

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, ATKARACHI

SB-I

APPEAL NO. AT-125/2022

M/s Invest & Finance Securities Limited.

(Now EFG Hermes Pakistan Ltd.)

(SNTN: S1056313-0)

Office No. 904, 09th Floor, Emerald Tower,

Plot No. G-19, Block-05, Clifton Karachi..... Appellant

Versus

The Assistant Commissioner (Unit-12), SRB

Sindh Revenue Board, (SRB)

2nd Floor, Shaheen Complex,

M.R. Kayani Road

Karachi..... Respondent

Date of filing of Appeal: 29.07.2022

Date of hearing: 30.08.2023 & 14.09.2023

Date of Order: 16.10.2023

Mr. Fareed Siddiqui, ITP and Mr. Kamil Gohar, ACA for appellant.

Mr. Shareef Malik, DC-DR, SRB and Ms. Sania Anwar, DC-SRB, Karachi.

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. 75/2022 dated 03.06.2022 passed by the Commissioner (Appeals) in Appeal No. 97/2018 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 361/2018 dated 27.04.2018 passed by Ms. Umi Rabbab, Assistant Commissioner, (Unit-12) SRB, Karachi.

02. The learned representative of the appellant in his Statement dated 06.03.2023 submitted that this appeal was filed against charging of SST of Rs.2,554,198/= on money market brokerage during the periods from July-2014 to June-2015 and no other amount is involved.

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03. The facts as stated in the OIO were that the appellant was registered with Sindh Revenue Board (SRB) under the service category of "Stockbrokers, Futures Brokers and Commodity Brokers" falling under Tariff Heading 9819.1000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as Act) and was engaged in providing taxable services under Tariff Heading 9819.1000, 9813.6000 and 9813.8100 chargeable to Sindh Sales Tax (SST) at standard rate specified in the Second Schedule to the Act.

04. It was alleged in the OIO that perusal of Annual Accounts of the appellant for tax periods from July-2014 to June-2016 revealed that it provided taxable services covered under above service categories, hence appellant was required to discharge its sales tax liabilities and to e-file sales tax returns in Form SST-03 since July-2011. It was further noticed that the appellant earned taxable revenue under aforesaid tariff headings amounting to Rs.161,194,228/-. The amount of SST thereon was worked out to Rs.22,282,482/- and appellant was required to declare its sales tax liabilities. The appellant during the above tax periods paid SST of Rs.17,499,461/- after claiming and deducting inadmissible input tax of Rs.1,177,039/-. This act of the appellant resulted in short payment of SST of Rs.4,783,021/-. The details of the SST payable were as under:-

Sr. No	Taxable Services Head	2014-15	2015-16	Grand Total
1	Equity Brokerage Income	55,880,834	47,229,127	103,109,961
2	Inter-Bank Brokerage	30,210,282	27,364,033	57,564,033
3	Community Brokerage Income	15,200	-	-
4	Fee and Commission	182,685	522,249	705,034
5	Sub-Total	86,289,001	75,115,509	161,194,228
6	Inadmissible Input Claimed	635,336	541,703	1,177,039
7	SST Payable	12,308,014	9,974,468	22,282,482
8	SST Paid	8,552,169	8,947,292	17,499,461
9	SST Short Paid	3,755,845	1,027,176	4,783,021

05. The appellant was served with a Show-Cause Notice (SCN) dated 02.10.2017 under section 23(2) of the Act to explain as to why the SST amounting to Rs.4,783,021/= may not be assessed under section 23(1) of the Act. The appellant was also called upon to explain as to why default surcharge under section 44 of the Act and penalties under Serial Nos. 2 & 3 of the Table under section 43 of the Act may not be imposed.

06. The appellant filed a written reply dated 11.10.2017 wherein it was stated that the issues raised vide SCN were earlier confronted vide notice dated

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31.12.2016 and 01.10.2017 which were discussed in detail and it appeared that the Officer was satisfied with the explanation set forth by the appellant. It was further stated that the issue of SST on money market commission was settled vide Commissioner (Appeals) Order dated 03.02.2015 in Appeal No. 35/2015. The appellant vide its letter dated 15.12.2018 submitted that for the tax periods July-2014 to June- 2015 money marker brokerage was not chargeable to SST. It was further stated that the issue was settled at the stage of Appellate Tribunal, SRB. It was further stated that the input tax of Rs.1,177,039/= was rightly claimed during the tax periods from July-2014 to June-2016.

07. The Assessing Officer in para 30 of the OIO held that "keeping in view the above legal provisions and contravention of SST Act/ Rules the charges leveled against M/s Invest and Finance Securities Limited (now EFG Hermes) on account of non-payment and inadmissible input claim of sales tax for the periods July, 2014 to June, 2016 are established. Therefore, Sindh Sales Tax of Rs.3,375,056/-, is hereby assessed and is recoverable /s 23(1) of the Act alongwith default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.4,730,329/- under clause 3 of the Table under section 43 of the Act

08. The appellant challenged the said OIO before the Commissioner (Appeals) under section 57 of the Act. The Commissioner (Appeals), SRB (CA-SRB) while dismissing the appeal held as under:-

"10. In the context of first query that whether "Money market brokerage" was a taxable service or not? It has been observed that as per substituted provision of value of services under Rule 41 of the Rules 2011. This relevant services were become taxable since 01.07.2014 which was admitted and agreed by the appellant and Sindh Sales Tax amounting to Rs.2,554,198/= was dully paid thereafter as explained in para No. 6 of this order"

"11. For the second query of inadmissible input tax adjustment of Rs.820,858/-, it has been noticed that the appellant has deposited Rs.117,370/- by admitting his default. Regarding the amount of Rs.508,997/- his contention is a procedural in nature as discussed in Para 7 above. Sales tax is a value added tax for which purpose, the department is entitled to check that a return is correctly filed. Apparently, it is a procedural mistake, whereas, respondent also agreed with the adjustment version of appellant and he could not find any mala-fide intention or revenue loss to the extent of adjustment of Rs.508,997/-. Therefore, in absence of any malafide against appellant no negative inference can be drawn. However, appellant is directed

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to be careful in future and to abide the procedure of returns filing u/s 30 of the Act, 2011 and input tax adjustment u/s 15, 15A read with rules thereunder. Input tax found valid on remaining amount as discussed in aforementioned Para and report submitted by respondent dated 20.05.2022”.

“12. In view of above facts and detailed submissions by the appellant and the respondent. Alleged in the impugned order has been reconciled and held deposited in Govt. exchequer. However, the appellant was required to deposit statutory penalty under section 43 of the Act, 2011 against OIO dated 27.04.2018. I have considered those, sympathetically, in line with points of facts and law and found that there was no willfulness, mal-intention and mens-rea on the part of appellant. This being apparent from the fact that the appellant voluntarily paid the alleged amount of due sales tax and respondent had no objection to that. Hence, penalties under Sr. No.3 of Table under section 43 ibid are set-aside. The appeal stands disposed of accordingly”.

09. The learned representative of the appellant submitted as under:-

i. The appellant was registered as Stock Broker and discharging its statutory obligations by paying due SST and filing SST returns.

ii. The Department has charged SST on money market brokerage/Interbank brokerage Commission for tax periods from July, 2014 to June, 2015 and such activity during the said tax periods was not a taxable activity.

iii. The money market brokerage was not a part of definition of “stockbrokers” provided under sub-section (90) of section 2 of the Act.

iv. The rule 41 of the Sindh Sales Tax on Services Rules, 2011 (The Rules) did not contain the money marker broker.

v. The money market broker does not issue any securities and the job was to strike a deal between two banks and the broker issued the invoices for its commission.

vi. The business has no relation with any stock exchange and is regulated by Financial Market Association of Pakistan.

vii. The then Commissioner (Appeals) had earlier accepted the contention of the appellant that Money Market Brokerage was not taxable during the tax periods from 2011 to 2013 and relief was granted as per OIA No. 36/2015, Appeal No. 88/2014 dated 03.02.2015 (Annexure “D” of the paper book).





viii. The appellant by filing this appeal challenged the SST charged on Money Market Commission at Rs.2,554,198/- (this amount was already deposited with SRB under Amnesty and under protest (letter dated 31.10.2018 annexure "C1" of the paper book).

ix. The CA-SRB erroneously mentioned in Para 10 of the OIO that the appellant admitted and agreed that the service of MMB was taxable from July-2014. No such statement was given before CA-SRB.

x. The MMB was made taxable by insertion of definition of "commission agent" sub-section (22A) of section 2 of the Act commission Agents vide Sindh Finance Act, 2015.

10. The learned DC-SRB submitted as under:-

i. The SCN was issued to the appellant confronting earning from various heads i.e. equity brokerage, interbank brokerage, commodity brokerage income, fees and commission and inadmissible input tax for an amount Rs.4,783,021.

ii. The transaction of securities was covered under the definition of "securities" provided under sub-section (77A) of section 2 of the Act.

iii. The appellant has got voluntary registration with SRB on 10.08.2011 under Tariff Heading 9819.1000, stockbrokers and commodity brokers (now Stock Brokers, future brokers and commodity brokers).

iv. The appellant during the proceedings before the AC-SRB and CA-SRB has never raised the plea that the Money Market Brokerage was not taxable during periods (July, 2014 to June, 2015) involved in this appeal.

v. The Note No.1 annex with the financial statement of the appellant for the period 2014-2015 provided that the appellant was engaged in providing services relating to equity brokerage (security brokers).

vi. The appellant possess Trading Right Entitlement Certificate (TREC) from Pakistan Stock Exchange Limited and a Licensed Securities Broker registered with the SECP and the SST was rightly charged under Tariff Heading 9819.1000.

vii. The appellant has not provided money market invoices to reconcile the matter.

viii. The appellant charged SST on Fees and commission and short paid SST to SRB.

ix. The money market brokerage is covered under Sub section (90) of the Section 2 of the Act and SST was rightly charged.



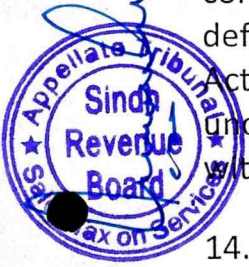
- x. The Tariff Heading 9813. 1300, commission agent was part of Second Schedule to the Act since inception of the Act.
- xi. The definition of commission agent was added to the Act vide sub-section (22A) of section 2 of the Act from July-2015.
- xii. The money market brokerage is also included in rule 41 of the Sindh Sales Tax on Services Rules, 2011 (The Rules).

11. The learned representative of the appellant in rebuttal submitted as under:-
- i. The record with regard to money market brokerage was produced before the AO which was mentioned in Para 29 of OIO.
 - ii. The appellant for doing money market brokerage business require Accreditation Certificate from Financial Market Association of Pakistan and placed on record the same as well License from Karachi Stock Exchange.
 - iii. The learned DC has miss-construed the definition of Stockbrokers and has ignored the definition which was applicable during tax-periods involved in this appeal.
12. I have heard the learned representatives of rival parties and perused the record made available before me.

13. The dispute between the parties is about charging SST on the services provided or rendered by the appellant as Money Market Broker (MMB). The contention of the appellant was that the MMB was made taxable by insertion of definition of commission agent in the Act vide sub-section (22A) of section 2 of the Act. Whereas the contention of the DC-SRB was that the service of MMB is covered under the definition of stockbrokers, sub-section (90A) of section 2 of the Act read with rule 41 of the Rules.

14. The AO in order to charge SST from the appellant invoked Tariff Heading 9819.1000 (stocks brokers, futures brokers and commodity brokers), 9813.6000 (commission and brokerage foreign exchange dealings) and 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 to the Act. Whereas, the appellant got registration under Tariff Heading 9819.1000 (stocks brokers, futures brokers and commodity brokers) of the Second Schedule to the Act.

15. The service of the appellant as MMB is not covered under Tariff heading 9819.1000. The said Tariff Heading covers three specific service providers i.e. stocks brokers, futures brokers and commodity brokers. The service of MMB is not



covered under the said Tariff Heading merely on the notion that word broker is common.

16. The appellant is neither a banking company nor a person dealing in such companies. The appellant while providing service of MMB was not dealing in foreign exchange hence Tariff Heading 9813.6000 is not applicable. Same is the position with 9813.8100, which is a general heading dealing with the services provided by banking companies and non-banking finance companies, modaraba and musharika companies and other financial institutions. The appellant has not provided any such service.

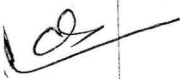
17. The appellant as per its own showing worked as a MMB for others for striking deals between two banks, earned commission and issue invoices. The Tariff Heading 9813.1300, commission agent was part of the Second Schedule to the Act since inception and was not inserted vide Sindh Finance Act, 2015 as erroneously urged by the representative of the appellant. However, the definition of commission agent sub-section (22A) of section 2 of the Act was inserted through Sindh Finance Act, 2015.

18. The SST is to be charged on the basis of the services listed in the Second Schedule to the Act as provided under section 3 of the Act and not on the basis of definition clause of the Act. In absence of the definition of commission agent provided in the Act the plain dictionary meaning of the word has to be considered.

19. The word commission agent was defined on Google as under@-

"A commission agent works for businesses of all sizes as a middleman between companies and vendors. A person in this role can work in many industries, from real estate to sales and entertainment, and in many parts of the world. A commission agent can also work for more than one business at a time".

20. The perusal of the above definition shows that commission agent is a go between two parties. The appellant as per its own showing actually worked for two banks and for all purposes is a commission agent. The appellant after insertion of definition of commission agent in the Act started depositing the SST as commission agent. The MMB is not covered under Tariff Heading 9819.1000 and 9819.6000 and 9813.8100 and the same was wrongly invoked for charging SST from the appellant.



21. It is an admitted position that the appellant worked as MMB for others on commission basis. The appellant being a service provider is required to charge, collect and pay SST to SRB in terms of section 9 of the Act. The appellant could not escape from its liability under the shelter that during the relevant tax periods the definition of commission agent was not available in the Act.

22. The Tariff Heading 9819.1300 is part of Second Schedule since inception and the appellant if not covered under Tariff Heading 9819.1000, stockbrokers, futures brokers and commodity brokers, is covered under Tariff Heading 9819.1300, i.e. commission agent and was required to charge, collect and pay the SST to SRB.

23. The AO has not invoked Tariff Heading 9819.1300 in the SCN. The OIO is also silent in this regard. In absence of raising this ground/allegation in the SCN the same cannot be adjudicated later. It is now well established point of law that the ground not mentioned in the SCN cannot be adjudicated while passing the 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”.

24. Identical position exists in the instant case since the tax was charged on the alleged service of MMB under Tariff Heading 9819.1000 which was not a proper Tariff Heading for charging tax on MMB. Moreover apparently when the SCN was issued, the concerned AC was not sure about the Tariff Heading under which the service of MMB is covered.

25. The representative of the appellant in support of his contention has also referred to para 44 of the earlier OIA No. 36/2015 that the CA-SRB accepted the plea of the appellant that money market brokerage was not taxable, the relevant portion read as under:-



44.....*The perusal of their letter dated April 29, 2014, it was revealed that the head fee and commission comprises of three different heads i.e. Money Market Commission, Commission on Initial Public Offerings (IPO) and Mark up on NCCPL and KSE Deposits. The consideration received in respect of Money Market Commission and Mark up on NCCPL and KSE Deposits are not chargeable to SSTs”.*

26. The above are merely observation of CA-SRB and not definite findings. The CA-SRB while recording the above findings failed to consider Tariff Heading

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9819.1300, commission agents which was part of Second Schedule to the Act since inception and has committed a gross mistake. Although from the said portion of OIA it appears that relief was granted to the appellant, but from perusal of concluding para No. 48 of the OIA No. 36/2015 it appears that no such relief as claimed by the appellant was granted; the relevant portion of the order is reproduced as under:-

"48.....The OIO is issued on the basis of the facts and in complete consonance of law without any arbitrary approach. Accordingly, the appeal of the appellant against the instant OIO is hereby dismissed being devoid of merit as they stalwartly failed in complying the law, paying the due tax amounts with GOS in the prescribed time and manner, and also that, the appellant failed in establishing their contention".to of the dated.

27. Perusal of the concluding para of earlier OIA No. 36/2015 clearly reflects that the contention of the appellant was not accepted by CA-SRB and no such relief as claimed by the appellant was provided.

28. In view of the above discussions it is held that the services of money market brokerage (MMB) are not covered under Tariff Heading 9819.1000, 9813.6000 and 9813.8100 and SST was wrongly charged from the appellant.

29. The appeal is allowed and the OIO and OIA are setaside. The department is at liberty to issue fresh SCN to the appellant after invoking proper Tariff Heading.

30. The appellant has already deposited the disputed amount Rs.2,554,198/- with SRB. The refund of the same is subject to the outcome of the fresh proceedings if any.

31. The copy of this order may be provided to the learned authorized representatives of the parties.

Karachi

Dated: 16.10.2023

(Justice Nadeem Azhar Siddiqi)

CHAIRMAN

Copy Supplied for compliance:

1. The Appellant through Authorized Representative.
2. The Deputy Commissioner, (Unit-12), SRB, for compliance

Copy for information to:-

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

Certified to be True Copy

Order Issued on 19-10-2023

Order Issued on

Registrar

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order Dispatched on 19-10-2023

Order Dispatched on

Registrar