

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARCHI
DOUBLE BENCH-I

APPEAL NO. AT-22/2021

M/s Silk Bank Limited (SNTN: 1456150-6)
Silk Bank Building, I.I Chundrigar Road,
Karachi—Appellant


Versus

Assistant Commissioner, (Unit-11),
Sindh Revenue Board,
2nd Floor Shaheen Complex,
M. R. Kiyani Road, Karachi—Respondent

Date of Filing of Appeal: 12.04.2021
Date of hearing: 10.01.2022
Date of Order: 16.05.2022

Mr. Anwer Kashif Mumtaz, advocate for appellant
Mr. Imran Ali, and Mr. Nasir Bachani, AC-DR for respondent

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. 17/2021 dated 22.03.2021 passed by the Commissioner (Appeals) in Appeal No. 65/2020 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 126/2020 dated 15.06.2020 passed by the Mr. Tasleem Ahmed Ghumro, Assistant Commissioner, (Unit-09) SRB Karachi.

02. The brief facts as stated in the OIO were the appellant was registered with Sindh Revenue Board (SRB) under the category of services provided or

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rendered by "Banking Companies" covered under Tariff Heading 9813.4000 and sub-headings thereof 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 rate of 16% under Section 3, 8, 9 & 17 of the Act read with rule 30 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

03. It was alleged in the OIO that during the examination/scrutiny of appellant tax profile and reconciliation with annual audited accounts for the year ended December, 2013. It was revealed that the appellant had not discharged due tax liability during the tax period from January-2013 to December-2013. Accordingly, the discrepancy of short payment of SST was communicated to the appellant vide letter dated 28.05.2019, whereby it was advised to substantiate the matter. In response, the appellant vide letter dated 17.06.2019 submitted detailed breakup of revenues along with Sales Tax returns filed with other revenue authorities i.e. FBR, PRA KPRA etc. Accordingly, the submission & working was thoroughly examined, and the following discrepancy was revealed:-

Description	Amount in Rs.
Fee, Commission and Brokerage Income	593,494,000
Gain on Sale of Securities	169,917,000
Other income: Rent on Property	15,074,000
Other income: Postage, telex, services charges etc.	38,349,000
Other income: Trade business rebate	49,221,000
Other income: Pakistan remittance initiative income	30,002,000
Others	46,213,000
Total	942,270,000
Less: Revenue declared with ICT & Others	(20,695,301)
Less: Revenue declared with PRA	(221,391,428)
Less: Revenue declared with KPRA	(4,271,645)
Less: Revenue declared with Baluchistan	(2,165,553)
Less: Revenue declared with SRB	(282,147,718)
Short declared value of Sales	411,598,355
Applicable Tax rate	16%
Short paid SST	65,855,737



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04. The appellant was served with Show Cause Notice (SCN) dated 04.10.2019 under section 23 (1) read with section 47 (1A) of the Act to explain as to why the short paid amount of SST of Rs.65,855,737/= should not be assessed and recovered alongwith default surcharge. The appellant was also told to explain as to why penalties under Serial No. 2 and 3 of the Table under section 43 of the Act should not be imposed.

05. The appellant file written reply refuting the allegations leveled against it in the SCN and contended that the revenue earned was Pan Pakistan and included certain exempt/non-taxable services. The appellant provided head wise particulars and details mentioned in Para 5 of the OIO relating to the services provided to each with amount.

06. The Assessing Officer (AO) determined and assessed the SST at Rs.9,402,401/- on account of different services provided or rendered by the appellant during the tax periods from January-2013 to December-2013 and ordered for the recovery of the same under section 23(1) read with 47(1A) of the Act along with default surcharge under section 44 of the Act (to be worked out at the time of payment of the principal tax). The AO also imposed penalty of Rs.120,000/= under Serial No. 2 of the Table under section 43 of the Act and penalty of Rs. 470,120/- under Serial No. 3 of the Table under section 43 of the Act.

The appellant challenged the said OIO before Commissioner (Appeals) by way of filing appeal under section 57 of the Act. The operative part of the OIA is reproduced for ready reference as under:-

"33. As elaborated in the foregoing paragraphs, all other disputed amounts were settled during the adjudication proceedings were accordingly dropped by the ACSR. It also transpires that the Appellants have already paid the amounts adjudged as noted above, in full, on 15.06.2020 availing the benefit of waiver of default surcharge and penalty under SRB Tax amnesty scheme Notification No.SRB-3-4/11/2020 dated 01.06.2020 a fact transpiring from the noting of the respondent AC in the relevant case-file, of the same date. For ready reference copy of the relevant payment challan is reproduced hereunder..."

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"34. Since the Appellant has already admitted and paid disputed/ adjudged amounts in the matter in the above-noted terms, availing SRB Tax amnesty scheme 2020, this Appeal has become infructuous. Even otherwise, the impugned OIO is liable to be upheld without any modification, in line with the observations made above, same being lawful and correct under the Act, 2011 and the Rules, 2011".

Resultantly the instant appeal was filed by the appellant / taxpayer before this Tribunal.

08. The learned advocate for the appellant Mr. Anwer Kashif Mumtaz submitted as under:-

- i. The appellant had challenged the charging of SST on Trade Business Rebate (TBR) and Pakistan Remittance Initiatives Income (PRI) received from State Bank of Pakistan.
- ii. No element of service is involved in furtherance of economic activity and this issue has already been decided by the Tribunal in the case of Allied Bank Limited, Appeal No. AT-205/2015 and J.S Bank, Appeal No. AT-98/2016.
- iii. The Commissioner (Appeals) had passed the OIA beyond the statutory time limit as allowed by law.
- iv. No specific Tariff Heading was available during the tax periods from January-2013 to December-2013 in the Second Schedule to the Act for taxing the activities of the appellant.
- v. The SCN was silent about the relevant Tariff Heading under which services provided fell.
- vi. The OIO was passed on the grounds which were not mentioned in the SCN and the Tariff Heading invoked was never confronted to the appellant hence the OIO was illegal.
- vii. The SST was charged on pan-Pakistan basis without properly bifurcating the services despite the fact that all particulars and details were provided to the department.
- viii. The Trade Business Rebate (TBR) was paid by the State Bank of Pakistan (SBP) on account of settlement of LCs and not the customers.



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- ix. The Pakistan Remittance Initiatives (PRI) was paid by SBP on account of transfer of money through banking channel under the Regulations of SBP which provided that the bank should not charge fee or commission from the customer. This initiative was to facilitate the transfer of foreign exchange through banking channel.
- x. The penalty and default surcharge were imposed without establishing mensrea and thus such imposition was malafide on the part of the appellant.

09. The learned AC-SRB for the respondent submitted as under:-

- i. That appellant being a banking company was registered under Tariff Heading 98.13 of the Second Schedule to the Act and all services provided or rendered by it were taxable.
- ii. The services listed under Second Schedule to the Act were provided or rendered by the appellant to others in furtherance of economic activity against consideration.
- iii. The OIA was passed within the time frame allowed by law and thus the same was not barred by time.
- iv. The SCN was issued invoking Tariff Heading 9813.4000 under which the appellant got registration and the OIO was passed under such sub-headings and sub-sub headings.
The SCN was issued on the basis of figures reflected in the audited accounts and the same was reconciled at the OIO stage. Finally the SST was charged only on the services provided in Sindh.
- vi. The appellant had provided or rendered services against consideration and it was not material whether the invoices were issued or not or the payment was received from third party.
- vii. The appellant earned revenue in two fields i.e., markup and interest income, and non-markup and non-interest income.



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The income of the appellant fell in the later category and was thus covered under the Second Schedule to the Act.

- viii. No exemption was available to the appellant in respect of services provided or rendered and SST was rightly charged.
- ix. The penalty and default surcharge were rightly imposed since the malafide and willful default on the part of the appellant were duly proved.

10. The learned advocate for the appellant in rebuttal submitted that the provincial authorities could not charge SST on the income of Federal Government and its departments and he relied upon the reported case of Civil Aviation Authority, 2017 SCMR 1344 and submitted that in case the SST was charged from the appellant being service provider the burden would pass on to SBP a department of Federal Government.

11. The Commissioner (Appeals) submitted Report dated 24.09.2021, which was again resubmitted on 04.12.2021 in which the time consumed in finalizing the appeal was clarified. It was submitted by Commissioner (Appeals) that the OIA was passed within time on i.e. on 179th day.

12. We have heard the learned representative of the parties, perused their written submissions, Reconciliation Reports and the record made available before us.

13. The dispute between the parties was in respect of charging SST during the tax periods from January-2013 to December-2013 on TBR and PR Income received from State Bank of Pakistan. The appellant got registration with SRB on 10.08.2012 under Tariff Heading 9813.4000, "services provided or rendered by banking companies in relation to".

14. We will first take up the ground as to "Whether the OIA was time barred or not?" We have carefully examined the Report submitted by the Commissioner (Appeals). As per his Report the appeal was filed on 07.07.2020 and was decided on 12.03.2021, thus the total days consumed in deciding the appeal were 248 days. The Commissioner (Appeals)

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extended sixty days vide order dated 11.01.2021 under sub-section (5) of section 59 of the Act. Therefore the days available with Commissioner (Appeals) were 120 days + 60 days = 180 days. Whereas the total days consumed in deciding the appeal were 248 days out of which adjournments for 69 days were obtained by the appellant and these 69 days were excluded (248-69=179) under sub-section (6) of section 59 of the Act. In this way the OIA was passed on 179th day. The doubt appears due to the date of order mentioned at the top of OIA which was 22.03.2021, whereas in the body of the OIA the date of order was mentioned as 12.03.2021. In time bound proceedings the date of order and date of issuance of order should be the same to avoid doubt as to the date of order. If this practice of putting two dates is allowed it will provide an opportunity to the department to pass OIO/OIA back dated. To avoid any doubt and suspicion it is desirable that the date of the order and the date of issuance of order should be same and the OIA/OIO should be issued to the parties within a reasonable time of three to four days. We therefore hold that the OIA was passed within time allowed by law.

15. The appellant as per the SCN was registered with SRB on 10.08.2012 under Tariff Heading 9813.4000, "Services provided or rendered by banking companies in relation to": This Tariff Heading only provided the institution and not the services which were to be provided. It is therefore apparent from this description that all services provided by banking companies were not covered and only those services were covered which fell under the ambit of sub-Tariff Headings or sub-sub-Tariff Headings. Under the main Tariff Heading there are number of sub-headings and sub-sub-headings. Moreover the Tariff heading 9813.4000 is a sub-heading under Tariff Heading 98.13 and there are several other sub-headings and sub-sub-headings under such Tariff Heading 9813.4000. The purpose of listing of various services appears to differentiate and separate one service from another. Sub-section (1) of section 3 of the Act provided that a taxable service is a service listed in the Second Schedule to the Act. Any service



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which is not listed in the Second Schedule to the Act even if it is economic activity could not be treated as service for the purpose of charging of SST.

16. The AO while issuing SCN in para 1 had mentioned that the appellant "was registered with SRB under the service category of 'Bank' Tariff Heading 9813.4000 and sub-headings thereof". In the body of the SCN SST was claimed on various service heads without mentioning or specifying the relevant Tariff Headings under which such service fell. The SCN is an important document and the basic purpose of the same is to put the taxpayer on notice and inform it about the allegations leveled against it so that the taxpayer may take a proper defence.

17. In the OIO the SST on TBR was demanded and charged under Tariff Heading 9813.4990, "other services not specified elsewhere" without confronting the same in the SCN. In the same way the SST on PRI was also demanded and charged under Tariff Heading 9813.4600, "Transfer of Money, including telegraphic transfer, mail transfer and electronic transfer" without confronting the same in the SCN.

18. The first point under consideration therefore is "Whether the ground which was not taken in the SCN could be adjudicated upon in the OIO and the same could be used to the disadvantage of the taxpayer?" The Tariff Headings under which the SST was charged were not part of the SCN and the appellant was not confronted about the same. Thus the adjudication of the grounds not mentioned in SCN amounts to adjudication beyond the contents of SCN which is not permissible. This aspect has been elaborated in the reported case of Collector Central Excise and Land Customs versus Rahim Din, 1987, SCMR 1840 wherein it was held by the Honorable Supreme Court that "*order of adjudication being ultimately based on a ground which was not mentioned in SCN, was palpably illegal on the face of it*". Apparently the AO was not sure or confused about the Tariff Heading (s) under which the said services fell. Thus the SCN was defective and could not be considered for charging SST from the appellant.



19. The second point is "Whether the Tariff Heading under which the SST was charged on PRI was applicable in case of appellant or not?". It was explained by the appellant that this head of income constituted home remittance income which was reimbursement of expenses from SBP. The PRI was established in 2009 to facilitate and support faster, cheaper, convenient and efficient flow of home remittance in the country. This activity related to transfer of money through telegraphic mail and electronic mode. The SST on PRI received from SBP could be demanded and charged under Tariff Heading 9813.4600 Transfer of Money, including telegraphic transfer, mail transfer and electronic transfer provided proper SCN was served upon the appellant invoking this Tariff Heading. Similar entry is also available at Entry No.8 of First Schedule of the Federal Excise Act, 2005 and was considered by the Honorable High Court in the case of M/s Citi Bank NA v. Commissioner Inland Revenue, 2014 PTD 284 as under:-

"14....In our view, on the foregoing basis, the amount paid to the banks, could not be regarded as "charges" within the meaning, and for purposes, of Entry No.8."

It was further held in the same para as under:-

".....The reimbursement of expenses by the Sate Bank in such circumstances could not be regarded as "charges" within the meaning, and for the purposes, of Entry No.8. Accordingly, it follows that although the service of transfer of money was provided by the applicant, it "charged" a nil amount for the same for purposes of Entry No.8, with the result that the amount of excise duty, being an advaloram, came to zero. Nothing therefore was payable by the applicant in respect of this type of transaction".

This Tribunal relying upon the judgment in the case of Citibank supra in its decision dated 16.03.2018 in the case of MCB Limited versus Commissioner (Appeals), AT-20/2017 held as under:-



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"7....It further states that performance based scheme has been developed to encourage overseas entities to enhance marketing efforts at origination and Government of Pakistan shall reimburse marketing expenses through State Bank of Pakistan and the said scheme has been subject to certain conditions laid therein. The purpose clearly shows is to encourage remittances through official banking channels. In view of the preceding discussions we not find any reason to treat Home Remittance as a taxable service. the appeal on this issue is allowed".

20. It is pertinent to mention that for charging SST on TBR no specific Tariff Heading was available and no Tariff Heading was invoked in the SCN for charging SST on such service. In the OIO the SST was charged under Tariff Heading 9813.4990 of Second Schedule to the Act "Other services not specified elsewhere". This Tariff Heading at the stage of OIO could not be invoked for two reasons viz., firstly that this Tariff Heading was not mentioned in the SCN and could not be invoked while passing OIO, and secondly that the tax periods involved in the instant appeal were from January-2013 to December-2013. The Tariff Heading under which the SST was actually charged were as under:-

9813.4700 Bank guarantee

9813.4800 Bill discounting Commission

9813.4900: Safe deposit lockers.

9813.4910: Safe vaults.

9813.4990: Other services not specified elsewhere (added vide Sindh Sales Tax on Services (Amendment) Ordinance, 2011 effective from 01.11.2011 and was converted into Act, 2012 effective from 26.01.2012).

It is evident from the above narration that during the tax periods involved in this appeal Tariff Heading 9813.4990 was not an independent sub-heading but was a sub-sub-heading of Tariff Heading 9813.4910. The said

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Tariff Headings were changed vide Sindh Finance Act, 2019 and after change the said sub headings read as under;-

9813.4700: Commission, including bill discounting commission.

9813.4800: Safe deposit lockers and safe vaults.

9813.4900: Other services, not specified elsewhere.

21. In view of change the Tariff Heading 9813.4900 was converted to sub-heading under the main Tariff Heading 98.13. The amendment is curative in nature and the legislature having realized the mistake and corrected the same to bring other services provided or rendered by banking companies in tax net. The sub-heading 9813.4000 read as "services provided or rendered by banking companies in relation to". It thus appears from this description that all services provided by banking companies are not covered and only those services are covered which fell under the ambit of sub-Tariff Headings or sub-sub-Tariff Headings under the main Tariff Heading. The mechanism and listing of sub-heading and sub-sub-headings was considered by the High Court of Sindh in the reported case of M/s Citibank Limited versus Commissioner Inland Revenue and another, reported as 2014 PTD 284, wherein it was held as under:-

"18...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"..... 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".

In the same judgment it was further 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....”

22. In view of the above factual and legal position we hold that the SST could not be charged on TBR under Tariff Heading 9813.4990 as during the relevant tax periods the same was not an independent Tariff Heading and was subservient to Tariff Heading 9813.4910 (safe vaults). Moreover we further hold that SST could also not be charged on PRI in view of judgment of High Court of Sindh in Citibank case as reproduced supra.

23. In the light of above discussions the appeal is allowed. The OIO and OIA are set aside. The copy of order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Karachi:

Dated:16.05.2022

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
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Order issued on 20/05/2022

Registrar

Order Dispatched on 20/05/2022

Registrar