

BEFORE THE APPELATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

SB-1

APPEAL NO. AT-63/2019

M/s Kashaf Foundation, Lahore.....Appellant

Versus

Commissioner (Appeals-I), SRB, Karachi and another.....Respondent

Date of Filing: 21.06.2019

Date of hearing 30.07.2019

Date of Order 26.08.2019

Mr. Muhammad Umer ITP for Appellant

Mr. Kaleemullah Siddiqi, AC-DR, SRB for Respondent

ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.91/2019 dated 25.04.2019 passed by the Commissioner (Appeals-I) in Appeal No. 464/2018 filed by the appellant against the order in original No.013/2018 dated 14.12.2018 passed by the Assistant Commissioner (Mr. Naheed Ahmed Mirani) SRB, Karachi.

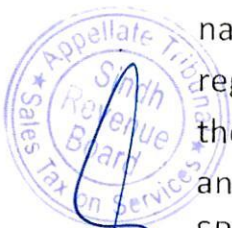
01.The facts as stated in the order-in-original are that the appellant is engaged in providing and rendering taxable services of investment

finance and received consideration in the form of service charges on account of micro loans extended to borrowers in Sindh besides other income. It was also stated that as per the web site of Security and Exchange Commission of Pakistan (SECP) the appellant is a listed as Non-Banking Finance Company. It was further stated that the said services are covered under tariff heading 9813.8100 (others including the services provided or rendered by non-banking finance companies, modaraba and musharika companies and other financial institutions) of the Second Schedule of Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) chargeable to Sindh Sales Tax @ 16% effective from 01.07.2011.

02. It was alleged in the order-in-original that appellant neither got registration with SRB nor deposited any tax with SRB.

03. The appellant was served with a notice dated 27.09.2018 calling upon it to explain why it should not be compulsorily registered under section 24B of the Act and why penalty under serial No.1 of Table under section 43 of the Act may not be imposed.

04. It appears that the appellant despite opportunities failed to file its reply refuting the assertion of the department leveled in the show-cause notice. However, in its letter dated 18.10.2018 the representative of the appellant informed the department that the non-banking micro finance companies operating in Sindh are member of a network/alliance body namely Pakistan Micro Finance Network (PMFN) and is a company registered under section 42 of the Companies Ordinance, 1984 and in the said letter a request for meeting with the Chairman has been made and it was further stated that the decision relating to registration with SRB will be finalized after requested meeting. The appellant vide its letter dated 01.11.2018 claim exemption which was replied by the department vide its letter dated 04.12.2018 and the appellant was informed that the document charges collected for the services are liable to sales tax in Sindh and other provinces of Pakistan.



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05. Finally the Assessing Officer passed order of compulsorily registration of the appellant under section 24B of the Act under tariff heading 9813.8100 of the Second Schedule of the Act and also imposed penalty of Rs.100,000/= under serial No.1 of Table under section 43 of the Act.

06. The Appellant challenged the Order-in-Original by way of filing appeal before the Commissioner (Appeals-I), SRB who dismissed the appeal and upheld the order in original, hence the appellant filed this appeal.

07. Mr. Muhammad Umer the learned representative of the appellant submitted as under:-

(i) The appellant is registered as a non-profit organization with Securities and Exchange Commission of Pakistan under Section 42 of the Company's Ordinance, 1984 and the appellant is working for the welfare of the poor to alleviate the poverty by providing affordable financial and non-financial services to low income households particularly to women to build their capacity and enhance their economic role.

(ii) The Assessing officer has wrongly held that receipt on account of the documentation charges falls under the definition of taxable services. He submitted that it is important to consider that there are two important components of a service that should exist in order to declare the service to be taxable. First one is that it should meet the definition of a service and in the instant case the appellant is a non-profit organization and it has no motive to make profits from micro finance activities and its case is different from commercial financing activities. Accordingly, documentation charges being charged by the appellant are not for the purpose of making profit, rather to cover the costs. The second one is that said service should be specifically listed in the second schedule of the SRB Act, and the document charges are not specifically listed and the tariff heading relating to others has been wrongly invoked.

(iii) The contention of the department that documents charges are covered under tariff heading 98.13 of second schedule is not



correct as the documentation charges are part of the profit on debt and not a separate service and in this case the documentation charges are mere reimbursement of expenses which could not be treated as taxable service.

- (iv) The documentation charges are not the principal activity of the appellant. The principal activity is to provide Micro Financing Facility to deserving and the processing fees and documentation charges, cheque book printing charges, stamp paper, stamp duty are all part of profit/markup and properly amortize.
- (v) The learned representative of the appellant has relied upon the earlier decision of the Tribunal in the case of M/s Zarai Taraqati Bank Limited versus The Commissioner, SRB, Appeal No. AT-51/2014.

08. Mr. Mr. Kaleemullah Siddiqui, AC-DR for the respondent submitted as under:-

- (i) A Non-Banking Microfinance Company (NBMFC) is a non-deposit taking Non-Banking Finance Company (NBFC) and primarily engaged in the business of investment financing within the province of Sindh as specified by Security Exchange Commission Pakistan ('SECP') from time to time.
- (ii) The financial statement of the appellant reveals that it had earned income in respect of processing fees, documentation charges and administration fee. A loan processing, administration fee, documentation charge is a fee charged to a potential borrower for processing a loan application. It is non-refundable and is recovered because the loanee avails some service from the bank/lending institution which utilizes extra manpower and time for processing the loan and is recovered in lieu of processing and approving the loans.
- (iii) The services provided or rendered by non-banking finance companies or institutions are covered under main tariff heading 98.13 and appellant's services are covered under sub-tariff heading 9813.8100 of Second Schedule to the Act, 2011.



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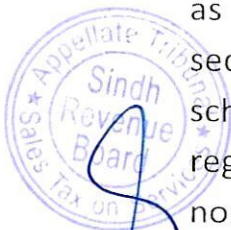
(iv) Besides mark-up income all the other services provided or rendered by the appellant are taxable. The argument of the appellant that their major income comprises of mark-up income hence all the other income in relation to rendition of services shall also be presumed to be exempted is illogical and void.

09. I have heard the learned representatives of the parties and perused the record made available before me including the written arguments filed by the appellant and the comments filed by the respondent.

10. The case relates to compulsory registration of the appellant under section 24B of the Act read with tariff heading 9813.8100 of the Second Schedule of the Act. Section 24 of the Act provides that registration will be required for all persons who are resident and provide services listed in the second schedule from their registered office or place of business in Sindh. Section 24B provides that if a person is required to be registered under the Act, 2011 and that person has not applied for registration, the officer of the SRB shall, after such enquiry as he may deemed fit and after notice, register the person through an order to be issued in writing and such person shall be deemed to have been registered from the date he became liable to registration.

11. The appellant is a resident person and is admittedly registered with SECP as non-banking finance company and is operating in Sindh. As per section 3 of the Act a taxable service is a service listed in the second schedule of the Act, which is provided by a registered person from his registered office or place of business in Sindh. The appellant being a non-banking financial institution is covered by the provision of Tariff Heading 98.13, which provides as under:-

*"98.13 Services provided or rendered by banking companies, insurance companies, cooperative financing societies, modarabas, musharika, leasing companies, foreign exchange dealers, **non-banking financial institutions** and other persons dealing in such services".* (Emphasis supplied). By virtue of this provision the services provided or rendered by the institutions mentioned in the main heading i.e. non-banking financial institutions are taxable under the Sindh Act of 2011.

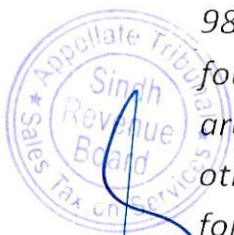


12. The department has invoked sub-tariff heading No. 9813.8100 for the purpose of registration of the appellant, which read as under:-

"9813.8100 (Others, including the services provided or rendered by non-banking finance companies, modaraba and musharika companies and other financial institutions. (Emphasis supplied)

From this provision it is clear that the services provided or rendered by the appellant as non-banking financial institutions are taxable services. The learned representative of the appellant has submitted that there is no specific tariff heading to cover the receipt of document charges and tariff heading 9813.8100 (other) cannot be invoked. The DR submitted that by virtue of sub-rule (1) of rule 30 of the Sindh Sales Tax on Services Rules, 2011 all services provided or rendered by the institutions mentioned in main heading 98.13 are taxable and by virtue of sub-rule (4) of rule 30 the tax is payable on the gross amount charged for the service provided or rendered to the customers. It is true that there is no specific tariff heading for charging sales tax on documentation charges. The tariff heading 9813.8100 is a sub heading under tariff heading 98.13 for taxing the services provided by the institutions mentioned therein. The Honorable High Court of Sindh in the reported case of Citibank 2014 PTD 284 and Justice Munib Akhtar (as he then was) speaking for the bench has held as under:-

"20. 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



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whether or not this type of transaction was a "non-banking service".

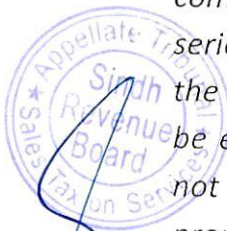
13. The contention of the appellant that documents charges are mere reimbursement of expenses and could not be treated as taxable service is concerned, the appellant may raise this issue at the time of assessment and the same will be considered by the department at that time.

14. Technically the appellant is not a bank but is providing or rendering services which normally the banks are providing. The appellant being a non-banking financial institution is one of the institutions listed in main heading 98.13 and 9813.8100. This aspect has been considered by the Honorable Supreme Court in the reported case of Habib Safe Deposit Vault versus Province of Sindh, 2016 SCMR 484 in which it has been held as follows:-

"5. The learned counsel for the appellant is correct in stating that tariff heading 9813.4900 (safe deposit lockers) and tariff subheading 9813.4910 (safe vaults) are in respect of services provided or rendered by banking companies, since these two tariff subheadings are listed under tariff subheading 9813.4000 and are, "in relation to:" services which are provided or rendered by banking companies. The learned counsel for the appellant meticulously took us through the documents on record to show that the appellant was neither a banking company nor was a part of Habib Bank Limited, which is a banking company. The learned counsel for the Sindh Revenue Board however does not seriously dispute that the appellant is not a banking company, but states that the appellant is liable to pay sales tax under tariff heading 98.13 as it cannot be excluded from "other person" who deal in "any such service", whether or not such persons are banking company. We therefore proceed to consider this proposition".

15. In the same judgment of Habib Safe Deposit Vault in para 8 it has been held as under:-

"8. The Next question which requires our consideration is whether the appellant is required to pay sales tax on the provision of safe deposit lockers (even if it is not a banking company) under the tariff 98.13 which also applies to "other persons". The learned counsel for the appellant could not advance any argument that could possibly do so. Section 3 of the Act sets out that



what is a "taxable services" and section 5 explains how the same is valued. Section 8 of the Act is the charging section and states that sales tax levied, "on the value of taxable service at the rate specified in the Schedule in which the taxable service is listed."

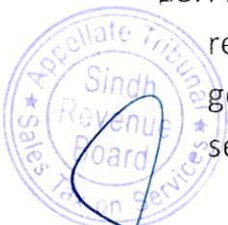
16. Bare perusal of the main tariff heading 98.13 of second schedule made it clear that the same has listed down the service providers. Tariff heading 9813.8100 of second schedule to the Act, 2011; has brought the services provided or rendered by NBFCs within the taxable ambit. Therefore, appellant's argument that its services are not liable to tax is not acceptable.

17. In the earlier decision of this Tribunal in the case of M/s Zarai Taraqiati Bank Limited in para 9 it has been held as under:-

"9. The service of loan application fee is a service as on that basis the appellant decide to grant or not to grant loan. In case the application for grant of loan is refused even then the application fee is not refundable. This service cannot be taxed from July, 2011 as at that time neither this service was specifically mentioned in the 2nd Schedule nor the general heading 9813.4990 (other services not specified elsewhere) was part of 2nd Schedule and was added effective from November, 2011 and same can be taxed effective from 1st November, 2011 under general tariff heading 9813.4990. The loan application fee was wrongly treated as service effective from July, 2011.

18. From the above discussion it is clear that the appellant is providing or rendering taxable services with in Sindh and since the appellant failed to get voluntarily registration it was rightly compulsory registered under section 24B of the Act of 2011.

19. The Assessing officer has imposed penalty of Rs.100,000/= under Serial No.1 of Table of Section 43 of the Act for non-registration. The provision provides that penalty can be imposed if any person who is required to apply for registration under this Act fails to make an application for registration before providing or rendering taxable services, such person is liable to pay penalty of Rs.10,000/- or five percent of the amount of Sales Tax. It was further provided that in case of non-compliance of



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compulsory registration the minimum penalty should be Rs. 10,000/-. It has not been discussed in the order in original as to what is the compliance (requirement) of compulsory registration, which the appellant failed to comply. It was also not discussed in the order in original why maximum/higher penalty of Rs.100,000/= was imposed instead of minimum/lessor penalty of Rs.10,000/=. When two types of penalties are provided under law the Assessing Officer is duty bound to justify the imposition of maximum penalty. The two types of penalties are provided to cater different situations. It has not been discussed under which situation lessor penalty can be imposed and under what situation the maximum penalty can be imposed. The penalty is reduced to Rs.10,000/=.

20. The appeal is partly allowed to the extent of reducing of penalty from Rs.100,000/= to Rs.10,000/=. The appeal is disposed of. Coy of the order may be provided to the learned representative of the parties.

Karachi.

Dated: 26.08.2019

(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Copies supplied to:-

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

Copy for information to:-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office copy
- 5) Guard file.

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on.....

03/09/2019

Registrar

Order Dispatched on.....

03/09/2019

Registrar