

(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD

Appeal no: AT-58/2014

Glaxo Smith Kline Pakistan LTD..... Appellant

VERSUS

Assistant Commissioner SRB..... Respondent

Mr. Abdul Qadir Memon, ITP and
Mr. Abdul Rehman Mirza Advocate For Appellant

Mr. Turab Ali A.C. SBR..... For Respondent

Date of hearing: 06-02-2018

Date of order: 24-04-2018

ORDER

Mr. Muhammad Ashfaq Balouch:

Present appeal has been filled by the above named appellant challenging Order In Appeal No: 43/2014 Dated 20-05-2014 passed by Commissioner of Appeal SRB, in Appeal No: 74/2013 dated 03-01-2014 (hereinafter referred to as OIA) of the appellant against the Order In Original No: 324/2013 dated 16-12-2013 (herein after referred to as OIO) passed by Ms. Nida Noor, Assistant Commissioner, SRB, Karachi.

(02). Brief facts as disclosed in OIA are reproduced here as under:-

"M/s Glaxo Smith Kline Pakistan (Pvt) Ltd (here in after referred as appellant) plot 35, Dockyard Road , west Warf, Karachi having SNTN S0710501-7 is engaged in receiving franchise service which is chargeable under section 8 of the Sindh sales tax on services Act 2011(hereinafter referred as Act 2011) read with rule 36 of wiz of Sindh Sales Tax Rules 2011(hereinafter referred to as Ruels-2011) the audited financial



statements for the period of July-2011 to December-2012 of the appellant revealed that the appellant is paying royalty and technical assistance fee to their different foreign based franchisers of Rs: 346,052,064/-. Therefore, the AC SRB passed the instant OIO by ordering that the record provided by the registered person shows that during the tax period July 2011 to December 2012 shows that the registered person has received the franchise service by using the non-exclusive license to manufacture, packaging, sales and marketing the licensed products under the trademarks (Velosef and Theragran) under the license granted by the appellant with effect from 1st January 2011, for the tax period July 2011 to December 2012, hence, the said amount of sales tax on franchise fee amounting to Rs. 8,712,853/- is now imposed to be recover under section 23 (1), 47(1A)(a) and 8 of the act along with the default surcharge to be calculated at the time of payment under section 44 of the Act 2011. Furthermore as the amount of Sindh Sales tax on franchise services deposited to FBR, said amount of Rs. 19,550,975/- is imposed to be recover from Federal Board of Revenue along with default surcharge to be calculated at the time of payment under section 44 of the act 2011. The appellant failed to deposit the said amount of Sales tax on franchise services, (including royalty, technical fee, license fee etc) in the time or manner laid down under rule 36(v) of rules 2011, read with section 8 of the act 2011 and tariff heading 9823.0000 of the second schedule to the Act, hence, taking a linnet view amount of Rs. 10,000/- is imposed under clause 3 of the table under section 43 of the Act, however, no adverse inference had been drawn against penalties under clause 6(d) and 11 of the table under section 43 of the act 2011."

(3). Being aggrieved from the ONO appellant filed appeal before the Commissioner (Appeals). The Learned Commissioner (Appeals) SRB vide order in appeal No. 43/2014 dated 20th May 2014 confirm OIO bearing No: 324/2013 dated 16-12-2013.

(4).The appellant against the aforesaid order of Learned Commissioner (Appeals), preferred present appeal before this Tribunal on following grounds:

1. That the Order passed under the Provisions of Sindh Sales Tax on Services Act, 2011 by the learned Commissioner (Appeals), Sindh Revenue Board, Karachi is bad n law and on facts of the case.
2. The learned Commissioner (Appeals) erred to confirm the impugned Order-In-Original No. 324 of 2013 dated 16 December 2013 without considering that the liability towards Sindh Sales Tax had already been discharged by the Appellant in accordance with the terms of 'Trade Mark License Agreement' dated 7 November 2013.
3. The learned Commissioner (Appeals) erred to hold that the payment of Sales Tax on franchise services is payable on accrual basis ignoring the revised timeline agreed under the Trade Mark License Agreement dated 7 November 2013 in compliance with the provisions of Rule 36(V) of the Sindh Sales Tax On Services Act 2011.
4. The learned Commissioner (Appeals) erred to confirm that entire amount of Sales Tax on franchise services is payable with Sindh Revenue Board, without recognizing the fact that the Appellant is marketing and selling the product all over the country as covered under the Trade Mark License Agreement with GlaxoSmithKline Trading Services Limited.
5. The learned Commissioner (Appeals) erred to confirm that the amount of Federal excise duty on royalty already paid by the Appellant is recoverable from FBR, along with default surcharge under section 44 of the Sindh Sales Tax On Services Act 2011.
6. Without prejudice, the learned Commissioner (Appeals) erred in confirming levy of default surcharge under Section 44 of the



Handwritten signature

Sindh Sales Tax On Services Act 2011 without considering that no deliberate delay in payment of the Sales Tax is involved.

7. Without prejudice, the learned Commissioner (Appeals) erred in confirming penalty without establishing any means-rea on the part of the Appellant.
 8. The Appellant requests your permission to add, withdraw or amend any of the above grounds before or at the time of hearing of appeal.
- (5). The Department/respondent in their parawise comments has stated that appellant had not provide any supporting document or evidence with regard to bifurcating the tax on the basis of quantum of sales of license product made in Sindh and other jurisdiction. As per department the respondent side during the course of hearing regarding the show cause notice stated that all the licensed products are manufactured in Sindh, department also claimed that registered office and manufacturing facilities of appellant are located at 35, dockyard road, west wharf, Karachi. As per royalty agreements the franchise services (including technical services, provided or rendered by aforesaid franchisers, are received by appellant in Sindh. Under the provision of rule 36 (iv) of Sindh Sales Tax On Services Rules 2011, read with section 3(2) and 9(2) of Sindh Sales Tax On Services Act 2011 the franchise, is liable to deposit the tax on such franchise fee (including, technical fee or royalty). Since the activity authorized to be carried on is exclusively being performed in the province of Sindh. Therefore, the question of Sindh Sales Tax On Franchise Service apportionment basis dose not arise under section 8 of the Act read with tariff heading 9823.0000 of Second Schedule to the Act read with section 9(2) Sindh Sales Tax On Services Act 2011. It was also stated that there is no provision in the law/rules for apportionment of tax on such franchise services on any basis. It was also contended by the department that the amount of Sales Tax on royalty which was liable to be paid to SRB was deposited and paid by the appellant to FBR for the period



Handwritten signature

covered under the show cause proceedings. The said amount which was paid to FBR, which was due to be deposited to SRB is recoverable from FBR. Thus the respondent has not imposed the said amount on the appellant and not conducted any recovery proceeding for the same. Department also contended that date of payment of royalty as mentioned in the agreement was to be paid within 30 days of each calendar quarter. Therefore, the appellant was liable to discharged their liability of Sindh Sales Tax On Franchise Services by the 15 of day of the month, following the payment month laid down in the franchise agreement therefore, penalty was rightly imposed.

Mr. Abdul Kadir Memon Advocate for the respondent has argued that by the orders of Hon'ble High Court of Sindh, Glaxo Pak merged with the Mayer and Bristol. Thereafter matter remained under process which was finalized and agreement was executed on 07-11-2013. Which was effective from 01-01-2011. During this period in accordance with Internal Accounting Standard and sec 34 of Income Tax ordinance 2001, accounts were maintained on accrual bases. As the scope of payment representative was under consultation between representatives of BMS and finally license agreement was executed on 07-11-2013 between Glaxo Smith kline, Trading service Ltd with GSK Pakistan (the appellant) on revised terms and condition which was effective from 1-1-2011. Since the default in payment was neither intentional nor willful and there was no mens rea. As such it honestly prayed that default surcharge and penalty may be deleted, reliance was placed on the different judgments of Superior Courts and this Tribunal.

Mr. Turab Ali AC SRB for the respondent has argued that appellant has not provided any supporting document or evidence in this regard. This shows that appellant failed to discharge the tax liability, therefore, was rightly panelized.

We have considered the arguments of both the sides and perused the record.



A handwritten signature or set of initials in blue ink, located at the bottom right of the page.

Though appellant has agitated several grounds in the memo of appeal but has pressed only the ground of default surcharge and penalty during the course of arguments. The contention of Assessing Officer was that appellant has committed willful default, therefore, was rightly penalized. On the other hand the contention of appellant is that as the matter regarding merger of appellant with other companies was sub judice before the Honorable High Court of Sindh. Therefore, tax could not be paid at proper time.

In the case in hand Assessing Officer in Para 18 of the OIO and respondent/department in Para 5 of Parawise comments filed before this Tribunal admitted that the appellant has deposited the Sindh Sales Tax On Services to the FBR, which shows that appellant has not avoided to pay the said tax.

It is settled law that default surcharge/penalty can only be imposed if non-payment of Tax is proved as malafide, willful and having element of mens rea, department has failed to prove mens rea. In such circumstances the Honorable Superior Courts have observed as under!.

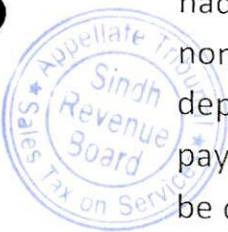
(i) 2004 SCMR 456

“Sales tax act (VII of 1990)---

Authorities to allow any exception---each and every case, however, had to be decided on its own merits as to whether the evasion or non-payment tax was willful or mala fide, decision on which would depend upon the question of recovery additional tax—where non-payment of the sales tax within period was neither willful nor it could be construed to be mala fide evasion of payment of duty, recovery of additional tax as penalty or otherwise was not justified on law.

[p. 464C].

In the case reported as PLD 1991 SC 963, this court held that imposition of penalty was illegal where the evasion of duty was not willful. The Lahore High Court in the case reported as PTCL 1995 CL 415 held that where the petitioner did not act mala fide with the



A large, stylized handwritten signature in black ink, appearing to be 'J. H.' or similar.

A small handwritten mark or signature in black ink, possibly initials.

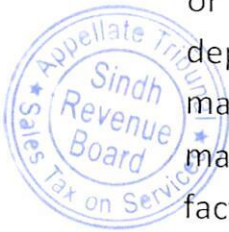
intention to evade the tax, the imposition of penalty of additional tax and surcharge was not justified. It was held by the sales tax Tribunal in the case of 2002 PTD (Trib) 300 that where the controversy between the department and the appellants related to interpretation of different legal provisions, the imposition of additional tax and penalty had no justification, in other case, the appellant's own Tribunal held that additional tax was punitive in nature as such unless default was willful or mala fide, the recovery of the same was unwarranted.

Each and every case has to be decided on its own merits as to whether the evasion or payment of tax was willful or mala fide, 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 willful nor it could be constructed to be mala fide evasion or payment of duty, therefore, the C recovery of additional tax as penalty or otherwise was not justified in law.

(ii) PTD 2006 1132
[Supreme Court of Pakistan]

It was observed by reference to section 34 of the Act that each and every case had to be decided on its merits as to whether the evasion or non-payment of tax willful or melafide, decision of which would depend upon the question of recovery of additional tax. There is no material available on record that the short payment of sales tax was mala fide or willful act of omission the respondent-C company. In the facts and circumstances of the case, the High Court had justifiably allowed the writ petition of the respondent-Company by the impugned judgment dated 06-08-2001 to which no exception could be taken.

(iii) 2005 PTD 1
[Lahore High Court]



A handwritten signature or set of initials in black ink, appearing to be "AM".

As far the merits of the case are concerned, again we will hold that imposition of penalty and its maintenance by CIT (Appeals) as well as the Tribunal was unjustified for the following reasons:-

Firstly, the revenue never succeeded in establishing the existence of mens rea in this case. Admittedly the impugned expense was claimed in bold words and the assess attempted to support the same from the books of accounts which were being maintained during the period of the project as with the Federal Government. The basis on which the assessing Officer rejected the explanation in response to the show-cause notice, as reproduced above are not open to exception as far the principles of accounting are concerned. However the fact remains that before imposition of penalty, the Assessing Officer must have brought home that the claim of expense was a deliberate and willful attempt on the part of the assesses to conceal the income, that having not been done the imposition was unjustified.

Secondly, it is by now well-settled that in fiscal matters a penalty should not be imposed only for the reason that it is legal to do so. Particularly where the statute vests a discretion in the Revenue Authority;

Thirdly, it is also established that in case where imposition of penalty is discretionary, the power so vested may not be exercised unless the defaulter is found contumacious.

(iv)1998 PTD (Trib.) 3507
[Income-Tax Appellate Tribunal Pakistan]



It is established principle of law that any fine, penalty, tax or any other pecuniary liability is to be imposed under a clear and unambiguous law and if there is any doubt it is to be resolved in favor of assesses/ a person who is to be saddled with such pecuniary liability.

A large, stylized handwritten signature in blue ink.

A small handwritten mark or initials in blue ink.

(v)1994 PTD (Trib.) 688

[Income-tax Appellate Tribunal Pakistan]

We have successfully considered the contentions raised by the learned representatives for the parties and have gone through the material available on record. We are persuaded to agree with the submission of Mr. Mashallah Khan that the onus of proving guilty intent lies squarely in the department as the penalty proceedings is in the nature of quasi-criminal proceedings. We are further persuaded to agree with the contention of Mr. Mashallah Khan that there should be specific finding on the point of concealment of income or furnishing of inaccurate particulars of income with the mens rea for evading the tax and this finding should be contained in the assessment order forming basis for initiating penalty proceedings independently.

The assessment proceedings and penalty proceedings being different in nature, no penalty can be imposed merely on the basis of findings on the point of concealment in the assessment proceedings. The onus lies on the department in the penalty proceedings to prove independently the guilty intent by showing deliberate commission or omission on the part of the assesses resulting in concealment of income or furnishing of inaccurate particulars of income which may result in avoiding of tax if the returned version is accepted.

(vi) A.T 87/2014 M/s AKD Securities Ltd v/s Commissioner (Appeals) SRB. (The Appeal Tribunal Sindh Revenue Board).

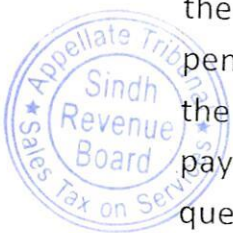
(16). Appeal No: AT. 87/2014, M/s AICD Securities Ltd u/s Commissioner and others. The Department has also imposed default surcharge and penalty upon the appellant. The appellant is paying sales tax to the department. There is a contest between the parties regarding the chargeability of some services, the default surcharge and penalty can only be imposed if non-payment of tax on the part of appellant is proved as malafide, willful and having an element of



A large, stylized handwritten signature in blue ink, written over the text of the paragraph.

A small, handwritten mark or signature in blue ink, located at the bottom right of the page.

mens rea, which is lacking in this case. The word "default" necessarily imports of an element of negligence or fault and, means something more than mere non compliance of statutory provisions. To establish default the Department must establish that the non-compliance of statutory provisions has been due to some avoidable cause. Mere non-deposit of tax without element of willfulness and malafide cannot entail default surcharge and penalty. In the reported case of Pakistan through Secretary Ministry of Finance and others versus Hardcastle Waud (Pakistan) Limited (PLD 1967 SC 1) in his separate note Mr. Justice (as he then was) Hamoodur Rehman has held that "Even in the case of a statutory offence the presumption is that mens rea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out". In the reported case of Commissioner of Income Tax versus Habib Bank Limited [(2007) 95 Tax 336 (H.C Kar.)] a learned DB of Sindh High court has held that "the penal provisions under the income Tax Act are quasi criminal in nature and mandatory condition required for the levy of penalty u/s 111 is the existence of mens rea and therefore, it is necessary for the department to establish mens rea before levying penalty u/s 111". In the reported case of collector customs versus Nizam Impex (PTCL 2014 CL 426 (SHC00 a learned DB of Sindh High Court has held that "if the party did not act malafidely with intention to evade the tax, the imposition of penalty and additional tax and surcharge is not justified. In such circumstances the Tribunal has discretion to waive/remit additional tax and penalty". In the reported case of D.G.Khan cement 2004 SCMR 456 the facts were that the sales tax in full has been deposited by the tax payer but the same having not been paid within tax period, the question before the Honorable Supreme Court was whether the tax payer was liable to pay additional tax by way of penalty under section 34 of the Act of 1990. In Para 28 of the judgment the honorable Supreme Court has held that "Each and every case has to be decided on its own merits as to whether the evasion or non-payment of tax was willful or malafide, decision of which would



A large, stylized handwritten signature in blue ink, written over the bottom portion of the main text.

A small, dark handwritten mark or signature located at the bottom right of the page.

depend upon the question of recovery of additional tax. In the facts and circumstances of the case, we find that non-payment of the sales tax within tax period was neither willful 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". In the reported case of Gharibwal Cement limited versus Income Tax Appellate Tribunal (2005 PTD) 1 A learned Bench of Lahore High Court has held that "imposition of penalty was un justified, firstly the revenue never succeeded in establishing the existence of mens rea in the case, secondly the penalty should not be imposed only for the reason that it is legal to do so, particularly where he statute vest the discretion in the Revenue Authority and thirdly where the imposition of penalty is discretionary, the power so vested may not be exercised unless the default is found contumacious". Same in the position in this case the department has failed to establish mens rea, malafides, willfulness and contumacious default on the part of appellant, which are necessary elements for imposing penalty and default surcharge. in the reported case of Deputy Collector, Central Excise and Sales Tax, Lahore versus ICI Pakistan Limited, Lahore PTD 2006 1132 the Honorable Supreme Court has held that "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 penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic requiring no determination at all". In this case also there is no independent determination at all in this regard and it was taken for granted by the forums below that the liability to pay default surcharge and penalty is a necessary consequence or corollary of non-payment of sales tax within stipulated period. In view of the above we are satisfied that the default surcharged and penalty was imposed without any just cause."

In view of above discussion, authorities of Honorable Superior Courts and of this Tribunal supra when department has not been able to



A handwritten signature in black ink.

establish mens rea against the appellant therefore, it appears that default surcharge and penalty were imposed without any justification, hence, present appeal is hereby allowed and order of Learned Commissioner (Appeals) is hereby set aside.

(Razia Sultana Taher)
Member Technical


(Muhammad Ashfaq Balouch)
Judicial Member

Copies Supplied to:

1. The Appellant through Authorized Representative.
2. The Deputy Commissioner (Legal) SRB
3. The Assistant Commissioner, SRB for compliance
Copy for information
4. The Commissioner Appeals, SRB
5. Guard File
6. Office File



Ms. Razia Sultana Taher, Member (Technical):

I have the privilege to go through the findings and observations made by the learned Member (Judicial) in the foregoing paragraphs. However, I do not find myself in agreement with the said findings / observations on default surcharge for the reason given in the paragraphs following:

In a similar case decided by Honorable Lahore High Court 2016 PTD 786

Commissioner Inland Revenue, Lahore

Versus

M/s Saritow Spinning Mills Ltd., Lahore

It was held as follows:

"9. Perusal of aforesaid provisions of law, shows that the legislature has in its wisdom, categorized "Additional Tax" (now substituted with "default surcharge") independently under section 34 of the Sales Tax Act, 1990, while section 33 deals with the situation where fine / penalty would be imposed. Additional Tax is imposed under section 34 of the Act, in a situation, if a registered person or enrolled person does not pay the tax due or any part thereof in time or in the manner specified under this Act, rules of notifications issued thereunder or claims a tax credit, refund or makes an adjustment which is not admissible to him, or incorrectly applied the rate of zero per cent to supplies made by him, he shall, in addition to the tax due, and the prescribed penalties, pay additional tax at the rate of [one] percent of the tax due per month or any part thereof.] Similarly fine / penalty is imposed under section 33 of the Act, whenever a citizen commits any offence described in the column 1 of the Table given in the said section, in addition to and not in derogation of any of any punishment to which he may be liable under any other law, he is liable to the fine / penalty mentioned against that offense in column (2) thereof. The rationale behind the above categorization appears to be is that additional tax is compulsory in nature in which is meant to retrieve loss cause to the revenue on account of delayed payment of tax, whereas penal / fine proceedings are criminal in nature. Guilt is to be established independently on the basis of cogent evidence as is required in criminal proceedings. The Taxation Officer is supposed to establish mens rea in penalty / fine cases which is a sine qua non".

The provisions of Section 44 of the Sindh Sales Tax on Services Act, 2011 is also relevant for default surcharge and use the words "shall pay". That being so, one has to understand the distinction between the words "shall pay" in section 44 of the Sindh Sales Tax Act of 2011, the default surcharge where due as per said section, has to be paid in accordance with the provisions of the said section 44. Default surcharge, under the said section 44, is in the nature of opportunity cost of money involved in the delay and / or default on the part of the person who was required to pay the principal amount of tax by a prescribed due date. As regards waiver or exemption of any default surcharge, this can be done by the appropriate forum in accordance with the provisions of Section 45 of the said 2011-Act.

For the reasons given in the foregoing paragraphs, I am of the view that we may hold that in case the appellant approaches the Sindh Revenue Board for relief / exemption in terms of the provision of Section 45 of the SSToS Act, 2011, the same may be considered by the Board for appropriate necessary action in view of the facts and the circumstances of the appellant's case.



A handwritten signature in blue ink, appearing to read "Razia Sultana Taher".

Razia Sultana Taher

(RAZIA SULTANA TAHER)
MEMBER (TEHCNICAL)

Honorable Chairman,

Respected Sir, in appeal no At-58/2014, Glaxo Smith Kline Pakistan Ltd v/s Assistant commissioner, there is difference of opinion between under signed and Learned Technical Member on following issues:-

Whether, default surcharge and penalty can be imposed without establishing mens rea, and this Tribunal has jurisdiction to set-aside the order regarding default surcharge and penalty?

It is requested that this matter may be referred to Learned Third Member.




(Muhammad Ashfaq Balouch)
Judicial Member

Justice (Retired) Nadeem Azhar Siddiqi, Chairman: There is a difference of opinion between the learned Judicial Member (Mr. Muhammad Ashfaq) and learned Technical Member (Ms. Razia Sultana Taher) on following issue, which was referred to me by the learned Judicial Member for decision:-

Whether, default surcharge and penalty can be imposed without establishing mensrea and this Tribunal has jurisdiction to set-aside the order regarding default surcharge and penalty?

After receiving the reference notice to both the parties was issued and they were heard on 08.08.2018.

Mr. Abdul Qadir Memon, ITP and Mr. Abdul Rehman Mirza, Advocate appeared for appellant

Mr. Turab Ali, AC-SRB appeared for respondent

1. Mr. Abdul Rehman Mirza Advocate for appellant at the very outset submitted that the tax has been deposited and the dispute is only in respect of default surcharge and penalty. He placed on record written submission along with photocopies of case laws in support of his submissions. Mr. Rehman Mirza submitted that without first establishing mensrea and willfulness on the part of the appellant the department cannot impose default surcharge and penalty and relied upon the reported judgment in the case of D.G. Khan Cement 2004 SCMR 456. He then submitted that the Tribunal is vested with the power to waive default surcharge and penalty and relied upon the reported judgment of Sindh High Court in the case of Collector of Customs versus Nizam Impex Private Limited 2014 PTD 498.

2. Mr. Abdul Qadir Memon for appellant submitted that the default was not willful or deliberate but due to circumstance beyond the control of the appellant. He submitted that the appellant has an agreement with Bristol-Myers Squibb Company which globally merged with Glaxo and the merger was also take place in Pakistan vide Court Order dated 17.03.2010 and two companies i.e. M/s Glaxo Smith Kline Pharmaceutical and M/s Glaxo Smith Kline were merged. He



107

then submitted that there was as a confusion as to whom the payment of franchise fee has to be paid. He then submitted that in accordance with the International Accounting Standards the provision for the payment of franchise fee was made in the accounts for the period July 2011 to December 2012. He then referred to Section 32 of the Income Tax Ordinance, 2001 and submitted that every company has to maintain its accounts on accrual basis. He then submitted that Agreement dated 07.11.2013 was entered into between appellant and Glaxo Smith Kline Trading Services Limited (Foreign Company) effective from 1st January, 2011 and after receipt of this agreement the payment to SRB was made on 17th March, 2014. In the end he submitted that the order of Judicial Member is proper and based on the earlier orders of DB of this Tribunal and should be followed and referred to the Order dated 29.06.2016 in the case of M/s AKD Securities Limited versus Commissioner (Appeals), SRB, Karachi. He then submitted that the facts of reported cases relied upon by the learned Technical Member are distinguishable and has been improperly relied upon.

3. Mr. Turab Ali AC in reply submitted that the case was already argued and he adopts the same arguments. He additionally submitted that the default surcharge and penalty was properly and rightly imposed as the tax on franchise fee was not paid/deposited as provided in law and rules. He also submitted that if the arguments of learned representative of the appellant were taken as correct the Agreement dated 07.11.2013 was entered into between appellant and Glaxo Smith Kline Trading Services Limited (Foreign Company) effective from 1st January, 2011 and payment to SRB was made on 17th March, 2014 after delay of about four months and the penalty and default surcharge was rightly imposed.

I have heard the learned representatives of the parties and perused the record made available before me.

4. The learned Judicial Member relying upon the several reported cases of superior courts of Pakistan has concluded that "*when department*



MOS

A large, stylized handwritten signature in blue ink.

has not been able to establish mensrea against the appellant therefore, it appears that default surcharge and penalty were imposed without any justification" and allowed the appeal filed by the appellant".

5. The learned Technical Member has discussed the imposition of default charges only and relying upon the reported judgment of Lahore High Court in the case of Commissioner Inland Revenue Lahore versus Saritow Spinning Mills Limited, Lahore 2016 PTD 786 has concluded that "waiver or exemption of any default surcharge, can be done by the appropriate forum in accordance with the provisions of section 45 of the said Act of 2011".

6. The reported judgment relied upon by the learned Technical Member is in respect of a question that the additional tax (substituted with default surcharge) under section 34 of the Sales Tax Act, 1990 for late payment of sales tax is not in the nature of fine and is thus not hit by the statutory allowance under section 21 (g) of the Income Tax Ordinance, 2001. The conclusion drawn by the Honorable Lahore High Court was that the since the additional tax is not a fine/penalty, thus the same is not hit by the provisions of section 21 (g) of the Ordinance and same is allowable/admissible deduction.

7. The learned Technical Member leaving the numerous reported judgments of superior courts available on the question whether the penalty and default surcharge can be imposed without establishing mensrea and that the Tribunal has the power to waive the default surcharge and penalty has relied upon a case the facts of which are distinguishable from the facts of the case in hand.

8. The first case cited by the learned representative of the appellant was D.G.Khan Cement versus Federation of Pakistan 2004 SCMR 456. In this case in para 27 the Honorable Supreme Court has held that "In view of these decisions, it could not be argued by the appellants that imposition of penalty of additional tax under section 34 was



[Handwritten signatures]

mandatory and there was no discretion left with the authorities to allow any concession". In para 28 of the same judgment the Honorable Supreme Court has held that "Each and every case has to be decided on its own merits as to whether the evasion or non-payment of tax was willful or malafide, decision of which would depend upon the question of recovery of additional tax. In the facts and circumstances of the case, we find that non-payment of the sales tax within tax period was neither willful 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". From this judgment is clear that for imposition of penalty and default surcharge the department has to establish that non-payment of the sales tax within tax period was willful or it could be construed to be malafide evasion or payment of duty. The Department has failed to establish that non-payment of tax on the part of the appellant was willful and malafide.


9. The second case cited by the learned representative of the appellant was Deputy Collector, Central Excise and Sales Tax Lahore versus M/s ICI Pakistan Limited, Lahore PTD 2006 1132 (Supreme Court). In this case in para 6 the Honorable Supreme Court has held that "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 penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic requiring no determination at all." In the present case also there is no independent determination at all in this regard and it was taken for granted by the forums below that the liability to pay default surcharge and penalty is a necessary consequence or corollary of non-payment of sales tax within stipulated period, which is not correct.

10. The third case cited by the learned representative of the appellant was Collector of Customs, Sales Tax and Central Excise Appeal, Karachi versus M/s Nizam Impex 2014 PTD 498 (Sindh High Court) In this case in para 9 a learned DB of Sindh High Court has held that "It

is well settled law that provisions of section 34 are attracted when there is a deliberate failure to pay the sales tax.If the party did not act malafidely with intention to evade the tax, the imposition of penalty and additional tax and surcharge is not justified. In such circumstances the Tribunal has discretion to waive/remit additional tax and penalties". In the present case the department has totally failed to prove or establish that the appellant has acted malafidely with the intention to evade the tax. The department has presumed that the penalty is a necessary consequence or corollary of non-payment of sales tax within stipulated period, which is not correct.

11. The appellant has also relied upon Order dated 29.06.2016 in the case of M/s AKD Securities Limited versus Commissioner (Appeals), SRB, Karachi by this Tribunal in which case the Tribunal after discussing the various case law has concluded that penalty and default surcharge was imposed without any just cause.
12. In the present case the appellant has sufficiently explain the reasons for non-deposit of tax, but the department has failed to establish mensrea, willfulness and malafide on the part of the appellant for imposing the penalty and default surcharge.
13. In view of the above discussions I agree with the findings recorded by the learned Judicial Member that default surcharge and penalty cannot be imposed without establishing mensrea and this Tribunal has jurisdiction waive the penalty and default surcharge resultantly this appeal is allowed and the orders of the forums below are setaside.
14. The copy of the order may be provided to the learned representative of the parties.

Karachi. Dated: 03.09.2018


(Justice Nadeem Azhar Siddiqi)
CHAIRMAN

Copies supplied to:-

- 1) The Appellant through Authorized Representative.

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

2) The Assistant Commissioner, SRB, Karachi.

Copy for information to:-

3) The Commissioner (Appeals), SRB, Karachi.

4) Office copy

5) Guard file.

