

Ground file.

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD
SINGLE BENCH-I

APPEAL NO. AT- 175/2022

M/s First Women Bank Limited,
(SNTN: S0700268-8)
20/2, C1-10, Syedna Tahir Saifuddin
Memorial Foundation,
Beaumont Road, Karachi.....
Appellant

Versus

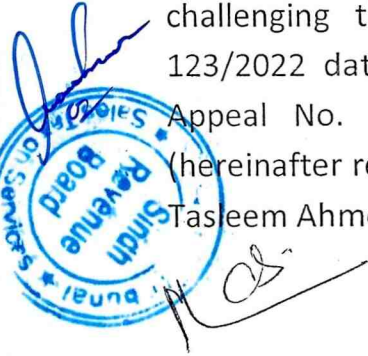
Assistant Commissioner,
Sindh Revenue Board, (SRB),
02nd Floor Shaheen Complex,
M.R. Kayani Road, Karachi..... Respondent

Mr. Rizwan Khan, ACMA for appellant
Mr. Shareef Malik, DC-DR, SRB and Mr. Sahil Kumar, SSTO-SRB for respondent

Date of filing of Appeal 18.01.2023
Date of hearing 15.02.2023 and 20.04.2023.
Date of Order 31.05.2023

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. 123/2022 dated 19.09.2022 passed by the Commissioner (Appeals-II), SRB in Appeal No. 54/2020 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 88/2020 dated 05.05.2020 passed by Mr. Tasleem Ahmed Ghumro, Assistant Commissioner, (Unit-09), SRB Karachi.

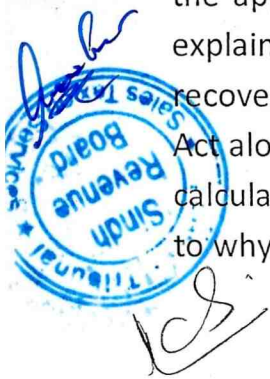


02. The facts as stated in the OIO were that the appellant (SNTN# S0700268-8) was registered with Sindh Revenue Board (SRB) and is engaged in providing or rendering taxable services of "Banks" Tariff Heading 9813.4000 read with sub-headings thereof of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh Sales Tax (SST) at the rate of 16% under section 3, 8, 9 and 17 of the Act read with rule 30 of Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

03. It was alleged in the OIO that scrutiny of the monthly Sales Tax Returns (STR) filed with SRB with financial statements for the tax periods from January, 2013 to December, 2013 the discrepancy of value of services short declared and short payment of SST was found. The workings are as under:-

Description	Amount (Rs.)
Fee, Commission and brokerage income (as per Annual Audited Accounts)	29,557,000
Gain on Sale of Securities	39,840,000
Other Income-Rent on Lockers	7,119,000
Total Income-Charges recovered from customers	14,357,000
Less: Value of Services	90,891,000
Less: Revenue Declared other than Sindh Province	(2,738,847)
Less: Revenue Declared as per SRB Returns	(24,472,752)
Short declared value of services	63,679,401
Short aid amount of Tax @ 16%	10,188,704

04. It was stated in the OIO that the above discrepancy was communicated to the appellant vide office notice dated 05.04.2019. However, the appellant failed to substantiate the matter except requesting for extension of time. Consequently, the appellant was served with a Show-Cause Notice (SCN) dated 07.05.2023 to explain as to why the tax liability of Rs.10,188,704/0, should not be assessed and recovered under the provisions of Section 23(1) read with Section 47(1A) of the Act along-with the amount of default surcharge under Section 44 of the Act (to be calculated at the time of payment). The appellant was further asked to explain as to why penalties should not be imposed under Serial No.2, 3 and 6(d) of the Table



under Section 43 of the Act for contravention of Sections 3, 8, 9 and 30 of the Act, 2011.

05. The authorized representatives of the appellant appeared before the Assessing Officer for hearing and submitted record on 14.05.2019 and 02.12.2019 wherein they submitted as evidence monthly tax returns filed with other tax authorities i.e. FBR, PRA, KPRA etc. for the captioned tax periods and breakup of exempt/non-taxable revenue pertaining to year January, 2013 to December, 2013 was also submitted vide letter dated 14.05.2019 and 02.12.2019. The working is as under:-

Breakup of Revenue:

Description	Amount in (Rs.)
Fee, Commission and Brokerage Income	29,557,000
Gain on Sale of Securities	39,840,000
Other Income-Rent on Lockers	7,119,000
Other Income-Charges recovered from customers	14,375,000
Total	90,891,000
Less: Revenue declared with FBR	(2,738,847)
Less: Revenue declared with SRB	(24,472,752)
Less: Revenue declared with PRA	(12,089,072)
Less: Revenue declared with KPRA	(644,288)
Short declared services	50,946,041

Table-2

Exempt/ Non-taxable Revenue	
Issuance of Cheque Book Charges	926,323
Commission on utility Bills	1,802,798
Rental Income	981,000
Gain on Sale of Securities	38,446,562
Gain on corporate incentive	1,393,229
Total Exempt/ Non-Taxable Income	43,550,412

06. The appellant submitted reply on revenue heads-wise as under

a) The commissions earned on issuance of Issuance of cheque books and commissions earned on utility bills were exempted from payment of



SST. Therefore, submitted that no Sindh sales tax applicable during the captioned tax periods.

- b) The rental income was earned from the renting of immovable property/ assets and the same was not taxable during the tax periods involved in this appeal and was became taxable with effect from 01.07.2015.
- c) The gain on sale of securities is a capital gain which is actually a difference between sales and purchase price of securities. It was stated that under the head of income there is no any services element but factually the bank trading through sale and purchase of shares/debt, securities, PIBs, T-Bills, TFCs, and Mutual Funds etc. The investment was made through open market. The investment/deal terms were set for fixed, ranging from 3 to 12 months and also fixed for 1 to 20 years, on maturity of investment period or on the market position the gain/loss was experienced/ sustained. Therefore, submitted that no Sindh sales tax applicable on the captioned head of income.
- d) The gain on corporate Incentive involved element of service and SST was not applicable during the tax periods involved in this appeal.

07. The assessing Officer after considering the reply of the appellant calculated the SST as under:-

Description	Amount Rs.
Short Declared Value of Services Table-I	50,946,041/-
Less Exempt/Non-Taxable Revenue Table 2	43,550,412/-
Remaining Short Declared Value of Services	7,395,729/-
Rate of Tax	16%
Short Paid SST.	1.183,301/-

08. The Assessing Officer passed OIO determining the SST at Rs.1,183,301 and ordered for recovery under section 23 (1) read with section 47 (1A) of the Act alongwith default surcharge under section 44 of the Act. The Assessing Officer also imposed penalty of Rs.229,165/- under Serial No. 2, 3, and 6 (d) of the Table under section 43 of the Act.



09. The appellant challenged the OIO by filing appeal under section 57 (1) of the Act before Commissioner (Appeals), SRB, which was dismissed vide OIA. Hence, this appeal.

10. The appellant during the pendency of appeal before Commissioner (Appeals) has admitted SST Liability of Rs. 1,183,307/= and deposited the same with SRB alongwith the penalty of Rs.229,165/- through CPR No. S1-20220224-005-01440506 dated 24.02.2023. The appellant requested the Commissioner (Appeals) to waive the default surcharge imposed under section 44 of the Act which was not accepted and the OIO imposing default surcharge was upheld.

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

- i. The default surcharge under section 44 of the Act could not be imposed without establishing mensrea, malafide and willfulness on the part of the appellant.
- ii. The forums below have imposed default surcharge mechanically without application of mind and without any adjudication and determining the quantum of default surcharge.
- iii. The calculation of default surcharge submitted by the AC on the direction of the Tribunal was not correct.
- iv. The calculation submitted by the appellant may be considered, in case the Tribunal is not convinced with the pleas taken by appellant.
- iv. The appellant before the passing of OIA realizing its mistake has paid due SST of Rs. 1,183,307/= alongwith the penalty of Rs.229,165/- which was not considered in its true perspective and by imposing default surcharge the appellant was unjustly penalized.
- vi. The reliance of the Commissioner (Appeals), SRB on judgments from Indian jurisdiction ignoring judgments of superior courts of Pakistan was not proper and appropriate and the same was deprecated/disapproved by a DB of Sindh High Court and relied upon the reported judgment of M/s Nishat Talkies, Karachi versus Commissioner Income Tax, 1989 PTD 591 (DB-SHC).
- vii. The learned representative of the appellant relied upon the following reported cases.
 - a) 2004 PTD 1179 (FB-SC) DG Khan Cement V/s Federation of Pakistan.



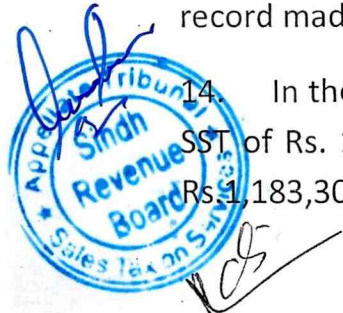
- b) 2006 SCMR 626 (DB-SC) Deputy Collector Central Excise and Sales Tax versus ICI Pakistan, Lahore.
- c) Unreported Judgment of DB of Sindh High Court in the case of Commissioner Inland Revenue, Zone IV versus BYCO Petroleum Limited.

12. The learned SSTO-SRB submitted as under:-

- i. That learned DC-SRB has already filed para-wise comments on 11.01.2023 and he relied upon the same and submitted that the same be treated as submissions and arguments on behalf of respondent.
- ii. In section 44 of the Act the word used are "whether willfully or otherwise" which clearly reflects that in case of imposition of default surcharge, the department is not obliged to establish mensrea and willful default on the part of taxpayer.
- iii. The appellant by voluntarily depositing the SST and penalty accepted that the due SST was not paid as prescribed.
- iv. The judgments quoted by the Commissioner (Appeals), SRB in the OIA and the judgments quoted by DC-SRB in his submissions may be considered.
- v. The following reported cases were relied upon by the DC-SRB in his submissions:-
 - a. 2016 PTD 786 (Lahore High Court) Commissioner Inland Revenue, Lahore versus Saritow Spinning Mills, Ltd.
 - b. 2006 PTD 2683 (Supreme Court) Pakistan Dhan Fibers Limited versus Central Board of Revenue.
 - c. 2012 PTD 405 (Sindh High Court) Wazir Ali Industries Ltd. versus Appellate Tribunal Inland Revenue, Karachi.
 - d. 2018 PTD 1869 (Sindh High Court)

13. I have heard the learned representatives of the parties and perused the record made available before us and the written submissions filed by them.

14. In the instant matter the Assessing Officer served SCN for short payment of SST of Rs. 10,188,704/- which was culminated in passing of OIO for recovery of Rs. 1,183,301/-. From this it is apparent that the SCN was issued without due



diligence. The appellant though filed appeal before Commissioner (Appeals). but realizing its mistake deposited the SST and penalty before passing of the OIA.

15. This appeal was only filed against the imposition of default surcharge under section 44 of the Act. The perusal of the OIO showed that the AO imposed penalty and default surcharge mechanically treating the same as a necessary corollary of non-payment of SST without first establishing the mensrea and malafide on the part of the appellant. The perusal of OIO further showed that the AO even had not used the words "mensrea and malafide" in the entire OIO. The superior courts in its numerous pronouncements have held that the default surcharge and penalty could not be imposed without establishing mensrea, willfulness and malafide intention to evade tax on the part of tax payer.

16. It is obligatory on the part of the department that before imposition of penalty or default surcharge it has to prove that the tax payer had acted deliberately in defiance of law or was guilty of contumacious dishonesty or 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 penalty and default surcharge is 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. The penalty and default surcharge should not be harsh and exemplary. 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 and default surcharge should not be imposed merely because it is lawful to do so.

17. The Commissioner (Appeals), SRB considering the language of sub-section (1) of section 44 of the Act concluded that the default surcharges could not be waived and concluded as under:-

"07. The above legal position explicitly elucidates that each and every content of section 44(1) has judiciously been formulated and the provisions of section 44(1) is prima facie indicates the imperative character of it thus, makes it mandatory/ obligatory of a defaulter to pay default surcharge despite the fact



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that the default/ delay in payment was intentional or otherwise. Therefore, I am inclined to dismiss the instant appeal and upheld the impugned order. Accordingly, the appellant is directed to deposit the amount of default surcharge under section 44 of the Act, 2011@.

18. The Commissioner (Appeals), SRB in reaching the above conclusion relied upon the following case laws.

- i. 2015 PTD 1068, (DB-LHC) Commissioner Inland Revenue versus M/s Azgard Nine Limited, on the point that any provision of the statute needs to ascertain the intention of law makers from the words used, which may receive their literal, natural and ordinary meaning. It was also held that the "customary usage of terms of art may and shall when that appear in a statute is that may involves a choice and shall an order (Reliance is placed on Muhammad Sadiq and others versus University of Sindh).
- ii. The Commissioner (Appeals), SRB without quoting the citation has relied upon the following judgments from Indian jurisdiction.
 - a) Ganesh Parsad Sah Kesari (Supreme Court of India). On the point that if the word shall is treated mandatory the net effect would be that even where default in complying with the direction given by the court is technical, fortuitous, unintended or on account of circumstances beyond control of the defaulter, yet the court would not be able to grant any relief and assistance to such a person.
 - b) State of Haryana versus Lakshmi Narayan Gupta (Supreme Court of India). On the point that the word shall be construed not according to language with which it is clothed but in the context which it is used and the purpose it seeks to serve. It was also held that if by holding them to be mandatory, serious general inconvenience is caused to persons or general public without very much furthering the object of the Act, the same would be construed as directory.

The above judgments are on the point of interpretation of word "shall".

19. The Commissioner (Appeals) in para 06 of OIO held that the question under consideration exclusively falls within the purview of sub-section (1) of section 34 of the Act and held as under:-



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34. *Default surcharge.- (1) Notwithstanding the provisions of section 11, if a registered person does not pay the tax due or any part thereof, **whether wilfully or otherwise**, (emphasis supplied) in time or in the manner specified under this Act, rules or notifications issued thereunder or claims a tax credit, refund or makes an adjustment which is not admissible to him, or incorrectly applies the rate of zero per cent to supplies made by him, he shall, in addition to the tax due, pay default surcharge at the rate mentioned below:-*

20. The question of waiver of default surcharge/additional tax was considered by our superior courts in various judgments relating to section 34 of the Sales Tax Act, 1990 which read as follows:-

*"44. Default Surcharge: (1) Notwithstanding the provisions of section 23, if a registered person does not pay the tax due or any part thereof, **whether wilfully or otherwise**, in time or in the manner specified under this Act, rules or notifications issued there under, he shall, in addition to the tax due and any penalty under section 43, pay default surcharge at the rate mentioned below:-*

21. Section 44 of the Act and Section 34 of the Sales Tax Act, 1990 are not materially different in scope, and both deal with imposition of default surcharge. Therefore in view of the similarity of language of two statutes the case law pertaining to section 34 of the Sales Tax Act, 1990 could also be relied upon in cases pertaining to Section 44 of the Act. Now I will examine the case laws available on the point that default surcharge could not be imposed without establishing malafide intention to evade the tax.

22. In 2004 SCMR 456, D.G. Khan Cement Company Limited versus Federation of Pakistan the Full Bench of Supreme Court of Pakistan it was held as under:-

*"26. 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 'intention to evade the tax, the imposition of **penalty of additional tax and surcharge** (emphasis supplied) 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** (emphasis supplied) 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***



male fide, the recovery of the same was unwarranted (emphasis supplied).

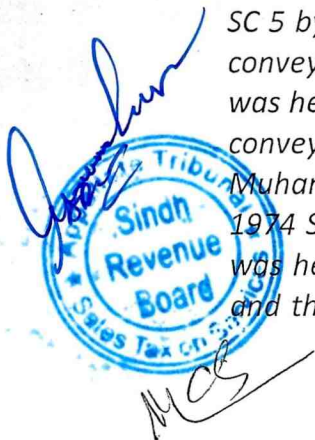
27. In view of these decisions, it could not be argued by the appellants that imposition of penalty or additional tax under section 34 was mandatory and there was no discretion left with the Authorities to allow any concession.

28. 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 (emphasis supplied).** 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 construed to be mala fide evasion or payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law (emphasis supplied).**

29.The appeals as regards acceptance of the Constitutional petitions of the respondents against the recovery of additional tax for the foregoing reasons are hereby dismissed. The connected Civil Appeals Nos. 1866 of 1996 and 1288 of 2000 stand disposed of in the above terms”.

23. In 2006 SCMR 626 (DB-Supreme Court of Pakistan) Deputy Collector Central Excise & Sales Tax versus ICI Pakistan Limited, Lahore, it was held as under:-

“The above provisions would clearly indicate that in case of failure of a registered person to pay the sales tax within time, he shall also be liable to pay additional tax and surcharge. The liability being not automatic B 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. *Shamroz Khan and another v. Muhammad Amin and others* PLD 1978 SC 89, it was held that the expression "he shall be liable to have his defence, if any, struck off" used in Order XII, rule 8, C.P.C., would mean that the Court might strike off defence in an appropriate case and it was not incumbent upon the Court to strike off the defence on failure to supply address. In *Haji Abdul Razzak v. Pakistan through Secretary, Ministry of Finance, Islamabad and another* PLD 1974 SC 5 by section 168 of the Sea Customs Act No. VIII of 1878, it was provided that conveyance used in removal of contrabands would be liable to be confiscated. It was held that the provision still gave discretion to the authorities to confiscate the conveyance and that discretion had to be exercised on sound judicial principles. In *Muhammad Musa v. Settlement and Rehabilitation Commissioner and 2 others* 1974 SCMR 352, the expression "shall be liable to cancellation" was examined. It was held that expression envisaged application of mind by appropriate authority and that failure of auction-purchaser to pay price or installment did not operate



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as automatic cancellation of auction sale. In the case of D.G. Khan Cement Factory (*supra*), 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 was willful or *mala fide*, 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-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 6-8-2001 to which no exception could be taken"** (*emphasis supplied*).

24. In 2005 PTD 1850 (DB-Lahore High Court) Additional Collector Sales tax versus Nestle Milk Pakistan.

"9.....Their Lordships of the Supreme Court in re: D.G. Khan Cement Company Limited (*supra*) also found that with regard to the levy of additional tax or penalties each and every case had to be decided on its own merits as to whether the evasion or payment of tax was willful or *mala fide*. The decision on which would depend upon the question of recovery of additional tax. The Hon'ble Court in the facts and circumstances of the case before it held that non-payment of the sales tax within the tax period was neither willful nor it could be construed to be *mala fide* evasion or payment of duty. **Accordingly the recovery of additional tax as penalty or otherwise was found to be unjustified in law (emphasis supplied)**. As noted above, the Tribunal found as a fact that in the given situation including prevailing uncertainty in application of the charging provisions of the Act the imposition of additional tax and penalties was unjustified. The use of that discretion based upon their appreciation of facts as well as the legal proposition, their finding for remitting/waiving additional tax and penalties is not open to exception.

25. In PTCL 1995 CL 415 (SB-Lahore High Court) Lone China Private Limited versus Additional Secretary. Ministry of Finance it was held as under:-

"11. According to Section 12(1) of the Sales Tax Act, 1951, it is necessary for the authorities to determine the amount of additional tax on the basis of criteria given therein which the petitioner was to pay as penalty and time is also to be specified within which the same should be paid. It is only on the failure of the petitioner to pay this additional tax within the period fixed that he could be visited with the further penalty of payment of further additional tax whereas in the relevant provisions of Sales Tax Act, 1990 this further penalty has been described as surcharge. The impugned orders as regards determination of penalty etc., for



the period from 1989 to June 1990 are not sustainable and a fresh decision is to be made as observed above.

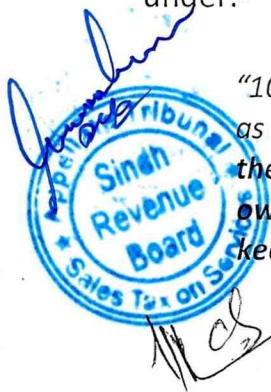
12. For the foregoing reasons, the writ petition is partly accepted. The impugned orders as regards imposition of penalty in the form of additional tax and surcharge as regards period from November 1990 to June, 1991 are hereby declared to be without lawful authority and of no legal effect. The said additional tax and surcharge shall not be recovered from the petitioner (emphasis supplied). As regards imposition of penalty for the period from June 1989 to October, 1990 the same are also declared to be without lawful authority and the case is remitted to the Deputy Collector to determine the same as directed in paragraph 11 above. The parties are left to bear their own costs.

26. In 2018 PTD 900 (DB-Sindh High Court) Commissioner Inland Revenue, Karachi versus Tianshi International Pakistan Co. Pvt. Ltd. it was held as under.

"7. Learned counsel for the applicant was confronted to assist the Court as to whether the provisions of Section 34 of the Sales Tax Act, 1990 in its scope, are materially different from the provisions of sections 161/205 of the Income Tax Ordinance, 2001 relating to the terms default, and willful default, in response to which, learned counsel for the applicant could not point out any material different in the scope and application of the aforesaid provisions, nor could assist the Court as to how the ratio of the aforesaid judgment of the Supreme Court would not apply to the facts of the instant case. Accordingly, we are of the considered opinion that the order passed by the Appellate Tribunal to this effect does not suffer from any factual error or legal infirmity; on the contrary, the same depicts correct legal position, which is duly supported by the judgment of the High Court and the Honble Supreme Court, as referred to hereinabove. (Emphasis supplied)

27. In 2006 PTD 397 (DB-Sindh High Court) Pakistan State Oil Limited versus Collector (Adjudication), Customs, Sales Tax and Central Excise it was held as under:-

"10.However, we find force in the submissions of Ms. Danish Zuberi as regards her other contention relating to levy of additional tax and penalty, as the question of imposition of additional tax and penalty is to be decided on its own merits looking to the peculiar facts and circumstances of each case, keeping in view, whether the evasion or non-payment of tax was willful, mala



fide or otherwise. Further guidance in this regard may be taken from the following cases:-

- (1) *Messrs Humayun Ltd. v. Pakistan and others PLD 1991 SC 963.*
- (2) *Messrs Lone China (Pvt.) Ltd. v. Additional Secretary to the Government of Pakistan Ministry of Finance, CBR, Custom House, Karachi PTCL 1995 CL 415.*
- (3) *Gandhara Nissan Diesel Ltd. v. Sales Tax Department and others 2004 PTD 2771.*

28. In 2004 PTD 2771 (DB-Sindh High Court) Gandhara Nissan Diesel Ltd. v. Sales Tax Department and others it was held as under:-

Regarding the imposition of penalty/additional tax, the Supreme Court observed as under:-

"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 construed to be mala fide evasion or payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law.

*Applying the above principle to the facts and circumstances of this case it is to be observed that non-payment of the sales tax within the tax period by the Petitioners was neither willful nor it could be construed to be mala fide evasion as the same was on account of the view adopted by the Petitioners on their interpretation of the provisions and the definitions of words supply, taxable supply and time of supply. **In the circumstances, imposition of penalty or levy of additional tax could not be justified and the order imposing the penalty/additional tax is set aside. (Emphasis supplied)***

29. In 2023 PTCL (CL) 260 (DB-Lahore High Court) Commissioner Inland Revenue versus Rice Exporters Association of Pakistan it was held as under:-

"5. We agree with the findings rendered by the Appellate Tribunal for non-payment of tax at relevant time was not a malafide, therefore, principles laid down in DG Khan Cement case supra applies Question No. 4 is answered in affirmative i.e. against the applicant department. (Emphasis supplied)



30. In and un-reported DB judgment of Sindh High Court) S. S.T.R.A. 191/2018 order dated 06.05.202, Commissioner IR Zone-IV versus Byco Petroleum relating to section 34 of the Sales Tax Act, 1990 It was held as under.

"Whether, in the present facts and circumstances, the levy of default surcharge and penalty upon the respondents was warranted per the law?"

6. *The scope of reference jurisdiction [8] is primarily confined to legal questions emanating from the judgment impugned [9] and it is settled law that the learned Appellate Tribunal is the final arbiter of facts [10].*

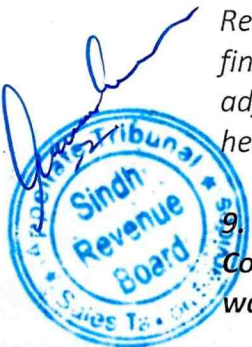
7. *In the circumstances before us, the assessment orders attributed no mens rea to the respondents and on the contrary stipulated that none was required to impose default surcharge and / or penalty.*

*The preponderance of binding precedent [11] demonstrates that the existence of mens rea is essential for imposition of **default surcharge and / or penalty (emphasis supplied)**. The principle has been extended to stipulate that even non-payment of tax due to misinterpretation of law in good faith does not attract a penalty [12].*

A Division Bench of this Court has maintained in China Power[13] that default surcharge ought not to be imposed in a perfunctory manner and may only be warranted upon proper adjudication as to willful default[14] and the presence of mens rea. It is imperative to mention that China Power has recently been maintained by the august Supreme Court [15].

8. *The Commissioner Appeals found that the delay in payment of tax, albeit marginal, was ostensibly on account of the prevalent crisis of circular debt in the petroleum industry; hence, there was no occasion of any willful default. The Commissioner remained of the view that in any event there was no attribution of culpable mens rea with respect to the respondents in the assessment orders and that none was even otherwise warranted. The learned Appellate Tribunal Inland Revenue found no reason to differ with the Commissioner Appeals and upheld the findings. Therefore, it is prima facie manifest that the final arbiter of facts in this adjudicatory hierarchy has found no element of willful default and mens rea, hence, did not sanction the imposition of default surcharge and penalty.*

9. *Even though China Power pertained to income tax, a Division Bench of this Court held in Tianshi International [16] that section 34 of the Sales Tax Act 1990 was materially not different in scope from sections 161 / 205 of the Income Tax*



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Ordinance 2001, relating to default and willful default and that the levy of default surcharge on a hypothetical basis, and without establishing willful default on the part of taxpayer, was illegal and a nullity in the eyes of law [17]. (Emphasis supplied) It is imperative to denote that the decision in Tianshi International was rendered in 2017, therefore, much after the amendment in section 34 of the Sales Tax Act 1990 and the Court observed that the developed principles of law remained indistinguishable [18].

Even though the honorable Islamabad High Court has been demonstrated to find otherwise [19], we remain bound by the enunciation of law expounded in Tianshi International in view of the Multiline [20] principles.

10. The applicants' counsel suggested that default surcharge and penalties were civil liabilities (and not relatable to offences), however, then argued that they were consequent upon strict liability offences. Prima facie the submissions appeared to be rather incongruent inter se. It is settled law that penalties under fiscal laws are quasi criminal in nature [21] and warrant imposition in the presence of culpable intent. It is pertinent to reiterate that the assessment orders themselves attribute no culpable intent to the respondents.

11. The Commissioner Appeals observed that the petroleum industry [22] was severely hit by the national calamity of circular debt leading to the marginal delays under scrutiny; however, the payment of the correct quantum of tax demonstrated that there was no willful default. Reference was made to binding pari materia decisions holding that since the vicious cycle of circular debt was linked to the Federal Government itself, the respondents could not be encumbered with a burden arising as a direct corollary thereof. The learned Appellate Tribunal Inland Revenue agreed with the foregoing and maintained that there existed no cause to warrant the imposition of default surcharge and penalty upon the respondents and particularized that identical treatment had been given to all similarly placed entities in the petroleum sector.

12. The statutory dispute resolution hierarchy recognized that the calamitous liquidity crunch originated with the Federal Government and penal consequences could not be imposed upon entities unable to meet their tax obligations in a timely manner purely on account thereof. These findings of fact are pertinent hereto and with respect thereof the learned Appellate Tribunal is the final arbiter. Nothing exceptionable has been demonstrated before us to warrant any interference in such regard even otherwise.



13. *In view of the reasoning and rationale contained herein, duly bound by the enunciation of law expounded by the earlier Division Bench judgments of this Court in Tianshi International [23] read with China Power [24] per the Multiline [25] principles, the question reframed for determination by this Court is answered in the negative, hence, in favor of the respondent/s and against the applicant department. This reference applications stand disposed of in the above terms".*

31. In another un-reported DB judgment of Sindh High Court SPL. S.T.R.A. 102/2006 order dated 16.03.2023, Mehran Sugar Mills Limited versus The Collector Collectorate of Customs Sales relating to section 34 of the Sales Tax Act, 1990 it was held as under.

"Admittedly the amount of ST was paid as soon as it was realized that input tax could not have been adjusted even before issuance of SCN and passing of OIO and therefore, in view of the judgments passed by the courts reported as 2013 PTD 1037, Premier Kadanwari CO. Ltd. V Customs, CE and ST App. Tr., Islamabad, PLD 2007 SC 517 Collector of Customs, CE and ST V Sanghar Sugar Mills and 2004 SCMR 456, D.G. Kham Cement Company Ltd. V FOP and Sp. STRA No. 191 of 2018, (Comm. IR Zone Iv, V Byco Petroleum Ltd. 06.05.2018) the levy of additional tax was not justified.

4. The tax in question was paid much prior to issuance of SCN and passing of OIO, despite this the adjudicating authority imposed additional tax and penalty on the ground that this by implication establishes the guilt of the applicant.the amount was immediately paid would not ipso facto mean that the tax was avoided intentionally and element of mensrea was present. It is a matter of fact that for certain period; the levy of sales tax was exempted on supplies in question and input tax was adjusted. This, in and of itself, is not a ground to sustain imposition of additional tax and penalty, as for that some corroborative material to the contrary must be on record. There is none in this case. Therefore, in our considered view, and based on the law cited above, is not a case wherein imposition of penalty and the levy of additional tax ought to be sustained.

32. In another un-reported DB judgment of Sindh High Court CP No. D-3532/2020 order dated 11.02.2021, China Power Hub Generation Company Pvt. Ltd. Versus Pakistan & others (confirmed by Supreme Court of Pakistan in CP 546-K of 2021) relating to default surcharge under section 205 (3) of Income Tax Ordinance, 2001 it was held as under.



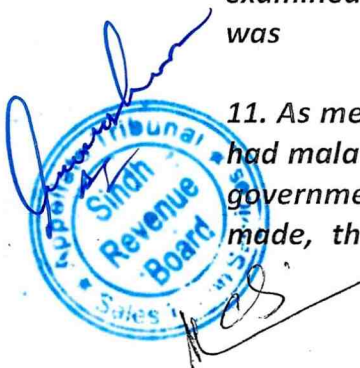
"7. Lastly, we may observe that insofar as imposition of default surcharge is concerned, it is settled law that it is not to be imposed in a mechanical manner; but only after a proper adjudication as to the willful default and presence of mens-rea".(emphasis supplied)

33. The Tribunal is vested with the power to remit penalty or default surcharge if the same were imposed without establishing mensrea, willfulness and malafide intention of evasion of tax on the part of tax payer. Reliance is placed on the reported judgment in the case of 2014 PTD 498. Collector Customs v. Nizam Impex,

"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 willful 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 willful 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)

10. Thus in the light of case-law discussed above it is clear that imposition of penalty or additional tax under section 34 is not mandatory and the authorities have discretion to allow such concession. The important issue which needs to be examined is as to whether the evasion or nonpayment of tax by the respondent was willful or mala fide. Emphasis supplied)

11. As mentioned earlier, nowhere it is case of department that the respondent had mala fide intention, or that default was willful and that too to defraud the government. In such circumstances when the imposition of sales tax has been made, the demand of additional tax appears to be harsh and unjustified.



12. As a sequel of above discussion, we are of the considered view that the Tribunal has rightly held that the Department has failed to show that the default was willful or to defraud the Government, therefore, has justifiably remitted the payment of additional tax". (Emphasis supplied)

34. From perusal of the above judgments relating to imposing of default surcharge under the provisions of Sales Tax Act, 1990 and Income Tax ordinance, 2001 it appears that there is a consensus that default surcharge could not be mechanically imposed without determination of willful default, malafide intention to evade tax and mensrea on the part of tax payer.

35. The learned DC-SRB in his submissions relied upon the following case laws which have distinguishable facts and are not directly applicable to the facts of the case. The discussions are as under.

i. *In the first case Saritow Spinning supra the question before the Court was whether the learned Appellate Tribunal Inland Revenue was justified to conclude that additional tax 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 disallowance u/s 21(g) of the Income Tax Ordinance, 2001. In this context the Court has held that "The rationale behind the above categorization appears to be is that additional tax is compulsory in nature which is meant to retrieve loss caused 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 Court has not held that in any case the payment of default surcharge is mandatory and was payable without any determination.

ii. *In the second case of Dhan Fibres supra the question before the Court was whether payment of tax made in deviation to the rules of 1996 could attract the liability particularly additional tax under section 34 of the Sales Tax Act, 1994 and in that context the Court has held that "In our considered opinion in the instant case there was no impediment or hurdle for appellant to ensure deposit of sales tax by submitting the tax return before 20th of the month instead of filing the same on the last cut out date, thereby depriving the public exchequer from the*



tax, which was due on the said date because actually the tax would be deemed to have been received when the bank instrument was cleared”.

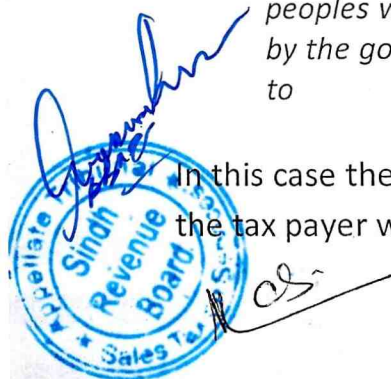
The Court has not held that in any case the payment of default surcharge is mandatory and was payable without any determination.

iii. In the third case of *Wazir Ali Industries supra* the question before the court was "whether the Appellate Tribunal was justified to hold that the prize offered by companies for promotion of sales as used in section 156 of the Income Tax Ordinance, 2001 covers the amount of free units given by the applicant company to the distributors towards sales promotion" and in that context the Court has held that "Recovery of such amount from the applicant in terms of section 161 as well imposition of default surcharge under section 205 of the Income Tax Ordinance, 2001, under the facts and circumstances of this case, is also in accordance with law. The order passed by the Tribunal depicts the correct position of law, hence requires no interference by this Court”.

However, in this case there was no discussion that the payment of default surcharge was mandatory.

iv. In the fourth case of *Independent Media Corporation supra* the question before the Court was "whether the Learned Customs, Excise and Sales Tax Appellate Tribunal was correct in observing that the applicant was liable pay penalty, additional tax/additional surcharge and had committed any tax fraud" and in that context it was held that "The tax amount which the petitioner collected as a collecting agency was retained by it illegally. This indeed resulted in double loss to the government, on the one hand the persons who paid sales tax to the petitioner claimed input tax adjustments on the basis of invoices issued to them for the amount of tax paid on account of release of advertisements on TV, and on the other the petitioner did not transfer the said amount of tax to the government. The vendor has no legal authority to hold on to the amount of sales tax which he recovers from the purchaser as an agent of the government". All these years since then, the petitioner has retained sales tax amount collected by it from its clients, it is self-evident that by such retention the petitioner has unjustly enriched itself to the detriment of peoples welfare upon which otherwise that amount of tax would have been spent by the government. This all clearly suggests a deliberate attempt of the petitioner to evade continuously paying tax.

In this case the default surcharge was imposed for the reason that the malafide of the tax payer was established by its conduct.



36. All the above cited judgments are binding upon this Tribunal as well as Officers of SRB including Commissioner (Appeals) under Article 189 and 201 of the Constitution of Pakistan. Apparently the Officers and Commissioner (Appeals) are passing orders imposing default surcharge without establishing the malafide intention of the tax payer to evade tax in violation of the provisions of the Constitution and the above judgments.

37. I am compelled to observe that the Officers of SRB by not following the provisions of the Constitution, judgments of the Superior Courts and the orders of the Tribunal are committing misconduct and disciplinary action may be initiated against them. This Tribunal in Appeal No. AT- 49/2019, Global Environmental Lab. Pvt. Ltd versus SRB observed as under:-

"The Assistant Commissioner in attaching the bank account against the expectation of Commissioner (Appeals) and against the proviso to sub-section (1) of section 66 of the Act, 2011 has committed serious misconduct and disciplinary action is required to be taken against her by the Board as per law. Since the Assistant Commissioner has unnecessarily harassed the tax payer she is also liable to compensate the appellant. We recommend that the appellant be compensated suitably by the SRB by deducting an amount equal to the amount which was recovered from the bank accounts of the appellant from the reward amount to be given to the Assistant Commissioner by SRB (this is in addition to the refund of amount recovered from the attachment of the bank accounts).

We are constrained to observe that it appears to us that the officers who are vested with quasi-judicial powers are even not aware about the basic principles of law and in passing orders and taking actions not only avoiding the orders of the Tribunal but also ignoring the judgments of the superior courts which are binding on all the officers of SRB under Article 189 and 201 of the Constitution. In our view the non-adhering of judgments of the Superior Court is amounts to contempt of court and on a reference action can be taken against the delinquent officers of SRB under Article 204 of the Constitution. We are sanguine that the Board will look into the matter and take necessary steps to avoid repetition of such acts in future and shall instruct the officers to follow the judgments of the superior courts, under intimation to this Tribunal".



38. The said order was challenged by SRB (not by the Officer) before the High Court of Sindh in SPL. Sales Tax Reference No. 277 & 278 of 2019. The Court has passed the following order:-

*"4.....whereas, on the undertaking given by the learned Counsel on behalf of Assistant Commissioner no further adjudication of the grievance as above is to be recorded: hence, we while disposing of these References Applications observe that **the concerned officer shall remain careful in future and shall not act against the orders passed by appellate forum, including the Superior**". Emphasis supplied.*

39. Despite the above directions the Officers and Commissioner (Appeals) are not following the judgments of the Superior Courts.

40. In a recent decision the Islamabad High Court passed Order dated 22.03.2023 in Writ Petition No. 2510/2017, Masud Reza Vs. The Federation of Pakistan through President & others dealing with a case in which the petitioner has impugned an order dated 31.05.2017 passed by the President of Pakistan, whereby findings and recommendations of the learned Federal Tax Ombudsman (FTO) dated 20.02.2017 were set aside. The facts of the case were that the taxpayer filed complaint before FTO for non-compliance of order of stay passed by the Commissioner Inland Revenue (Appeals). The FTO recommended the Chief Commissioner to initiate action against the official in the manner required by law. The said recommendation was challenged before the President of Pakistan, who set aside the recommendation. The order of the President was challenged before Islamabad High Court and in this context it was held as under:-

*"The question before the learned FTO was with regard to the maladministration on part of the Assessing Officers as defined under Section 2(3) (i) of the FTO Ordinance. The finding of the learned FTO was that the **failure or refusal of the relevant tax officials to honor and implement the stay order issued by the Commissioner Appeals was perverse, arbitrary, unjust and oppressive. And such conduct fell within the definition of maladministration under Section 2(3) (i) (b) of the FTO Ordinance. After reaching such conclusion, the learned FTO issued recommendations to the Chief Commissioner Inland Revenue to take suitable action against the officials responsible for failure to comply with the order of the Commissioner Appeals. Such recommendations fell within the powers vested in the learned FTO under section 14 (6) of the FTO Ordinance, (Emphasis supplied).***



41. The Islamabad High Court allowed the petition, set aside the order of President of Pakistan and upheld the recommendations of the learned FTO.

42. In view of the above it is advisable that the Officers, SRB including Commissioner (Appeals) to adhere to the orders of the superior courts to avoid any adverse action against them.

43. The Commissioner (Appeals), SRB relied upon the judgments from Indian Jurisdiction ignoring the case laws of Pakistan available on the subject. The reliance on judgments of other jurisdiction in presence of case laws of Pakistan was disapproved and deprecated by our superior Courts. In 2017 PTD 1158 (Supreme Court of Pakistan) Shifa International Hospital vs. Com. IT & WT, Islamabad. It was held as under:-

"5. As regards the Indian judgments relied upon by the learned counsel for the petitioner, these judgments are from a foreign jurisdiction and may be relevant in understanding and resolving the issues before us but they have no binding effect upon the Courts in Pakistan. We are of the opinion that they are also distinguishable from the instant case as the provisions of law analysed therein are not pari materia to the law of our country being examined in this case, besides the facts of those cases are entirely different as they pertain to the question of whether a nursing home fell within the purview of plant and not a factory or workshop.

44. In another case reported as 1989 PTD 591 (DB-Sindh High Court) M/s Nishat Talkies versus Commissioner of Income Tax, Justice Saleem Akhtar as he then was speaking for the Bench held as under:-

*"Before parting with the judgment we are, constrained to observe that while deciding appeal the learned Tribunal has taken pains to refer in detail several judgments of the Supreme Court of India and has relied on them without referring the judgment of the Supreme Court of Pakistan which was available and referring been referred in this judgment. **We disapprove the practice of not considering and relying upon the judgments of our superior Courts. It is the duty of every Court and Tribunal in Pakistan to follow the judgments of Supreme Court. Under Article 189 of the Constitution any judgment of the Supreme Court which***



decides a question of law or enunciates a principle of law is binding on all Courts in Pakistan. Likewise and in the same terms, Article 201 provides that subject to Article 189 all judgments of the High Court are binding on all the Courts subordinate to it. We hope in future the learned Tribunal will be careful in this regard". {Emphasis supplied}

45. This Tribunal in an earlier Order dated 19.01.2023 passed in Appeal No. AT-169/2022 URS Inspection versus Assistant Commissioner, SRB relying upon a judgment of our Supreme Court has held as under:-

"22. The CA-SRB for dismissing the appeal for non-prosecution relied upon an judgment of Indian Supreme Court reported as AIR 197 SC 429 (the year was incorrectly mentioned (due to which I could not be benefited) ignoring the judgments of the Superior Courts of Pakistan. The judgments of other jurisdiction are not binding and be perused and considered if the judgments of our superior courts on the subject are not available".

46. In view of the above it is advisable that the Officers, SRB should avoid relying upon the judgments from Indian/foreign Jurisdiction ignoring the case laws of Pakistan available on the subject.

47. In view of the above discussions the appeal is allowed. Consequently it is held that the appellant is not liable to pay default surcharge and the OIO and OIA to the extent of imposing of default surcharge are setaside

48. The appeal is disposed of in the above terms. The copy of the order may be provided to the learned representatives of the parties. The copy of the order may also be sent to the learned Chairman, SRB for placing the same before the Board and to take appropriate action as he deemed appropriate.

Karachi

Dated: 31.05.2023

(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Certified to be True Copy
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Order Dispatched on 02/06/2023
Registrar

Order issued on 02/06/2023
Registrar

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy Supplied for compliance:

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

Copy for information to:-

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

Chairman - (SRB) Karachi

