

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT-KARACHI

DOUBLE BENCH

APPEAL NO. AT-10/2021

M/s Burj Bank Limited  
Now M/s Albaraka Bank (Pakistan) Ltd.,  
1500-A, Saima Trade Towers,  
I.I. Chundrigar Road, Karachi..... Appellant

**Versus**

Assistant Commissioner (Unit-09),  
Sindh Revenue Board, Shaheen Complex,  
M.R. Kiyani Road, Karachi .....Respondent

Date of filing of Appeal 03.02.2021

Date of hearing 07.04.2021

Date of Order 07.05.2021

Mr. Muhammad Wajahatullah, ACA, Ms. Hira Tahir, ITP, Mr. Saud-ul-Hasan, advocate, and Mr. Junaid Siddiqui, CIMA for appellant.

Mr. Hasan Abbas, AC-SRB and Ms. Uzma Ghory, AC-DR-SRB for respondent.

ORDER

**Justice<sup>®</sup> Nadeem Azhar Siddiqi**: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.107/2020 dated 19.11.2020 passed by the Commissioner (Appeals) in Appeal NO. 335/2019 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 553/2019 dated 22.06.2019 passed by the Mr. Mehrab Khan, Assistant Commissioner, (Unit-09) SRB Karachi.

02. The brief facts as stated in the OIO were that the appellant having SNTN: S2634080-1 was registered with SRB for providing or rendering

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taxable services classified under Tariff Heading 9813.4000 ("Services provided or rendered by banking companies") read with sub-headings thereof. It was also read with main Tariff Heading 98.13 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh Sales Tax (SST) at the statutory rate under section 3 and 8 of the Act read with rule 30 of the Sindh sales Tax on Services Rule, 2011 (hereinafter referred to as the Rules).

03. It was alleged in the OIO that from scrutiny of financial statement and reconciliation with monthly SST returns for the tax periods January-2012 to December-2012 it was revealed that the registered person failed to discharge their due tax liability during the above tax periods. Such details are given as under:-

Description	Amount (Rs.)
Fee Commission Brokerage (as per Annual Audited Accounts)	104,544,000
Gain on Sale of Securities-Net (Non-Markup Income)	212,575,000
Fees and Charges recovered	12,270,000
Rental Income	211,000
Locker Rent	424,000
<b>Total Earned Value of Services</b>	<b>330,024,000</b>
<b>Less: Revenue Declared as per SRB Returns</b>	<b>(62,858,262)</b>
Short declared value of services	267,165,738
<b>Short paid amount of Tax @ 16%</b>	<b>42,746,518</b>

04. The appellant was served with a Show-Cause Notice (SCN) dated 10.12.2018 to explain as to why the short-paid SST of Rs.42,746,518/- should not be assessed and recovered under section 23(1) and 47(1A) of the Act alongwith default surcharge under section 44 of the Act. The appellant was also called upon to explain as to why penalties listed under Sr. No.3 of the table under section 43 of the Act should not be imposed and recovered for violating relevant provisions of the Act and rules made thereunder.

05. The appellant through its representative filed Reply dated 18.01.2019 and submitted as under:-

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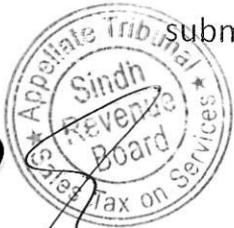
- i) The SCN was time barred relating to the year ended December-2012 as the limitation of five years provided in sub-section (2) of section 23 was substituted by eight years vide Sindh Finance Act, 2016 effective from 18.07.2016 having no retrospective effect.
- ii) The appellant is not obliged to retain the records beyond the period mentioned in section 28 of the Act.
- iii) The revenue shown in the financial statement was pan-Pakistan. Such jurisdiction wise breakup was accordingly submitted.
- iv) No element of security was involved in sale and purchase of securities thus the same were Capital Gain.

06. The Assessing Officer (AO) determined SST of Rs.1,341,516/-on account of bancassurance services provided or rendered by the appellant during the above mentioned tax periods under section 23 the Act alongwith the default surcharge under section 44 of the Act(to be worked out at the time of payment of principal tax). The AO also imposed penalty of Rs.76,076/= under serial No. 3 of the Table under section 43 of the Act.

07. The appellant challenged the OIO by way of filing of appeal before the Commissioner Appeals), who dismissed the appeal, hence this appeal.

08. The learned representative of the appellant Mr. Wajahatullah submitted as under:-

- i) The SST was charged on the services provided by the bank to insurance companies (bancassurance) and for taxing the services during the tax periods no specific Tariff Heading was available in the Second Schedule to the Act.
- ii) The appellant had acted as the agent of the Insurance Company and the service of insurance agent was inserted in the Second Schedule under Tariff Heading 9855.000 vide Sindh Finance Act, 2019 effective from 5<sup>th</sup> July, 2019. However before such period the service of insurance agent was not taxable.
- iii) The SCN was timed barred as the same was issued after expiry of period of five years as mentioned in the original provision of section 23 (2) of the Act.



- iv) The OIO was also time barred as the same was issued after expiry of the period of one hundred twenty days mentioned in the original provision of section 23 (3) of the Act.
- v) The tax was charged under Tariff Heading 9813.4000 without specifying the relevant Tariff Heading in the SCN and OIO under which SST could be charged on alleged bancassurance service.
- vi) The amendment in Tariff Heading 9813.4990 w.e.f. 05.07.2019 was sufficient to establish that bancassurance was not covered under the old Tariff Heading 9813.4990 which was a sub-sub-heading of Tariff Heading 9813.4910.
- vii) Reference was given to various earlier Orders of the Tribunal and it was submitted that both OIO and OIA were against the same and were liable to be set aside. It was further submitted that the earlier orders of the Tribunal on the same subject are binding on the Assessing Officers as well as Commissioner (Appeals) and they could not pass orders in violation thereof.

09. The learned representative of the appellant Mr. Hasan Abbas, AC submitted as under:-

- i) The SST was charged on the services provided by the bank to insurance companies (bancassurance) under Tariff Heading 98.13 read with sub-Tariff Heading 9813.4000 and 9813.4990.
- ii) The SCN was not time barred and was issued within eight years as provided under sub-section (2) of section 23 of the Act. The amendment in sub-section (2) of section 23 of the Act was made on 18.07.2016 much before the issuance of SCN dated 10.12.2018.
- iii) The OIO was passed within the time allowed by law after excluding the adjournments sought by the appellant. He submitted that the SCN was issued on 10.12.2018, whereas the OIO was passed on 22.06.2019 on 194<sup>th</sup> day. However after excluding the adjournments of 29 days sought by the appellant the OIO was in fact passed on 165<sup>th</sup> day, whereas the time provided in sub-section (3) of section 23 of the Act was 180 days.
- iv) The tax was charged on bancassurance service provided by the appellant to insurance companies and the same was covered under



*Hasan Abbas*

*Hasan Abbas*

Tariff Heading 98.13 which mentioned that all services provided by banks were taxable.

v) The tax was rightly charged under Tariff Heading 9813.4990 which provided that "other services not specified elsewhere".

vi) The amendment in Tariff Heading 9813.4990 w.e.f. 05.07.2019 was clarifactory in nature and had not made any difference, since bancassurance service was covered under the old Tariff Heading 9813.4990.

vii) Tariff Heading 9855.0000 (Insurance Agent) which was added to the Second Schedule to the Act has no bearing upon the merit of this case.

10. The learned representative of the appellant formally submitted that the tax periods involved in the instant appeal were from January-2012 to December-2012. Thus the law applicable was the law which existed during the relevant tax periods and not the subsequent amendments made in sub-section (2) and (3) of section 23 of the Act and the amendment made in Tariff Heading 9813.4990.

11. We have heard the learned representatives of the parties and perused the record.

12. The OIO was passed only in respect of bancassurance services allegedly provided or rendered by the appellant and the other items in the SCN were dropped.

13. The SCN was issued invoking Tariff Heading 9813.4000 (services provided or rendered by banking companies in relation to). No relevant sub-heading or sub-sub-heading was however specified. The SCN was also silent regarding the bancassurance service provided or rendered by the appellant and in the SCN the SST was demanded on "Fee Commission Brokerage". The OIO was passed invoking Tariff Heading 8913.4000 read with sub-headings thereof and also read with main Tariff Heading 98.13 of the Second Schedule to the Act. Initially the SST of Rs.42,746,518/= was demanded from the appellant without specifying the bancassurance service and the relevant Tariff Heading. The bancassurance service was first time mentioned in para 7 of the OIO under heading "Judgment". However initially in para 2 of the



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SCN and OIO as mentioned above the SST was demanded on "FEE Commission Brokerage" and the value of service was mentioned at Rs.104,544,000/= involving SST of Rs. 16,727,840/=.

14. Apparently the SCN was issued in undue haste without due diligence and without collecting proper documents / material. The SCN and OIO were silent about the alleged bancassurance service provided or rendered by the appellant. In absence of raising this ground/allegation in the SCN the same could not be adjudicated in the OIO. It is now well established point of law that the ground not mentioned in the SCN could not be adjudicated while passing such order. In the reported case of Collector Central Excise and Land Customs versus Raham Din, 1987 SCMR 1840 it was held as under:-

*"Order of adjudication being ultimately based on a ground which was not mentioned in the SCN, was palpably illegal on face of it".*

15. The identical position exists in the instant case since the tax was charged on the alleged service of bancassurance which was not found mentioned in the SCN. Moreover apparently when the SCN was issued to the appellant the AC/AO was not aware about the facts of the case and no material was available before him to allege that the bancassurance service was provided or rendered by the appellant. Due to this reason the SCN was issued alleging that the value of service provided or rendered was Rs.330,024,000/=, resulting in short declared value of service of Rs.267,165,738/= involving short payment of SST of Rs.42,746,518/=. In the words of the Honorable Supreme Court of Pakistan the AC was merely shooting in dark and was making a roving enquiry. The issuance of SCN without any material available with the officers has been deprecated by the superior courts and it has been held that roving enquiries in tax matters were not admissible. In the reported judgment of Assistant Director Intelligence & Investigation, Customs, Karachi versus B. R. Herman, **PLD 1992 SC 485** it was held as under:=

*"The authority cannot make a roving inquiry or issue a notice by merely shooting in dark in the hope that it will be able to find out some material out of the same".*

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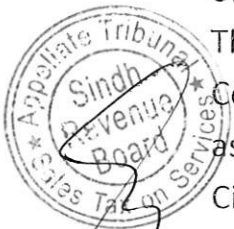
16. In another reported judgment of Caretex versus Collector, Sales Tax, 2013 PTD 1536 it was held as under:-

*"Show cause notice" was not a casual correspondence or a tool or license to commence roving inquiry into the affairs of the tax payer based on assumption and speculations but was a fundamental document that carried definitive legal and factual position of the department against the tax payer".*

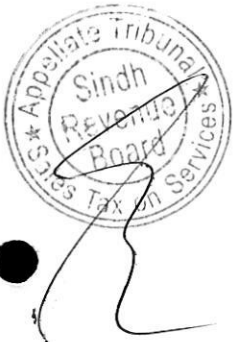
17. It may be further mentioned that the AO charged tax on the service of bancassurance which was allegedly provided or rendered by the appellant and such OIO was maintained by the Commissioner (Appeals). It is thus apparent that both the OIO and OIA were passed against the various orders of the Tribunal based upon the dictum laid down by the Honorable High Court in the case of Citibank NA versus Commissioner Inland Revenue and another, which are still holding the field and had not been set aside by the Honorable High Court of Sindh in referential jurisdiction and attained finality under sub-section (8) of section 62 of the Act subject to section 63 of the Act and were binding on the AO as well as Commissioner (Appeals). 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



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*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.*

18. 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. The main Tariff Heading only provide for the service providers who provide or render services mentioned in the sub, or sub-sub-headings. This has nothing to do with the services that were liable to tax.

19. 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."*

20. Relying upon our findings in the above case this Tribunal while hearing Appeal No. AT-36/2019, Summit Bank Limited versus AC-SRB, Karachi relied upon the following portion of the Order dated 05.10.2018 rendered in Appeal No. AT-20/2017 (MCB vs. SRB) 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*

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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, Justice Munib Akhtar, as he then was (now elevated to Supreme Court of Pakistan) speaking for the bench held as under:

"...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



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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".

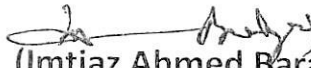
21. Considering the above discussions and relying upon the reported case of Citibank Supra and our earlier Orders we hold that the bancassurance service was not a listed service during the relevant tax periods involved in this appeal.

22. In the original Second Schedule there was no Tariff Heading relating to others. The Tariff Heading 9813.4990 (other services not specified elsewhere) was added to the Second Schedule to the Act vide Sindh Sales Tax on Services (Amendment) Act, 2011 (Sindh Act No. II of 2012). Apparently it was added under Tariff Heading No. 9813.4910 (Safe Vaults). The Tariff Heading 9813.4990 was re-numbered as 9813.4910 (other services not specified elsewhere) vide Sindh Finance Act, 2019 (XII of 2019) effective from 5<sup>th</sup> July, 2019.

23. It may be pertinent to mention here that during the relevant tax periods the service of insurance agents was not part of Second Schedule to the Act and the Tariff Heading 9855.0000 (insurance agents) was inserted vide Sindh Finance Act, 2019 (XII of 2019) effective from 5<sup>th</sup> July, 2019. The banks while providing bancassurance service to insurance companies acted as their agents. Since the service of insurance agents was not part of

Second Schedule of the Act and the other insurance agents were not paying the SST, therefore charging of SST from the banks tantamount to discrimination which is not permissible under Article 25 of the Constitution of Pakistan. Moreover, it is now well settled that what cannot be achieved directly it could not be achieved indirectly. We therefore hold that during the tax periods involved in this appeal the bancassurance service was not part of the Second Schedule to the Act and was therefore not taxable.

24. In view of the above discussions and relying upon the reported case of Citibank NA and our earlier orders this appeal is allowed and the OIO and OIA are set aside. The copy of this order may be provided to the learned representatives of the parties.

  
(Imtiaz Ahmed Barakzai)  
TECHNICAL MEMBER

  
(Justice® Nadeem Azhar Siddiqi)  
CHAIRMAN

Karachi:

Dated: 07.05.2021

Copy Supplied for compliance:

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

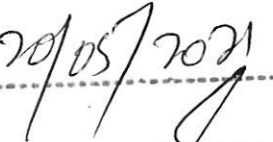
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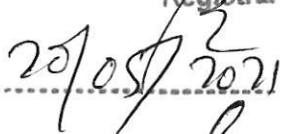
  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order issued on

  
20/05/2021

Registrar

Order Dispatched on

  
20/05/2021

Registrar