

(Guard file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

APPEAL NO. AT-39/2019

M/s Azee Securities (Pvt.) Ltd Appellant

Versus

Assistant Commissioner, SRB Karachi. Respondent

Mr. Shahid Hussain FCA/Advocate For Respondent

Mr. Muhammad Saleem AC-SRB For Appellant

Date of hearing 02.05.2019

Date of Order 09.05.2019

ORDER

Mr. Agha Kafeel Barik: This appeal has been filed against order of Commissioner (Appeals) dated 30.03.2019 on the following main grounds.

Grounds

1.01. "That the learned Commissioner (Appeals) SRB has failed to abide the decision of Appellate Tribunal SRB on non-applicability of SST on late payment charges by Brokerage house falling under tariff heading 98.19 of the second schedule to the SSTSA."

1.02. "That the learned Commissioner (Appeals) SRB failed to understand that the levy of SST on "late payment charges" was contested in the appeal and not the reimbursement of expenses."

2. As per facts of the case the appellant is a stock broker registered under tariff heading 9819.1000. A show cause notice was issued on 11.04.2018 that it was also providing various taxable services under tariff headings 9819.1000, 9819.6000 and 9819.8100 of the 2nd Schedule, during the periods from July, 2013 to June, 2015. The registered person earned revenue of Rs.123,448,940/- during the said period and according to the show cause notice it was liable to pay sales tax of Rs.19,049,686/- on these receipts, against which it declared and paid Sindh Sales Tax at Rs.14,435,511/-, thus balance payable Sindh Sales Tax was 4,614,175/-. After Obtaining an explanation of the registered person the AC (unit-12) passed order under section 23, on 24.12.2018,

creating Sindh Sales Tax demand of 4,614,175/- beside penalty of Rs.230,708/- under section 43 (3) and default surcharge of 140,075/- under section 44 of the Act.

3. On the assessment order the AC recorded that since the said person had already discharged its liability in respect of brokerage commission income and Commission on initial public offering (IPO), no action was taken by him.

4. However, in respect of Income through applied financial charges the AC alleged that Sindh Sales Tax amounting to 2,395,444/- for 2014 and 2,320,602/- for 2015 was payable on receipts under this head chargeable under tariff heading 9819.1000 read with Rule 41 but same were contested by the tax payer as "financial charges that were received from the customers against unpaid outstanding amount and were reimbursed to the bank against the markup charges/interest expense. Reference was made to Rule 41 (3) in this regard. The Assessing Officer did not accept the contention of the registered person that it was not a service. The AC held that since the money was used for the sole purpose of buying and selling of shares on which the registered person earned these charges, it is chargeable to tax under tariff heading 9819.1000, read with Rule 41. Thus the AC assessed it to Sindh Sales Tax amounting to Rs.4,614,175/- for the two years, after giving credit to a payment of Rs.101,871/- for 2015. The officer also imposed penalty of Rs.230,708/- under section 43 (3) @ 5% for non-payment of this tax. Default surcharge was further imposed at Rs.140,075/- under section 44.

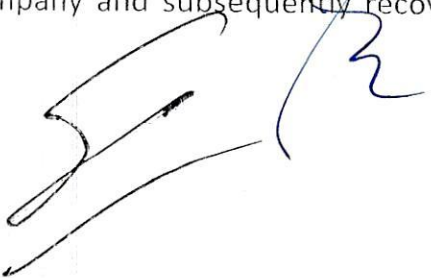
5. On appeal the Commissioner (Appeals) confirmed the Order-in-original and dismissed tax payer's appeal with his findings as under.

"The study of the above submission of the Appellant shall show that the matter revolves around the "receipt of the amount from clients and subsequent payment to banks". The Appellant equated the transaction with the "late payment charges" and submitted that it is a reimbursement in its nature but not a service. Therefore, per the Appellant the amount could not be taxed. In support of his contention the Judgment of this forum in the matter of M/s Arif Habib Limited is relied upon. By rendering the underlined portion hereinabove it shall be learned that it appears to be an advance payment by the clients for their future defaults. Ideally a liability has to be discharged, if and when the same has accrued. In view whereof the questions shall arise that how a liability has been discharged before its accrual. Because, if there is no accrual of a liability, there is no concept of discharging the same. Supposedly, if a person/client fails to pay towards the stock/trade to be managed by the Appellant and there arises a vacuum then only the question of "late payment" has to arise. It is not possible that the Appellant receives "late payment charges" before taking place of such incident of "late payment". In such circumstances the submission of the Appellant that the Appellant receives the amounts against the late payment charges and subsequently pays the same to the banks etc cannot be accepted."

6. In his appellate order the Commissioner (Appeals) has referred to a judgment of Sindh High Court in Jamshoro Power Company reported as 2017 PTD 237 to drive his point home as to how "late payment charges" or as it was placed before him "reimbursement of expenses" would be treated. In the cited judgment the honorable High Court has held that reimbursement of Income Tax shall be treated as "business income" and not "other (miscellaneous) income". The Commissioner (Appeal) has tried to draw an analogy of that decision to the present case before us to prove that any reimbursement of expenses or late payment charges is part of the consideration of the same taxable service for imposing Sindh Sales Tax. However, it is observed that the learned Commissioner (Appeals) has erred in making the comparison of the two laws. In fact the judgment of Sindh High Court cited by him is one of the decisions on the theory of "tax on tax". In simple words if an employer or the principal of a contractor under takes to pay income tax payable on the salary of his employee or the consideration of the contract, the amount of income tax so paid on behalf of the employee or the contractor, as the case may be, is treated as perquisite and a part of the 'income on which it is payable. Thus further tax or "tax on tax" is payable on such amount of tax paid or reimbursed to the person by whom it is originally payable. There is plethora of case law on this issue. Income tax law is totally different from sales tax law. In income tax law every revenue receipt is taxable unless declared exempt and listed in the Second Schedule, whereas in Sales Tax on Services law no service is taxable unless listed in the Second Schedule.

7. The issue in this case about late payment charges or reimbursement of expense is not that of taxability to income tax, which these are. The question here is whether these receipts are in the nature of the consideration or value of a taxable service or not under sales tax on services law. As discussed supra both the laws are poles apart in respect of chargeability and one cannot be equated with the other. In income tax it is a settled law about perquisites and under section 18 (d) (2) a perquisite is to be regarded as a business receipt. On the other hand, there is no provision of law in sales tax on services law as how to treat late payment charges as taxable service or part of existing taxable service.

8. The learned Commissioner (Appeals) has further referred to a judgment of this Tribunal in the case of M/s Arif Habib limited and observed that the said judgment speaks of the absence of the element of services. He has differed with the judgment of the Tribunal to further observe that it is not in line with the judgment of Sindh High Court in the case of Jamshoro Power Company. He has thus held that the Tribunal was not assisted properly (in the case of Arif Habib Ltd.) so as to give a proper treatment if the transactions were in fact in the nature of reimbursements. While the nature of transaction of an expense, (whether paid in advance by the clients or first paid by the appellant company and subsequently recovered from clients) can be sorted out from



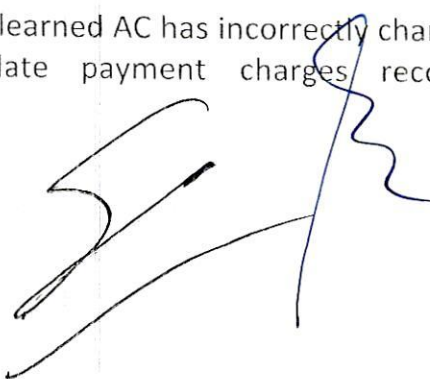
the accounts, we observe that as discussed at length above the learned Commissioner (Appeals) has grossly erred in drawing an analogy from an income Tax case law.

9. In the present case if the clients of the appellant stock broker company paid amounts in advance to settle their contingent liabilities these would become part & parcel of the same business or service in whose rendering/ provision these were paid. However, it appears that these payments were made by the clients as reimbursement of expenses already born by the appellant company to settle their liabilities regarding their business of sale & purchase of stocks, with the Stock Exchange. Elaborating the system the learned AR stated that as the clients place their orders on phone /online they have to settle the dues in a day or two, generally known as T.1 or T.2. As there is normal delay of 2-3 days on their part, the stock broker company pays the amounts to the Stock Exchange, sometimes borrowing the money from the bank and paying markup on the same. Subsequently, the clients while settling their accounts have also to reimburse such expenses known as 'late payment charges' to the stock broker Company. As such these do not form a taxable service as held by this Tribunal in so many cases including Arif Habib limited. Relevant part of the judgment of this Tribunal in M/s Arif Habib Limited in Appeals No AT-45 & 47/2017 dated 13.08.2018 is cited as under:

"The tax under tariff case 9813.100 can be levied on fulfillment or two conditions. First the service provider comes within the specified institutions mentioned in Tariff 98.13 or other persons dealing in such services and secondly the services which were provided are listed under Tariff Heading 98.13. Admittedly the Advisory and Consultancy service and late payment charges is not mentioned under tariff heading 98.13 and a service of stock broker cannot be taxed under other tariff heading. The Honorable High Court in the Judgment of Citi Bank Supra very clearly stated that any those services specified in the Schedule are taxable and if any service is not specified in the Schedule it is exempt from excise duty even if it comes within the definition of contained in Section 2 (23) of the Federal Excise Act. The position is clear as both the alleged services "advisory and consultancy" and "late payment charges" are not listed services in the Second Schedule of the Act of 2011."

10. The learned A.R argued that the appellant never claimed these expenses as advance payment of contingent liability in any manner, as alleged by the Commissioner (Appeals). He also submitted copy of grounds of appeal filed before Commissioner (Appeals) to show that in the grounds before the Commissioner (Appeals) also he had agitated the same point stating these were late payment charges. These are reproduced below:

i. "That the learned AC has incorrectly charges Sales Tax amounting to Rs.4,614,175/- on financial /late payment charges/ recovered by the appellant amounting to



Rs.14,971,526/- for tax year 2014 and Rs.15,470,682/- for tax year 2015 from the clients which does not fall under tariff heading 98.19 of the second schedule to the SSTSA.”

ii. “That the learned AC has erred in the recovery of Sales Tax on financial/late payment charges which does not fall under any tariff heading of the second schedule to the SSTSA.”

11. Apparently there was no material available before the learned Commissioner to hold that “it appears to be an advance payment by the clients for their future default. The Commissioner (Appeals) in giving findings traveled beyond the pleadings of the parties. This fact was neither pleaded by the AC nor of the appellant and it appears to be wishful hopes of the Commissioner (Appeals) to tax the appellant.

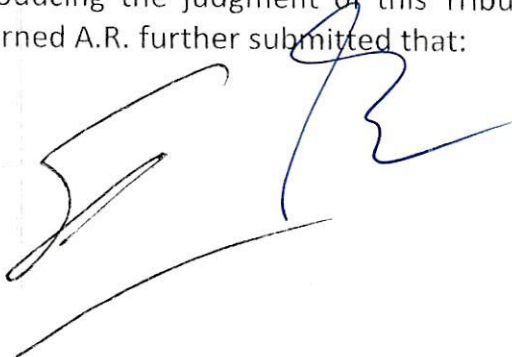
12. Even if the parties have made advance payment the same cannot be taxed until it was converted into charges / consideration for providing or rendering services. Against receiving late payment charge no service was provided and it is re-imbusement not falling with in ambit of service. Rule 41 of the rules 2011 provides for “Services provided or rendered by Stock brokers, Commodity brokers or future brokers. Sub rule (3) provides, the services which can be taxed and the late payment charged is not included in the services listed in clause (a) to clause (d). I am quoting this without prejudice to my view that the scope of payment of tax cannot be enlarged through rules and all services required to be taxed should be part of 2nd Schedule of the Act.

13. The learned A.R further argued as under

“That the learned AC and later Commissioner (Appeals) SRB has erred while calculating/ upholding sales tax liability for the Tax Year 2014 & 2015 on income through applied financial charges, which were reimbursed from client as they paid/ settled their liability towards settlement of shares they purchased through the appellant brokerage house, the office has ignored the order passed by the Appellate Tribunal, Sindh Revenue Board dated August 13, 2018. It was decided in the said order that financial/ late payment charges is not listed service in the Second Schedule of SSTSA, therefore, it is exempt from levy of Sindh Sales Tax.”

It is now a decided matter in the case of stock and commodity brokers whose taxable activity falls under tariff heading 98.19 of the second schedule to SSTSA and it is not possible to tax the financial / late payment charges under tariff heading 98.19 because it is not mentioned in its sub-headings.”

14. After reproducing the judgment of this Tribunal dated 13.08.2018 in M/s Arif Habib Ltd. the learned A.R. further submitted that:



"We would also like to state that orders/decisions of Honorable Supreme Court, Honorable High Court and Appellate Tribunal are binding on lower courts. It is stated in a reported judgment as 73 TAX 132 (copy attached) that interpretation or enunciation of any point of law by Honorable High Court and Appellate Tribunal has the force of precedent and is binding in absolute form on all sub-ordinate Courts and Tribunals." "Therefore, the said order is binding on Assistant Commissioner who charged sales tax on late payment charges."

15. In view of the above discussion and following the earlier decisions of the Tribunal, in particular the judgment of 13.08.2018 in the case of Arif Habib Ltd. in AT45-47/2017 I hold that 'late payment charges' do not constitute receipts from any service enlisted in the 2nd Schedule, hence not taxable to Sindh Sales Tax on Services.

16. Consequently, the impugned order is set aside and the appeal is allowed.

17. Before parting with this order I want to express that though Commissioner (Appeals) is an officer of SRB but being Commissioner (Appeals) a heavy quasi-judicial responsibility is cast on him to provide justice and relief to those to whom the department has not provided relief. The Commissioner (Appeals) in his quasi-judicial function is not bound by the departmental instructions as provided in the proviso of S-79 of the Act of 2011.

18. I wish to record my dismay on the attitude of the Commissioner (Appeals) and Assessing Officer for not following our orders and interpreting the same according to their whims. Our order in Arif Habib is still in field and has not been set aside by the High Court of Sindh and is binding upon the learned Commissioner (Appeals) and learned Assessing Officer.

(Agla Kafeel Barik)
TECHNICAL MEMBER

Karachi

Dated: 09.05.2019

Copies supplied for compliance:-

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

Copy for information to:-

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

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on-----

09/05/19

Registrar

Page 6 of 6

Order Dispatched on-----

09/05/19

Registrar