

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD,
ATKARACHI

DB-I

APPEAL NO. AT-22/2022

M/s MCB Islamic Bank Limited Appellant
(SNTN # 4422426-5),
59, T-Block, D.H.A, Phase-02, Lahore

Versus

The Assistant Commissioner (Unit-09), SRB Respondent

Date of filing of Appeal 30.03.2022

Date of hearing 11.05.2022

Date of Order 19.07.2022

Mr. Burhan Ahmed, FCA for appellant.

Mr. Imran Ali, AC-SRB, (Unit-09), SRB for respondent.

ORDER

Imtiaz Ahmed Barakzai: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 20/2022 dated 23.02.2022 passed by the Commissioner (Appeals) in Appeal No. 49/2021 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 147/2021 dated 19th May, 2021 passed by Syed Hassan Abbas, Assistant Commissioner, (Unit-09) SRB Karachi.

02. The facts as stated in the OIO were that the appellant having SNTN # 4422426-5 was registered with SRB under the category of services provided or 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). The services provided or rendered by the registered person are chargeable to Sindh sales tax at the rate of 13% 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).

M. S.

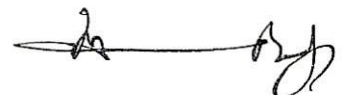
[Signature]

03. It was alleged in the OIO that during the scrutiny of monthly sales tax returns filed by the appellant with SRB viz-a-viz reconciliation with their financial statements for the tax periods of January, 2018 to December, 2018, it was observed that the appellant had short declared its taxable services in the monthly SST returns. These facts were communicated vide this office letter No.SRB-COM-1/AC-09/Banks/2019-20/079 dated 10th December, 2019, and the appellant submitted Province/ Branch wise bifurcation of Revenue dated 12.02.2019 duly stamped and signed by Departmental Head of Budget and Taxation of MCB Islamic Bank. The details were as under:

Description of Services	Jan-2018 to Dec-2018
Fee, Commission and Brokerage income (as per Annual Audited Accounts)	Rs.162,245,000
Other Income	13,020,000
Income Pertaining to SRB, received in Advance	697,345
Total Services Revenue Earned	175,962,345
Less: Revenue Declared with SRB	(40,932,154)
Revenue Declared with PRA	(94,242,304)
Revenue Declared with KPRA	(7,873,850)
Revenue Declared with BRA	(3,958,039)
Revenue Declared with Azad Kashmir	(622,124)
Revenue Declared with FATA/ PATA	(581,170)
Total Declared Revenue	(162,059,772)
Short Declared Value of Services	13,902,573
Applicable Sindh Sales Tax Rate	13%
Short paid amount of SST	1,807,334

04. Accordingly, the registered person was called upon vide Show Cause Notice (SCN) dated 03.12.2020, as to why the short paid amount of SST of Rs.1,807,334/- should not be assessed along with default surcharge under Section 44 of the Act should not be imposed for contravention of the provisions of Section 8, 9, 17 & 30 of the Act and rules made thereunder:

05. The appellant was provided with four opportunities and the case was fixed on 10.12.2020, 13.01.2021, 22.01.2021 and 05.02.2021 respectively. However, the A.R M/s AF Ferguson & Co. sought adjournments on one or other pretext for



analysing the contents of the notice and gathering necessary supporting information/ documents. However after persuasion the authorized representative of the appellant M/s AF Ferguson & Co. submitted the written reply dated 22.01.2021 which is reproduced as under:-

“In respect of the amount of sales tax allegedly short paid by our client, it is submitted that the same comprises (i) bancassurance income of Rs.13.002 million: and (ii) cheque book issuance charges aggregating to Rs.900.533. While Bank’s position in connection with chargeability of sales tax on such incomes has already been communicated to your office vide our earlier letter T 2619 dated February 12, 2020, however, for ease of a ready reference our comments are summarized hereunder:

- (a) Since ‘bancassurance income’ was not chargeable to SST under any of the sub-section headings of 98.13 and thus our client was not required to pay sales tax in respect of such income. This position has already been endorsed by the honorable Appellate Tribunal. Sindh Revenue Board in the case of our client’s parent company, M/s MCB Bank Limited, in Appeal No.AT-20/2017 [copy of the judgment enclosed as Annexure ‘A’]: and
- Income pertaining to issuance of cheque books has specifically been excluded from levy of SST in terms of Rule 30(2) of the Sindh Sales Tax on Services Rules, 2011 and, thus provincial sales tax liability was not assumed in respect of such income. For your perusal and record, a branch wise detail is been enclosed herewith as Annexure ‘B’.



06. The Assessing Officer (AO) passed the OIO holding that the services including Bancassurance Services provided or rendered by banking companies were chargeable to the Sindh Sales Tax under Section 8, 3 reads with Tariff Heading 98.13, sub-Tariff Heading 9813.4000 and sub-sub-Tariff Heading thereof

M.S.

[Handwritten signature]

of the Second Schedule to the Act. The AO placed reliance on the decision of Appellate Tribunal and decision of Honorable Sindh High Court in case of JS Bank vs. AC-2, SRB, CP No.D-4420/20147 dated 11th June, 2015. However the AC did not add income on account of cheque book charges and excluded such revenue amounting to Rs.900,533/- holding that the said services were exempted during the subject tax period under the provisions of the Rules.

07. In view of the foregoing reason, the value of services relating to 'Bancassurance Services' were worked out at Rs.13,002,040/- and an amount of SST was imposed at 13 percent of such value at Rs.1,690,265/-. The appellant was directed to deposit the same along with levy of default surcharge under Section 44 of the Act, (to be worked out at the time of payment of principal tax). Moreover, penalty of Rs.845,513/- was imposed under Serial No.03 of the Table under section 43 of the Act.

08. The appellant challenged the said OIO by way of filing appeal under Section 57 of the Act before Commissioner (Appeals) SRB who upheld the OIO to the extent of principal amount of tax viz Rs.1,690,265/- and the default surcharge. However he set aside the penalty of Rs.845,513/- imposed upon the appellant and discharged the same.

Resultantly the instant appeal was filed by the appellant.

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

- a) The Commissioner (Appeals) erred in confirming the AC's action of charging SST of Rs.1,690,265/- on account of Bancassurance, when such activities of insurance agent were not specifically chargeable to SST under the provisions of the Act.



b) That the appellant has an arrangement with insurance companies to the effect that it would recommend the said companies to its customers for their insurance needs. In case, the person approached the insurance company and purchases a policy from such insurance company, then the Appellant, acting as an insurance agent, was paid a commission by the

M.S.

[Handwritten signature]

said insurance company. As such, the said commission is being earned by the appellant on providing banking channel to insurance company for the sales of insurance products.

- c) That the said services of insurance agent are not specifically chargeable to SST under Part B (Taxable Services under Tariff Heading 9813.4000) of the Second Schedule to the Act. Even, if the contention is assumed to be correct that all services of banking company are taxable by virtue of tariff sub-heading 9813.4990 – Other services not specified elsewhere, then the whole concept of sub-heading becomes redundant which could be attributed to the legislature.
- d) The position that bancassurance commission was not taxable in any PCT heading during the subject tax periods is further strengthened by the fact that through Finance Act, 2019 the PCT heading '9813.4800 – Bill discounting commission' was replaced with '9813.4700 – Commission, Including bill discounting commission'. This essentially means that before the said amendments, introduced through the Finance Act, 2019, only 'bill discounting commission' remained taxable and it was only after these amendments that Bancassurance Commission also came within the ambit of SST.
- e) That the Commissioner (Appeals) erred in deviating from the principles settled in the judgment of the Hon'ble Sindh High Court in the case of Citibank reported as 2014 PTD 284 and principles laid down in the judgment of the Honorable Supreme Court of Pakistan in the case of M/s PTV (Civil Appeal No.1509 of 2016). Commissioner (Appeals) has also erred in deviating from the principles enunciated in the two cases decided by the Appellate Tribunal Sindh Revenue Board vide order dated November 9, 2016 in respect of appeal No.AT-93/2014 (in the case of BMA Asset Management Co. Ltd.), and the order dated March 16, 2018 in respect of Appeal No.AT-



M.S.

2 Bridges

20/2017 (in the case of MCB Bank Limited – the parent company of your appellant).

- f) The tax demand has been created merely on the basis of surmises and conjectures and without considering the fact and legal position that certain incomes have no element of service and therefore fall outside the purview of the Act.
- g) The Commissioner (Appeals) was not justified in confirming the levy of Default Surcharge as there was no deliberate action or intention of the Appellant Bank to evade taxes. Consequently, the necessary condition of 'mens rea' has not been complied with which has been held to be necessary in number of judgments of superior courts for imposition of Default Surcharge.

10. The learned AC on behalf of the respondent submitted as under:-

- a) That under the Agreement of Bancassurance services, the insurance company has to sign an agreement with Bank. Wherein, the role of Bank is to sale, market and distribute the insurance products through their sales channel to customers / accounts holders of their own branches directly. The Bank has to receive certain amount of commission / fee against the services provided or rendered as per the contract / agreement.
- b) That for the purpose of Bancassurance services the insurance company receives the services from Bank under an agreement / contract made under the provision of clause 5.3 of the said Guidelines for Bancassurance-2010.

The appellant has considered 'bacnassurance' as a single service that was provided by bank and insurance company at the same time. Whereas, the correct position of law is that there are two different services. One is provided by insurance company to its client i.e. insurance services that are chargeable to SST under Tariff Heading 9813.100 (and its sub-headings)



Handwritten signature

Handwritten signature

and another is service under the bancassurance agreement that is provided by bank to insurance company that is covered under Tariff Heading 9813.4000 (and its sub-headings) of the Second Schedule to the Act read with rule 20 of the Rules.

- d) The commission paid by insurance company to the Bank in lieu of services received of bancassurance in an expense of insurance company and the remuneration earned by the bank under the agreement of bancassurance is bank's commission, hence are taxable under the Act. Furthermore, reliance is placed upon the judgment of the Honorable Sindh High Court in the case of JS Bank v/s Assistant Commissioner-2, SRB CPD No.D-4420/2014 dated 11th June, 2015. Wherein, the placement and taxability of services under relevant Tariff Heading was correctly decided.
- e) The doctrine of "ejusdem generis" means "the same kind or class" which required that when a general word or phrase followed a list of specifics, the former would be interpreted to include the items of the same class as those listed. The reliance is placed upon the Judgment of Honorable Supreme Court in the matter of M/s Pakistan Telecommunication Corporation Limited versus the Commissioner Inland Revenue (legal) LTU, Islamabad reported as 2019 SCMR 282.



That the services of Bancassurance when read "ejusdem generis" to the services listed in the group under Tariff Heading 9813.400, squarely fall in the then sub-tariff heading 9813.4990 thus such services are duly taxable falling under tariff heading 9813.4000 read with sub-heading 9813.4990 of the Act.

11. We have heard the oral and written submissions made by the learned representatives of the parties and perused the record made available before us.

12. It may be mentioned that the AO charged tax on the service of bancassurance which was allegedly provided or rendered by the appellant and

A handwritten signature in blue ink, appearing to be "M. S.", located at the bottom left of the page.

A handwritten signature in blue ink, appearing to be "In. Singh", located at the bottom right of the page.

such OIO was maintained by the Commissioner (Appeals). It is then 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.

13. The tax periods involved in this appeal were from January-2018 to December-2018. At the relevant the Tariff Heading under which the SST was charged was as under:-

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).

From the above it appears that during the tax periods involved in this appeal Tariff Heading 9813.4990 was not an independent sub-heading, but was sub-sub-heading of Tariff Heading 9813.4910. The said Tariff Headings were changed vide Sindh Finance Act, 2019 and after change the same read as under:-

9813.4800: Safe deposit lockers and safe vaults.

9813.4900: Other services, not specified elsewhere.

After change in the Tariff Headings the Tariff Heading 9813.4900 became a sub-heading under the main Tariff Heading 98.13. The amendment is curative in nature and the legislature had realized the mistake and corrected the same to bring other services provided or rendered by banking companies in tax net. It is evident from the description of sub-heading 9813.4000 read as "services provided or rendered by banking companies in relation to" that all services provided by banking companies were not covered and only those services are covered which come under the ambit of sub-Tariff Headings or sub-sub-Tariff Headings. Under the main Tariff Heading there was a number of sub-headings and sub-sub-



headings. The mechanism and listing of sub-heading and sub-sub-headings were considered by the High Court of Sindh in the reported case of M/s Citibank Limited versus Commissioner Inland Revenue and another, 2014 PTD,284 and it was held 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



M.S.

[Handwritten signature]

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 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.

14. 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.

15. 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

Mos

[Signature]

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."

16. 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 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

Handwritten signature

Handwritten signature

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 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".

17. 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.

18. The AO also imposed default surcharge under section 44 of the Act and penalty of Rs.845,513/- under serial No. 3 of the Table under section of Act. The same was imposed without establishing mensrea. We have considered it as

obligatory on the part of department that before imposition of penalty and default surcharge it had to prove that the tax payer had acted deliberately in defiance of law or was guilty of contumacious dishonesty or had acted in conscious disregard of its legal obligation. In case of non-payment of tax it has to be seen whether the same was deliberate or not. The purpose of imposing penalty was to create deterrence for the tax payers to avoid default in payment of due tax and not for enrichment of the department and to meet its target of collection of SST. Furthermore the levy of penalty and default surcharge is a matter of discretion which must be exercised by the authorities judiciously on consideration of relevant circumstances and facts of the case. Penalty should not be imposed merely because it is lawful to do so. However for ready reference some of the decisions are quoted as under:-

- a) In the reported case of DG Khan Cement Company Limited versus Federation of Pakistan, 2004 SCMR 456 relating to imposition of penalty/additional tax it was held as under:-

"Each and every case is to be decided on its own merits as to whether the evasion or non-payment of tax was wilful or malafide, decision on which would depend upon the question of recovery of additional tax. In the facts and circumstances of this case, we find that non-payment of the sales tax within tax period was neither wilful nor it could be construed to be malafide evasion or payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law".(Emphasis supplied)

- b) In the reported judgment of Dy. Collector Central Excise and Sales Tax versus ICI Pak. Ltd. Lahore, 2006 SCMR 626 the Supreme Court of Pakistan has held as under:-

"....In an appropriate case of default in payment of sales tax, a manufacturer or producer of goods could be burdened with additional sales tax under section 34 of the Act as well as the penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic. It was further held that"....In case of failure of a registered



MOS

[Handwritten signature]

person to pay the sales tax within time, he shall also be liable to pay additional tax and surcharge. The liability being not automatic would be determined by the appropriate authority as to whether or not there was any reasonable ground for default in payment of Sales Tax which could be considered to be willful and deliberate".(Emphasis supplied)

- c) In the reported judgment of Collector of Customs versus Nizam Impex), the Honorable DB of Sindh High Court while considering the imposition of default surcharge under section 34 of the Sales Tax Act, 1990 held as under:-

"9. It is well settled law that provisions of Section 34 are attracted when there is a deliberate failure to pay the sales tax. In the present reference the perusal of the show-cause notices, order-in-original and order in appeal reveal that there was no allegation against the present respondent in respect of deliberate or wilful default, or to defraud the Government. We are, in agreement with the learned counsel for respondent that ample law is available on the point that imposition of penalty was illegal where the evasion of duty was not wilful as held by the Hon'ble Supreme Court of Pakistan in the case of D.G. Khan and others. Further reliance is placed upon the case of Messrs Lone China (Pvt.) Ltd. v. Additional Secretary, Government of Pakistan decided by the Hon'ble Lahore High Court, reported as PTCL 1995 CL 415 wherein it has been held that if the party did not act mala fide with intention to evade the tax, the imposition of penalty of additional tax and surcharge was not justified. In another case Additional Collector Sales Tax Collect-orate of Sales Tax Multan v. Messrs Nestle Milk Pak Ltd., Kabirwala and another, 2005 PTD 1850, it has been held that in such circumstances the Tribunal has discretion to waive/remmit additional tax and penalties. (Emphasis supplied)

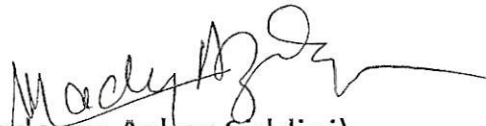



Considering the above reported judgments we hold that the penalty and default surcharge were imposed without establishing mensrea, wilful default and malafide on the part of the appellant, which was a necessary ingredient for penalizing the appellant thus the same is deleted.

MOS

Ang

19. 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.


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER

Karachi:

Dated:19.07.2022

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-09), SRB, for compliance

Copy for information to:-

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

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
FINANCE REVENUE BOARD

Order issued on.....

26/07/2022

Registrar

Order Dispatched on.....

26/07/2022

Registrar