court of Sindh in the case of Citi Bank N.A V/s Commissioner Inland Revenue (2014 PTD 284) in its true perspective and wrongly sated that the case was decided under the FED law whereas the Sindh Sales Tax law is distinguishable.

(viii) The legal position after the judgment of the High Court of Sindh in the case of 2014 PTD 284 (Citibank N.A V/s Commissioner Inland Revenue) and the AT-SRB is that bancassurance service was not a listed taxable service during the periods under review. However bancassurance service was rendered taxable under service category of insurance agents, Tariff Heading 9855.0000 of the Second Schedule to the Act with effect from 01st July 2019.

08. The learned AC for the respondent in his written synopsis submitted as under:-

(i) M/s. Summit Bank Limited having SNTN-S2663705-7 is registered with SRB under Tariff Heading 9813.40000 ("Services provided or rendered by banking companies") in relation to sub-heading thereof read with main Tariff Heading 98.13 of the Second Schedule to the Act chargeable to SST at the applicable rates within the meaning of section 3, 8, 9 & 17 of the Act read with rules 3,4,5,6 and 30 of the Rules.

(ii) In view of agreement with insurance companies the bank provided bancassurance service to insurance companies and earns certain amount of commission on the said services under the agreement. The bank receives the commission from insurance companies, and not from the customer/account holder against the services of bancassurance provided to the insurance company. Moreover, there is no burden of double taxation because under the agreement, the insurance company is the service recipient and the bank is the service provider therefore the said service was taxable under the Tariff Heading 9813.40000 read with Tariff Heading 9813.4990 to the Second Schedule of the Act.

(iii) In the decision of the CITI Bank, Honorable High Court has observed on the basis of available facts that "insurance commission" was not mentioned specifically under entry 8 of the First Schedule of Federal Excise Act, 2005. However, it was determined that the same was not taxable without considering the actual business module of bancassurance services, in which the services provided or rendered by the banking companies to insurance companies were taxable.

(iv) The appellant is engaged in bancassurance service under the Guidelines 2010 issued by Securities & Exchange

Commission of Pakistan (SECP), Insurance Division vide circular No. 5/2010 dated 23rd January, 2014.

(v) It was clarified in relation to the fact that there was no specific Tariff Heading mentioned under the SCN. It was stated that the banking companies were defined under Section 2(28) of the Act, 2011 read with the Section 7 of the Banking Companies Ordinance 1962 in which the form of business of banking companies were defined. Accordingly, Section 3 of the Act provides the definition of taxable service provided or rendered by the registered person read with the definition of service mentioned under Section 2(79) of the Act, 2011. The combined interpretation of the definitions shall be read with main Tariff Heading 98.13 which provides the description of services provided or rendered by the banking companies & others. The interpretation of main Tariff Heading 98.13 leads the sub-tariff heading 9813.4000 (Services provided or rendered by banking companies in relation to all relevant entries of banking companies mentioned under Second Schedule). Accordingly, the registration under Tariff Heading 9813.4000 applied to all the relevant sub-tariff headings of banking companies as mentioned under the Second Schedule to the Act. Therefore, factually the description of services provided or rendered by banking companies as already mentioned in the SCN or OIO shall be interpreted with the description of main Tariff Heading 98.13 read with the description of Tariff Heading 9813.4000 and sub-heading thereof and applied accordingly.

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

09. The dispute between the parties is that whether the service provided by appellant to insurances companies was taxable under

the Tariff Heading 9813.4990 of the Second Schedule to the Act or not.

10. 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 show cause notice. The SCN was issued invoking main Tariff Heading 98.13 (services provided or rendered by banking companies) in relation to alleged service of bancassurance provided by the appellant to insurance companies. The entries relating to banking companies commence from Tariff Heading 9813.4000 to 9813.7000 and none of these sub-headings relates to service of bancassurance. Apparently at the time of issuance of SCN the officer was not sure under which Tariff heading this services fell and for that reason rule 30 of Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as 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. It is pertinent to mention that the scope of tax cannot be enlarged through framing of Rules under enactment. The Rules are sub-ordinate legislature which is framed by the executive under the delegated powers. The tax can only be levied by legislature under specific intendment and unambiguous provisions.

11. The effect of non-mentioning or deviation from Tariff Heading confronted in the SCN was violative of law laid down by the Honorable Supreme Court in the reported case of The Collector Central Excise and Land Customs and others versus Rahim Din, 1987 SCMR 1840 in which it was categorically 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".*

The initiation of proceedings under a particular Tariff Heading and its conclusion/termination on a different Tariff Heading which was never confronted to the tax payer is not lawful and thus cannot be allowed.

12. The next question is whether bancassurance is a service listed in the Second Schedule to the Act. The listed services as per section 3 of the Act are those services which are listed in the Second Schedule to the Act.

13. The contention of the AC that all services provided by the Banking Companies irrespective of Tariff Headings are taxable has no force. This aspect has been considered by the High Court of Sindh in the case of Citibank 2014 PTD 284 as under:-

> *"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. 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.

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The crux of the matter is that main Tariff Heading only provide for the service providers who has to provide or render services mentioned in the sub or sub-sub headings. This had 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 them were included in Heading No.98.13 cannot be accepted and is against the specific listing of services.

14. The DB-I of this Tribunal in its earlier order dated 28.08.2017 passed in the case of Allied Bank Limited versus SRB, Appeal No. AT-205/2015 had held as under:-

> *"19.11. 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."*

15. The DB-II of this Tribunal comprising of Mr. Muhammad Ashfaq, Member Judicial and Ms. Razia Sultana Taher, Member Technical in the subsequent order in the case of Habib Bank Limited (Appeal No. AT-66/2017 pronounced on 07.02.2018 after the order of DB-I in Allied Bank Case took a different view without referring the matter for constitution of a larger bench and held as under:-

> *"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".*

16. Thereafter the Bench II comprising of Mr. Muhammad Ashfaq, Member Judicial and Ms. Razia Sultana Taher, Member Technical heard Appeal in the case of Muslim Commercial Bank Limited, Appeal No. AT- 20/2017 on 06.03.2018 and reserved the appeal for order. The Technical Member recorded findings on 16.03.2018 taking contrary view to the case of Citi Bank (2014 PTD 284, Judgment of High Court of Sindh) and the earlier order dated 28.08.2017 of DB-I of this Tribunal in the case of Allied Bank, Appeal No. AT-205/2015 and the Judicial Member had recorded separate findings dated 03.04.2010 dissenting with the findings of the Technical Member and agreeing with the earlier decision of the Tribunal in the case of Allied Bank, supra.

17. The learned Technical Member while recording findings in the case of MCB, Appeal No. 20/17 dated 16.03.2018 relied upon findings recorded in paras 12 to 14 in Appeal No. AT-66.2017 (Habib Bank Limited) dated 07.02.2018 and has concluded that bancassurance is a service.

18. The learned Member Judicial though earlier agreed with the Technical Member in the case of Habib Bank Limited, supra this time took a different view vide order dated 03.04.2018 in Appeal No. AT-20/2017 and had held that bancassurance is not a service.

19. The difference of opinion between the two members in Appeal No. AT-20/2017 was referred to the Chairman who after hearing the parties vide order dated 05.10.2018 held as under:-

> *"...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, it was held and the relevant portion is reproduced as under:*

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"...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....."
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 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..."

20. In view of the above discussion, while relying upon the reported case of Citibank Supra, the appeal is allowed and both the OIO and OIA are setaside and annulled. The copy of the order may be provided to the learned representatives of the parties.

(Imtiaz Ahmed Barakzai)
Member Technical

(Justice® Nadeem Azhar Siddiqi)
Chairman

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order Dispatched on 20/04/2020
Registrar

Order issued on 20/04/2020
Registrar

Karachi
Dated: 24.03.2020
Copy for compliance:

1. The appellant through authorized Representative.
2. The Assistant Commissioner (Unit-), SRB, Karachi.

Copy for information to:-

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