

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT KARACHI

SB-1

APPEAL NO. AT-34/2023

M/s Seaboard Logistics
(SNTN: 7173989-8)
C-33, 1st Floor, Block No.2, Kehkashan,
Clifton, KarachiAppellant

Versus

The Assistant Commissioner (Unit-32),
Sindh Revenue Board, 2nd Floor,
Shaheen Complex, M.R. Kayani Road
Karachi..... Respondent

Date of filing of Appeal 03.03.2023
Date of hearing 14.03.2023 & 01.06.2023
Date of Order 15.06.2023

Mr. Asif Khaliq Shar, Advocate for appellant.

Mr. Shareef Malik, DC-DR, SRB and Mr. Mujeeb Rehman SSTO, SRB for the
respondent.

ORDER

Justice © Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 45/2023 dated 17.02.2023 passed by the Commissioner (Appeals) in Appeal No. 510/2022 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 2747/2022 dated 24.11.2022 passed by Mr. Awais Raza, Assistant Commissioner, (Unit-32) SRB Karachi.

02. The brief facts as stated in the OIO were that the appellant was registered with SRB in the service category of Terminal Operator, classified under tariff heading 9819.9090 of the Second Schedule to the Sindh Sales Tax on Services Act,





2011 (hereinafter referred to as the Act) subject to levy of Sindh Sales Tax (SST) at the statutory rate of tax. Accordingly, the appellant was required to:

- a. Charge, collect and to e-deposit SST with SRB against their services in terms of the provisions of sections 8, 9 and 17 of the Act.
- b. Furnish its tax returns in the form "SST-03" as required under section 30 of the Act read with rule 12 and 13 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

03. It was alleged in the OIO that the appellant has failed to deposit the SST and also failed to e-file the prescribed tax returns (SST-03) for the tax period September, 2022. It was further alleged that despite issuance of the notice regarding non-payment and non-filing the appellant nether submitted any response nor deposited amount of Sindh sales tax due, nor e-filed the prescribed SST returns.

04. The appellant was served with Show-Cause Notice (SCN) dated 25.10.2022 to explain as to why penal action under Serial No. 2 & 3 of the Table under section 43 of the Act should not be taken against it. The appellant was also asked to explain as to why default surcharge under section 44 of the Act should not be imposed.

05. The appellant filed written reply dated 18.11.2022 stating therein that the SCN was received on 01.11.22 and the delay in depositing of SST of Rs.9,123,222/- was due to mistake and assured that this will not happened again in future. The appellant has deposited the SST on 01.11.2022 and e-filed SST return on 02.11.2022.

06. The Assessing Officer (AO) passed OIO imposing penalty of Rs.456,161/- under serial No. 3 (on account of late payment of SST) of the Table under section 43 of the Act and further penalty of Rs.5,000/- under serial No.2 (for late e-filing of SST return) of the Table under section 43 of the Act and also imposed default surcharge of Rs.81,584/- under section 44 of the Act.

07. The appellant challenged the OIO by filing appeal under section 57 (1) of the Act before Commissioner (Appeals), SRB, who uphold the imposition of penalty and default surcharge and dismissed the appeal vide OIA, the operating part of which is reproduced as under:-

"6. Considering the foregoing facts, I am of the view that the appellant's persistent late payment its mala-fides and the delay in payment of sales tax due & filing of tax returns was intentional and without any reasonable cause (paragraph 5.2. above). As a result, appellant committed offences mentioned against serial No.2 & 3 of the Table in section 43 ibid. Therefore, I hold that the appellant is very much liable to pay the amount of penalties imposed under serial No.2 and 3 of the Table in section 43. The appellant is also liable to deposit default surcharge under section 44 of the reasons that the said section 44 prima-facie indicate the imperative character of it thus, makes it mandatory/ obligatory for a defaulter to pay default surcharge despite the fact that the default/ delay in payment was intentional or otherwise.

7. In view of the all above, I am inclined to dismiss the instant appeal and uphold the impugned order. Accordingly, the Appellant is directed to deposit the penalties amounting to Rs.5,000/- and Rs.456,161/- under serial No.2 and 3 of Table under Section 43 of the Act, 2011, respectively, along-with the amount of Rs.81,584/- as default surcharge under section 44 of the Act, 2011".

08. The learned advocate for the appellant submitted as under:-

The appellant immediately on receiving the SCN dated 25.10.2022 deposited SST for the month of September, 2022 on 01.11.2022 and e-filed the SST return on 02.11.2022 and caused no loss to the exchequer.

- ii. The penalty under section 23 of the SST-Act, 2011 and default surcharge under section 44 of the Act was imposed without establishing *mensrea*.
- iii. The penalty and default surcharge was imposed by forums below mechanically without application of mind.
- iv. The appellant is a potential taxpayer and its monthly deposit of SST was always over five (5) million.



- v. The appellant has explained the cause of delay which was not accepted without assigning any reason.
- vi. The forums below had failed to justify that the appellant was a habitual defaulter.
- vii. The ground of habitual defaulter was not taken in the SCN and the ground not taken in SCN could not be considered.

09. The learned SSTO-SRB Mr. Mujeeb Rehman submitted as under:-

- i. The appellant is a habitual defaulter in payment of SST and filing of returns. Earlier the default was condoned keeping in view that the same was for 1 or 2 days.
- ii. The *mensrea* is established by the conduct of the appellant who always delayed payment of SST and filing of e-returns.
- iii. The OIO and OIA were properly passed after providing right of hearing to the appellant.
- iv. The appellant by late depositing SST has caused loss to public exchequer and the penalty and default surcharge were rightly imposed.
- v. The words used in section 44 of the Act are "whether willfully or otherwise" clearly reflects the intention of the legislature that the provision is mandatory.
- vi. The provision for imposing default surcharge does not provide for establishing mensrea and malafide intention to evade tax.

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

11. In the instant matter the AO served SCN dated 25.10.2022 upon the appellant for non- payment of SST without mentioning the amount in the SCN and without alleging that the appellant was a habitual defaulter. The SST was deposited on 01.11.2022 and return was e-filed on 20.11.2022 even before passing of OIO which was passed on 24.11.2022. However the AO passed OIO and imposed penalty of Rs.461,161/- and default surcharge of Rs.81,584/-.



12. This appeal was only filed against the imposition of penalties under serial No. 2 & 3 of the Table under section 43 of the Act and 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, willfulness and malafide on the part of the appellant. Merely saying that "the element of mensrea existed against the appellant" was not sufficient to establish mensrea. The AO has to establish that delayed payment was willful and with malafide intention to evade tax, which was lacking.

13. The AO in para 4 of the OIO stated that the "default surcharge was auto imposed in Section 44 of the Act should be imposed" was misconstrued and against the various judgments of the superior courts in which it was 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 mala fide, decision on which would depend upon the question of recovery of default surcharge.

14. The Commissioner (Appeals), SRB in para 5.2.3. held that the "legislature, by using the words 'willfully or otherwise', makes it clear that, whether the delay in payment is deliberate or it is the upshot of any other circumstances (avoidable/inevitable), the payment of default surcharge would be obligatory". These findings are in violation of Article 189 and 201 of the Constitution of Pakistan as well as the various judgments of the superior courts of Pakistan which clearly provides 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 mala fide, decision on which would depend upon the question of recovery of default surcharge".

15. 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, willfulness and malafide on the part of the appellant. 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 on the part of tax payer.

Handwritten signature

16. The forums below have mechanically imposed the default surcharge and penalties without determining whether the default surcharge was willful and with malafide intention to evade SST. It was obligatory on the part of the department that before imposition of penalty or default surcharge 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 vested in the taxing authority, 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) ignoring the judgments of the Supreme Court of Pakistan and High Court of Sindh relied upon the judgment of Islamabad High Court, which despite utmost respect was not binding in presence of the judgments of Supreme Court of Pakistan and High Court of Sindh. In my various Orders I have quoted such judgments, which were also in the knowledge of the Commissioner (Appeals) but the same were deliberately ignored just to extract more money from the tax payer.

18. The perusal of OIO and OIA showed that the forums below were impressed with the words "**whether willfully and otherwise**" used in sub-section (1) of section 44 of the Act and held that the imposition of default surcharge was automatic, the relevant provision of the Act is reproduced as under:-

*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 (emphasis supplied)**, 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:-*



19. 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:-

*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. Section 44 of the Act and Section 34 of the Sales Tax Act, 1990 are not materially different in scope, and both were dealt with imposition of default surcharge. Both the provisions provide "**whether wilfully or otherwise**". Therefore, in view of the similarity of language of two statutes the case laws 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 and penalty could not be imposed without establishing mensrea, willfulness and malafide intention of the tax payer to evade the tax.

21. In D.G. Khan Cement Company Limited versus Federation of Pakistan, 2004 SCMR 456, the Full Bench of Supreme Court of Pakistan had 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 wilful 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).

22. In Deputy Collector Central Excise & Sales Tax versus ICI Pakistan Limited, Lahore, 2006 SCMR 626 the DB of Supreme Court of Pakistan relying upon the decision of the full bench of Supreme Court of Pakistan in the case of D.G. Khan Cement had held as under:-

"6. We have heard the learned counsel for the parties and have also perused the available record. We find that judgment, dated 30-10-1994 passed by the High Court in Writ Petition No.4876 of 1994 was set aside by this Court in Civil Appeal No.1441 of 1995 by consent of the learned counsel for the parties and not on merits. Therefore, the impugned judgment may not be interfered with merely on that score. 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 requiring no determination at all. (Emphasis supplied) The respondent had taken a categorical position that it had charged and paid sales tax on the basis of discounted prices which was the same as the prevalent retail prices and that there was no evasion in the payment of sales tax in terms of S.R.O. dated 1-11-1990.

"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 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) 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 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).**

23. The perusal of above two judgments of the Supreme Court of Pakistan clearly established that for imposing default surcharge under section 44 of the Act the department has to establish that the non-payment of SST was **willful or mala fide, the decision on which would depend upon the question of recovery of additional tax.** The clear findings of the Supreme Court **was that "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".**

The view taken by both the forums below were contrary to the above two judgments of the Supreme Court of Pakistan and could not be sustained



24. In Additional Collector Sales tax versus Nestle Milk Pakistan, 2005 PTD 1850 the DB-Lahore High Court relying upon the judgment in D.G. Khan Cement had held as under:-

"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. (Emphasis supplied)** 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 Lone China Private Limited versus Additional Secretary, Ministry of Finance, PTCL 1995 CL 415 the SB of Lahore High Court had 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 Commissioner Inland Revenue, Karachi versus Tianshi International Pakistan Co. Pvt. Ltd., 2018 PTD 900 the DB of Sindh High Court had 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 difference 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.

27. In Pakistan State Oil Limited versus Collector (Adjudication), Customs, Sales Tax and Central Excise, 2006 PTD 397 the DB of Sindh High Court had 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) Ghandhara Nissan Diesel Ltd. v. Sales Tax Department and others 2004 PTD 2771.



28. In Ghandhara Nissan Diesel Ltd. v Sales Tax Department and others, 2004 PTD 2771 the DB of Sindh High Court had 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 Commissioner Inland Revenue versus Rice Exporters Association of Pakistan, 2023 PTCL (CL) 260 the DB of Lahore High Court had 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, Commissioner IR Zone-IV versus Byco Petroleum, S.S.T.R.A. 191/2018, order dated 06.05.2022 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? (Emphasis supplied)

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 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 supplies) 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.

MOS

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 judgment of Mehran Sugar Mills Limited versus The Collector Collectorate of Customs, SPL. S.T.R.A. 102/2006 order dated 16.03.2023,



the DB of Sindh High Court relating to section 34 of the Sales Tax Act, 1990 had 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 judgment of China Power Hub Generation Company Pvt. Ltd. versus Pakistan & others, CP No. D-3532/2020 order dated 11.02.2021, the DB of Sindh High Court relating to default surcharge under section 205 (3) of Income Tax Ordinance, 2001 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

Mos

reported judgment of Sindh High Court in the case of Collector Customs v. Nizam Impex, 2014 PTD 498. The operative part is reproduced 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 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/remit 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. The imposition of penalty is discretionary with the imposing authority. It is not necessary to impose penalty in every case without establishing mensrea. The words used in various clauses of section 43 of the Act are "such person shall be liable to pay penalty" gives discretion to the officers to impose or not to impose



penalty. In Assistant Collector, Customs and Central Excise, Sukkur versus M/s Mari Gas Company Limited, 2003 PTD 818 the DB of Sindh High Court had held as under:-

"The use of the phrase "shall pay" makes it mandatory on the person to pay the amount while the use of the words "he shall be liable to pay" gives a discretion to the concerned officer of the Excise Department to impose additional tax or waive it totally if, in his opinion, the circumstances so require@. (Emphasis supplied)

The discretion has to be exercised judiciously. Power to impose penalty even though discretionary, should not be exercised, unless tax payer was found contumacious. In fiscal matters penalty should not be imposed for the reason that it is legal to do so, particularly where the statute vests discretion in the officers.

35. The perusal of the above judgments relating to imposing of default surcharge under section 34 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.

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 and penalty 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 should be initiated against them. This Tribunal in its decision dated 13.05.2019 passed 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.

WOS

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 on a representation filed by respondent No.2 the learned FTO in his order dated 20.02.2017 found that lapse in giving effect to the stay order dated 11.11.2016 was borne out by the record as produced before the learned FTO, who concluded that failure to implement a stay order by the Commissioner (Appeals) was tantamount to maladministration under Section 2(3)(i)(b) of the FTO Ordinance and recommended that the Chief Commissioner Inland Revenue "take suitable action against the official for failure to comply with CIR (Appeals) stay order in the manner required by law." Against the order of FTO, FBR filed a representation before the President of Pakistan, who by order dated 31.05.2017 found that the recommendations of the learned FTO were in excess of his jurisdiction as the learned FTO had no power to interfere with the matter of assessment of tax and interpretation of law and set-aside the findings of the learned FTO. The said order of President of Pakistan 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. (Emphasis supplied).***

41. From the above order of Islamabad High Court it is clear that orders of superiors have to be followed and complied with and failure to comply with the same will result in misconduct liable to action.

Mas

42. In view of the above discussions the appeal is allowed. Consequently it is held that the appellant is not liable to pay penalty and default surcharge and the OIO and OIA are set aside.

43. The appeal is disposed of as above. The copy of the order may be supplied to the learned representatives of the parties.

Karachi


Dated: 15.06.2023

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.


(Justice[®] Nadeem Azhar Siddiqi)

CHAIRMAN

Certified to be True Copy


19-06-2023

REGISTRAR

APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 19-06-2023

Registrar

Order Dispatched on 19-06-2023

Registrar