

# IN THE HIGH COURT OF SINDH AT KARACHI

Present:

**Mr. Justice Muhammad Junaid Ghaffar**  
**Mr. Justice Agha Faisal**

Special Sales Tax Reference

Application 30 of 2020 : Fatima Fertilizer Company Limited vs.  
Commissioner-II, Sindh Revenue Board

For the Applicant : Mr. Hyder Ali Khan, Advocate

For the Respondent : Mr. Shamshad Narejo, Advocate

Date of hearing : 23.11.2020

Date of announcement : 22.12.2020

## JUDGMENT

**Agha Faisal, J.** The applicant has impugned the Judgment dated 25.11.2019, rendered by the learned Appellate Tribunal, Sindh Revenue Board, Karachi, in Appeal No.AT-52/2018 (“Impugned Judgment”). The relevant discussion and the operative findings are reproduced herein below:

“19. The other legal pleas raised by the appellant are that (a) section 47 (IB) for recovery of non-withholding or non-deposit of sales tax from withholding agent, was introduced vide Sindh Finance Act, 2016 and do not apply to tax periods prior to July, 1, 2016, (b) prior to Finance Act, 2019 (applicable from July, 1, 2019), there was no section under the Sindh Sales Tax Act, 2011 to hold the withholding agent personally liable for not withholding sales tax or depositing the tax withheld as the said provisions were introduced under section 13 of the Act through Finance Act, 2019, (c) mere mentioning of section 47(1A) of the Act does not vest the tax department jurisdiction to proceed on the ground of tax ‘fraud’ without first establishing collusion on the part of appellant.

20. We will deal with all these legal points jointly as these are interconnected. In the show cause notice sub-section 47 (1A) (a) of the Act has been mentioned. Although sub-section 47 (1A) (a) of the Act was added to the Act vide the Sindh Sales Tax on Services (Amendment) Ordinance, 2011 dated 01.11.2011 and subsequently enacted as the Sindh Sales Tax on Services (Amendment) Act, 2012 dated 26.01.2012. In the SCN sub-section 47 (1B) of the Act was not invoked as contended by the learned representative of the appellant. From the perusal of the contents of SCN it appears that the same does not meet the requirement of clause (a) of sub-section (1A) of section 47 of the Act. The requirement of sub-section (1A) of section 47 of the Act mentions that the SCN can only be issued if it is alleged that “where by reason of some collusion, abetment, deliberate attempt, misstatement, fraud, forgery, false or fake documents any tax or charge has not been paid or is short paid, assessed or collected, the person liable to pay such tax shall be served with a notice within five years of such tax period, requiring him to show cause for non-payment of such tax”.

21. The SCN in substance was issued under sub-section (1) of section 47 of the Act and can be treated as such in view of clear language of SCN, although ingredients of clause (a) of sub-section (1A) of section 47 of the Act are missing. Quoting a wrong provision of SCN is a mere technicality causing no prejudice to the appellant in preparation of its defence.

22. This view gains support from the following cases:-

“(a) In the reported case of Commissioner Income Tax, Karachi versus Abdul Ghani, PTD-2007 967 the honorable Supreme Court held as under:

Applying this pronouncement to the present case, there can be no doubt with regard to the power of the Assessing Officer to re-open the assessment for the previous assessment years under section 65 of the Ordinance, if he is satisfied that there has been escapement of assessment. Thus the fact that the Assessing Officer instead of issuing a notice under section 65 issued a notice under section 56 would neither invalidate the notice issued under section 56 of the Ordinance nor would render the assessment framed in pursuance of such notice illegal and without jurisdiction”.

“(b) In the reported case of Collector of Sales Tax and Central Excise, Lahore versus Zamindara Paper and Board Mills, 2008 SCMR615 the honorable Supreme Court held as under:-

It is to be noted that instead of taking in to consideration technicalities, the Court looks into the matter with different angles namely as to whether substantial compliance has been made or if

any of the sub-rule has been omitted then what prejudice is likely to cause to the party to whom the show cause notice is given”.

(c) It is now well settled that instead of form the substance of the transaction should have been seen and considered. In the reported judgment in the case of Habib Insurance Limited versus Commissioner of Income Tax (Central), Karachi PLD 1985 Supreme Court Page 109, it has been held as under:-

“It is true as contended by the learned counsel for the appellant that in Revenue cases one must look at the substance of thing and not at the manner in which the account is stated”.

23. The object of section 47 of the Act is to recover tax not levied or short levied. Sub-section (1) of section 47 of the Act provides that where by reason of some inadvertence, error or miscalculation any tax or charge has not been levied or has been short levied, the person liable to pay any amount of tax or charge shall be served with a notice, within five years of the relevant date, requiring him to show cause for payment of the amount specified in the notice. In this provision the word “person” has been used and not withholding agent. The word “person” has been defined under clause (a) of sub-section (63) of section 2 of the Act as a “company, an agency or an association of persons incorporated, formed, organized or established in Pakistan or elsewhere”. The appellant is a company established in Pakistan and fully covered by the definition of person. Sub-section (2) of section 47 of the Act provides that “the officer of the SRB empowered in this behalf shall after considering the objections of the person served with a notice to show cause under sub-section (1), determine the amount of tax or charge payable by him and such person shall pay the amount so determined”. The appellant being service recipient of advertising services is a withholding Rules, 2011 and being company fall within the definition of a person and has short deposited the tax with SRB thus SCN was rightly issued and tax liability was rightly determined under sub-section (2) of section 47 of the Act.

24. The Commissioner (Appeals) in paragraph 11 of the OIA held, and the relevant portion is reproduced for ready reference as under:-

“There are two primary issues in the case at hand. The first is whether the Appellant is liable to pay the Sindh Sales Tax on advertisement services received by it and second is whether the Appellant has already deposited the tax amount on advertisement services against the above parties. The former question is a legal question while the latter is based on facts”.

25. The Commissioner (Appeals) relying upon the provisions of clause (f) of sub-rule (2) of rule 1 read with sub-rule (5) and (9) of rule 3 of Withholding Rules held, and the relevant portion is reproduced for ready reference as under:-

“12. The section 9 of the Act prescribed “the Person liable to pay the tax”. Sub-section (3) of section 9 of the Act empowers the Sindh Revenue Board (“Board”) to prescribe the rules whereby the Board can specify the service or class or services in respect of which the liability to pay the tax shall be on the person providing the taxable service or the person receiving the taxable service or any other person. Accordingly, the Board, in exercise of such powers, prescribed the Sindh Sales Tax Special Procedure (Withholding) Rules, 2011 (“Withholding Rules”). The rule 1(2) of the Withholding Rules lists the persons qualified to be Withholding Agents. The clause (f) of sub-rule (2) of rule 1 of the Withholding Rules relates to receiving of advertisement services. Relevant rule is reproduced as follows:

14. This means the recipient of service of advertisement is required to withhold entire/whole/100% tax amount to deposit the same with SRB. Therefore, the responsibility to deposit whole amount of tax on advertisement service lies with the Appellant irrespective of the fact whether the tax has been charged by the service provider or not. In the case at hand, the service provider has charged the tax and the Appellant has deducted the said amount of tax however, did not deposit the revenue into the Sindh Government treasury which otherwise is the responsibility of the Appellant under the law.

15. As per the record available before this forum the Appellant has voluntarily e-signed up with SRB as withholding agent and is receiving various services including advertisement services from SRB registered persons and is withholding Sindh sales tax amount which were reflected in the monthly sales tax returns of the service providers.

16. Coming to another ground of the appellant that they have already deposited the tax amount on advertisement services, in my opinion, the learned counsel could not fully understand the outcome of the reconciliation exercise between the Appellant and the Respondent in which it has clearly been specified that the payment made by the Appellant does not pertain to the parties involved in the ambit of SCN and in absence of said invoices, the assessing officer could not verify or reconcile as to whether the payments made by the Appellant include the tax on advertisement services against the above parties. The assessing officer duly afforded the opportunities of hearing to reconcile duly supported with documentary evidence as to whether the tax amount of Rs. 12,150,517/- has been deposited into Sindh Government treasury. The Appellant, rather producing the record and explanation in respect of each transaction, raised frivolous grounds without any supporting evidence. It is apparent from the record that the Appellant could not justify as to whether they have actually deposited the tax involved. This shows the malafide intention or willful default on the part of the appellant.

17. In view of the foregoing reasons and discussion, I am of the view that the appellant has withheld the Sindh Sales tax amount, however, did not deposit with SRB. Hence, the assessing officer is justified to treat the Appellant in default on this count. I hereby upheld the OIO and the appeal of the appeal is hereby dismissed being devoid of any merit”.

26. We have examined the above findings recorded in OIA and found no defect and legal infirmity in the same. The findings were recorded with reasons. The appellant has failed to justify the deposit of SST with FBR.

27. As far as factual controversy is concerned the appellant has admitted that it being a service recipient of taxable advertising services and withholding agent had withheld the SST on advertising services received in Sindh from the service providers registered in Sindh and mistakenly deposited the SST with FBR and applied to FBR for refund of amount or to transfer the amount to SRB. Despite granting sufficient time the amount could not be transferred from FBR to SRB. The deposit of SST with FBR cannot be treated as valid or legal tender and the appellant cannot escape its liability or responsibility to deposit SST with SRB. The appellant has relied upon the Order of this Tribunal in the case of Burj Bank Ltd versus

SRB, Appeal No. AT-18/2016 and submitted that the amount deposited with FBR may be allowed to be adjusted as allowed in the earlier case. The reference to the earlier case is distinguishable since in that case the amount was allowed to be adjusted for the reasons that the same pertained to Tax periods July, 2011 and August, 2011 which was the very initial period after enactment of Act, 2011 and the defence of the tax payer was that the Act was newly introduced and it took some time to understand the new law and the FBR has allowed the tax payers to deposit Sindh Sales Tax with FBR. Whereas in the instant case the periods involved are from July, 2011 to December, 2011, January, 2012 to June, 2012, October, 2012 to December 2012, January, 2013 to March, 2013, May, 2013 to December, 2013 and January, 2014 to February, 2014. Furthermore the respondent had informed that there was not mechanism between the FBR and SRB for adjustment of amount of SST wrongly or mistakenly deposited with FBR. However the facts in the instant case are different since such mechanism is in place.

28. As far as the penalty of Rs.2,187,094/= is concerned we found force in the arguments of the learned representative of the appellant that unless the mens rea is established by the department the penalty cannot be imposed. It has been claimed by the appellant the tax was mistakenly deposited with FBR due to some confusion. The deposit of tax with FBR is apparently without carrying any patent contumaciousness and obvious willfulness with disregarded to statutory provisions. Once it was found that the tax payer having been out of pocket to the extent of such erroneous, but bon afide, deposit could not be treated as defaulter. The word "default" necessarily imports of an element of negligence or fault and means something more than mere non-compliance of statutory provisions. To establish default the Department must establish that the non-compliance of statutory provisions has been due to some avoidable cause. Mere non-deposit of tax without element of willfulness, mala fide and mens rea cannot entail penalty. The law in this regard is well established. The department has failed to established mens rea and mala fides on the part of the appellant. We hold that appellant is not liable to pay penalty.

29. As far as the default surcharge is concerned it is noted with concern that despite being provided with an opportunity the appellant has failed to deposit the SST amount with SRB and has failed to take any cogent steps to get the amount refunded or transferred from FBR to SRB except writing letters that too under the directions of the Tribunal. The appellant by depositing the SST which belonged to Sindh exchequer with FBR has caused financial losses to the Sindh exchequer and is liable be compensated. The default surcharge was rightly imposed and the appellant is liable to pay the same till the payment is made to SRB.

29. In view of the above, the appeal is dismissed to the extent of payment of principal amount of tax and default surcharge and allowed to the extent of payment of penalty.

30. The appellant is granted two months' time to deposit the amount with SRB or to get the same transferred from FBR to SRB, failing which the SRB is at liberty to recover the amount from the appellant in accordance with law.

31. The appeal is accordingly disposed of. The copy of the order may be provided to the learned representatives of the parties."

2. Briefly stated, the applicant is aggrieved for having been held liable as a withholding agent in respect of a period prior to when such a liability was incorporated into the statute. A show cause notice<sup>1</sup> was issued to the applicant with respect to the periods from July 2011 till February 2014, pursuant whereof an order in original<sup>2</sup> was delivered. The matter was escalated before the Commissioner Appeals and the Order in Appeal<sup>3</sup> was assailed before the learned Appellate Tribunal, culminating in the Impugned Judgment. Aggrieved by the Impugned Judgment, the present reference application was preferred and on 30.01.2020, this court issued notice to the respondents in respect of the following questions framed for determination:

- (a) Whether the Appellate Tribunal erred by holding that Section 47 (1) of the Sindh Sales Tax on Services Act, 2011 allowed for the recovery of tax from withholding agent in respect of tax periods prior to the insertion of Section 47(1B) through Sindh Finance Act, 2016?
- (b) Whether the Appellate Tribunal was justified to hold that the Assistant Commissioner-21's incorrect invocation of Section 47 (1A) in the Show Cause Notice dated 31.03.2014 was a mere technicality which could be remedied at the time of hearing of the appeal?
- (c) Whether the Appellate Tribunal was justified to apply the Sindh Sales Tax Special Procedure (Withholding) Rules, 2011 ('Withholding Rules-2011') despite their repeal by the Sindh Sales Tax Special Procedure (Withholding) Rules, 2014?
- (d) Whether the Appellate Tribunal was justified to direct the Appellant to deposit Sindh Sales Tax already deposited with the Federal Board of Revenue?
- (e) Whether the Appellate Tribunal was justified to impose default surcharge on the Appellant in the absence of mens rea?

<sup>1</sup> Show cause notice dated 31.03.2014.

<sup>2</sup> Order in Original dated 21.06.2014.

<sup>3</sup> Order in Appeal dated 23.07.2018.

3. Learned counsel for the applicant demarcated the scope of the reference jurisdiction of this court<sup>4</sup> and submitted that the questions framed merited determination in favor of the applicant, as fiscal statutes operate prospectively<sup>5</sup>; amending a statute signifies change of intention of the legislature<sup>6</sup>; rules repealed, in absence of a saving clause, do not survive repeal<sup>7</sup>; failure of the issuing authority to quote the correct provisions of law in a show cause would render it invalid<sup>8</sup>; quoting the incorrect provisions of law in a show cause notice renders it untenable<sup>9</sup>; existence of *mens rea* is a mandatory condition for levying of default surcharge<sup>10</sup>; unjust enrichment could not be sanctioned in fiscal matters<sup>11</sup> or otherwise; redundancy could not be attributed to legislation<sup>12</sup>; and that a default surcharge could not be levied in present circumstances<sup>13</sup>.

4. Learned counsel for the department supported the Impugned Judgment and submitted that it was validly rendered as reliance upon repealed rules was sanctioned within the law. It was further added that since the appellant was a *person* within the general meaning of the law, therefore, the liability in the Impugned Judgment was rightly adjudged there against. It was thus concluded that the questions framed for determination ought to be adjudged in favor of the respondents.

5. We have heard the respective learned counsel and have also considered the law to which our surveillance was solicited. The learned Tribunal has anchored its findings on the premise that since the applicant qualifies as a *person* liable to tax, hence, the apportionment of tax liability thereupon was warranted per the law. Therefore, the primary question before

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<sup>4</sup> *Squibb Pakistan (Pvt.) Ltd. vs. Commissioner* reported as 2017 PTD 1303; *F.M.Y. Industries vs. Deputy Commissioner* reported as 2014 SCMR 907

<sup>5</sup> *Hashwani Hotels Limited vs. Federation of Pakistan* reported as PLD 1997 SC 315; *Zila Council Jehlum vs. Messrs Pakistan Tobacco Company* reported as PLD 2016 SC 398; *Member (Taxes) Board of Revenue Punjab vs. Qaiser Abbas* reported as 2019 SCMR 446; *Super Engineering vs. Commissioner Inland Revenue* reported as 2019 SCMR 1111; *Kurdistan Trading Company vs. Commissioner Inland Revenue* reported as 2014 PTD 339; *Allied Engineering Services Ltd. Commissioner of Income Tax* reported as 2015 PTD 2562; *Galaxy International Karachi vs. Commissioner Inland Revenue* reported as 2019 TD 561.

<sup>6</sup> *Pakistan Tobacco vs. Karachi Municipal Corporation* reported as PLD 1967 SC 241; *Chairman District Council vs. Ali Akbar* reported as 1970 SCMR 105; *State Life Insurance Corporation vs. Mercantile Mutual Insurance* reported as 1993 SCMR 1394; *S. Zafar Ejaz vs. Chairman, Steel Mills Corporation* reported as 1998 PLC (C.S.) 777.

<sup>7</sup> *Kolhapur Canesugar Works Ltd. vs. Union of India* reported as AIR 2000 SC 811; *Pakistan Post Offices vs. Nadeem Ahmed Khan* reported as 1995 PLC (Labour) 205.

<sup>8</sup> *Assistant Collector Customs vs. Messrs Khyber Electric Lamps* reported as PTCL 2002 CL 1; *Messrs PSIC Cutlery Wazirabad vs. Collector of Sales Tax* reported as 2005 PTD 2453; *D.G. Khan Cement Company vs. Collector of Customs* reported as 2003 PTD 1797.

<sup>9</sup> *Al-Khair Gadoon Ltd. vs. Appellate Tribunal* reported as 2019 SCMR 2018.

<sup>10</sup> *D.G. Khan Cement vs. Federation of Pakistan* reported as 2004 PTD 1179; *Deputy Collector Central Excise vs. Messrs ICI Pakistan* reported as 2006 SCMR 626; *Commissioner Inland Revenue vs. Messrs Tianshi International Pakistan* reported as 2018 PTD 900; *Coca Cola Beverages Pakistan vs. Customs & Sales Tax Tribunal* reported as 2017 PTD 2380.

<sup>11</sup> *Messrs Pfizer Laboratories vs. Federation of Pakistan* reported as PLD 1998 SC 64; *H.M. Extraction Ghee & Oil Industries vs. FBR* reported as 2019 SCMR 1081.

<sup>12</sup> *Collector of Sales Tax vs. Messrs Mega Tech Pvt Ltd* reported as 2005 SCMR 1166; *Iqbal Hussain vs. Pakistan* reported as 2010 PTD 2338.

<sup>13</sup> *R.C.D. Ball Bearing Limited vs. Sindh Employees Social Security Institution, Karachi* reported as PLD 1991 SC 308; *Masood Textile Mills Ltd vs. Ihsan-ul-Haq* reported as 2003 PTD 2653; *Resource Marketing Consultants vs. Assistant Commissioner* reported as PTCL 2017 CL 613.

us is whether the learned Tribunal rightly determined the applicant as a *person* liable to pay tax for the relevant period under deliberation. In view hereof it is considered appropriate, with respect, to abridge and slightly reformulate<sup>14</sup> the questions of law in order to efficaciously adjudicate the *lis* before us; therefore, we do hereby reformulate and frame the following questions of law to be determined herein:

- (a) Whether the applicant as a withholding agent was a person liable to tax in respect of the period under deliberation?
- (b) Whether the subsequently added provision of section 13(3) of the Act could be construed to have retrospective effect in the present facts and circumstances?
- (c)
- (d) Whether the imposition of default surcharge was warranted in the present facts and circumstances?

### *Person liable to tax*

6. Section 9<sup>15</sup> of the Sindh Sales Tax on Services Act 2011 (“Act”) contains the statutory definition of a person liable to tax. It is manifest from the provision that the liability is generally imposed upon the *registered person providing the service* or the *person receiving the service*. Section 13(3)<sup>16</sup> was inserted in the Act vide the Finance Act 2019 to impose liability upon a withholding agent. The applicant’s case quite simply is that prior to the coming into effect of the Finance Act 2019, a withholding agent was not a *person liable to tax* within meaning of the Act.

7. The learned Tribunal appears to have erred in relying upon the generic meaning of the term *person*, as contained in section 2(63)<sup>17</sup> of the Act, in order to maintain liability upon the applicant. It is our deliberated view that the generic definition could not be applied to impose liability upon a person who otherwise did not qualify as a *person liable to tax*, within meaning of the Act itself, for the periods prior to when such a liability was imposed.

8. The initial imposition of liability upon the applicant was per section 47(1A)<sup>18</sup> of the Act; however, the learned Tribunal has already disregarded the

<sup>14</sup> *A. P. Moller Maersk & Others vs. Commissioner Inland Revenue & Others* reported as 2020 PTD 1614; *Commissioner (Legal) Inland Revenue vs. E.N.I. Pakistan (M) Limited, Karachi* reported as 2011 PTD 476; *Commissioner Inland Revenue, Zone-II, Karachi vs. Kassim Textile Mills (Private) Limited, Karachi* reported as 2013 PTD 1420.

<sup>15</sup> 9. Person liable to pay tax: (1) Where a service is taxable by virtue of sub-section (1) of section 3, the liability to pay the tax shall be on the registered person providing the service. (2) Where a service is taxable by virtue of sub-section (2) of section 3, the liability to pay the tax shall be on the person receiving the service.....

<sup>16</sup> Where a person or class of persons is required to withhold or deduct full or part of the tax on the provision of any taxable service or class of taxable services and either fails to withhold or deduct the tax or, having withheld or deducted the tax, fails to deposit the tax year the Government treasury, such person or class of persons shall be personally liable to pay the amount of tax and the default surcharge thereon in the prescribed manner.

<sup>17</sup> “person” means (a) an individual; (b) a company, an agency or an association of persons incorporated, formed, organized or established in Pakistan or elsewhere; (c) the Federal Government; (d) a Provincial Government; (e) a Local Authority or Local Government in Pakistan; or (f) a foreign Government, a political sub-division of a foreign Government, or a public international organization; Explanation: The use of the word “he” in this Act shall be taken to refer to any or all of the persons mentioned in sub-clauses (a) to (f) above.

<sup>18</sup> (1A) Where by reason of some collusion, abetment, deliberate attempt, misstatement, fraud, forgery or false or fake documents- (a) any tax or charge has not been paid or is, short paid, assessed or collected, the person liable to

application of the said provision and instead maintained liability per section 47 (1)<sup>19</sup> of the Act. The period for issuance of the show cause notice read five years<sup>20</sup> at the relevant time; however, the verbiage of section 47 of the Act clearly states that the obligation is placed upon a *person liable to pay any tax*. There is no cavil to the proposition that the liability upon a withholding agent to pay tax was not imposed until the Finance Act 2019; hence, any apportionment thereof prior thereto appears to be devoid of a statutory sanction.

### *Prospective application of fiscal statutes*

9. The law states that that interpretation of a fiscal statute has to be made strictly and any doubts arising from the interpretation of a fiscal provision must be resolved in favor of the taxpayer. The august Court<sup>21</sup> has summarized the settled principles in such regard and enunciated as follows:

- i. There is no intendment or equity about tax and the provisions of a taxing statute must be applied as they stand;
- ii. The provision creating a tax liability must be interpreted strictly in favor of the taxpayer and against the revenue authorities;
- iii. Any doubts arising from the interpretation of a fiscal provision must be resolved in favor of the taxpayer;
- iv. If two reasonable interpretations are possible, the one favoring the taxpayer must be adopted;
- v. When a tax is clearly imposed by a statutory provision any exemption from it must be clearly expressed in the statute or clearly implied from it;
- vi. Where the taxpayer claims the benefit of such express or implied exemption, the burden is on him to establish that his case is covered by the exemption;
- vii. The terms of the exemption ought to be reasonably construed; and
- viii. If a taxpayer is entitled to an exemption on a reasonable construction of the law it ought not to be denied to him by a strained, strict or convoluted interpretation of the law."

10. In *Citibank*<sup>22</sup> a Division Bench of this Court has maintained that it is a fundamental principle of interpreting fiscal statutes that there is no intendment or equity with regard to the charging provision, which must be applied as they stand. *Munib Akhtar J* maintained the established principle of law that even if two reasonable interpretations were possible, the one favoring the taxpayer would be adopted<sup>23</sup>. Generically speaking amendments introduced vide fiscal statutes are prospective in nature and charging provisions are to be applied

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pay such tax shall be served with a notice within five years of such tax period, requiring him to show cause for non-payment of such tax.

<sup>19</sup> Recovery of tax not levied or short-levied. (1) Where by reason of some inadvertence, error or miscalculation any tax or charge has not been levied or has been short-levied, the person liable to pay any amount of tax or charge shall be served with a notice, within eight years of the relevant date, requiring him to show cause for payment of the amount specified in the notice.

<sup>20</sup> Amended to state eight years per Finance Act 2016.

<sup>21</sup> Per *Saqib Nisar CJ (as he then was)* in *Pakistan Television v. CIR*, reported as 2019 SCMR 282; reiterating *Pakistan Television v. CIR* reported as 2017 SCMR 1136.

<sup>22</sup> Per *Munib Akhtar J* in *Citibank NA vs. Commissioner Inland Revenue* reported as 2014 PTD 284; cited with approval by the honorable Supreme Court in *Pakistan Television*.

<sup>23</sup> Reliance is also placed upon *Oxford University Press vs. Commissioner of Income Tax & Others* reported as 2019 SCMR 235; Per *Munib Akhtar J*.

prospectively<sup>24</sup>, unless retrospective effect has been accorded thereto by the legislature itself<sup>25</sup>, however, assessment or recovery provisions could be considered retrospective unless the enactment expressed or implied otherwise. It is a general rule that a retrospective impact was to be avoided unless the express language of the enactment warranted such an interpretation. It is clear that the law envisages protection of a tax payer's vested rights so that its position is not altered to its detriment by a subsequent enactment.

11. It would thus appear that the subsequent imposition of liability upon a withholding agent could not be construed to have retrospective effect.

#### *Implication of default surcharge*

12. The learned Tribunal has maintained the levy of default surcharge upon the applicant on the premise that the applicant had abjured its obligation to deposit the tax for the relevant period within the mandated timeframe.

13. Section 44<sup>26</sup> of the Act stipulates that if a registered person does not pay the due tax due in time, he shall be pay default surcharge at the specified rates. We have already concluded supra that the obligation upon a withholding agent, in respect hereof, was incorporated into the Act vide the FA 2019; hence, without having been encumbered with the obligation to pay tax, in respect of periods prior to the Finance Act 2019, there appears to have been no occasion to delay such a payment. Therefore, the imposition of default surcharge was not warranted in the present facts and circumstances.

14. We remain conscious of the ambit of the reference jurisdiction of this court<sup>27</sup> and have confined ourselves to the legal questions emanating from the Impugned Judgment, relevant for the determination of the *lis* before us.

<sup>24</sup> Per *Yahya Afridi J* in *Super Engineering & Another vs. CIR* reported as 2019 SCMR 1111; Per *Saqib Nisar CJ* (as he then was) in *Member BOR Punjab & Others vs. Qaisar Abbas & Others* reported as 2019 SCMR 446; Per *Iftikhar Muhammad Chaudhry J* (as he then was) in *Zila Council Sialkot vs. Abdul Ghani & Others* reported as PLD 2004 Supreme Court 425.

<sup>25</sup> Per *Umar Atta Bandial J* in *CIR vs. Trillium Pakistan (Private) Limited* reported as 2019 SCMR 1643; Per *Asif Saeed Khosa J* in *Government of Sindh vs. Khan Ginners (Private) Limited & Others* reported as PLD 2011 Supreme Court 347;

<sup>26</sup> 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 willfully 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: (a) the person liable to pay any amount of tax or charge, shall pay default surcharge at the rate of Inter-Bank Rate plus three per cent per annum of the amount of tax due; and (b) in case, the default is on account of tax fraud, the person who has committed tax fraud shall pay default surcharge at the rate of two per cent per month, of the amount of tax evaded, till such time the entire liability including the amount of default surcharge is paid. (2) For the purpose of calculation of default surcharge, the period of default shall be reckoned from the sixteenth day of a month (following the due date of the tax period to which the default relates) to the day preceding the date on which the tax due is actually paid. Explanation-- For the purpose of this section tax due does not include the amount of penalty.

<sup>27</sup> *Squibb Pakistan (Pvt.) Ltd. vs. Commissioner* reported as 2017 PTD 1303; *F.M.Y. Industries vs. Deputy Commissioner* reported as 2014 SCMR 907

Learned counsel for the department had adverted to section 16<sup>28</sup> of the Act, during the course of arguments, to suggest that the department was competent to seek recovery wrongly collected tax; however, admitted that no notice had ever been sent to the applicant in such regard. It is in this context that we deem it proper to eschew any deliberation in such regard lest it prejudice the legal position of either party in such regard.

15. It is manifest that the legislature intended a change in the law, hence, incorporated the obligation upon withholding agents per the Finance Act 2019. To assume that such an obligation pre-existed, as suggested by the department's counsel by relying upon the generic definition of the term person, would imply redundancy<sup>29</sup> in so far as Section 13(3) of the Act is concerned. It is maxim of the law that the legislature remains aware of the statutory position and undertakes an amendment to alter the status, existing prior to the amendment having been incorporated<sup>30</sup>.

16. In view of the reasoning and rationale contained herein the questions re-framed for determination by this Court are answered in the negative, hence, in favor of the applicant and against the respondent. This reference application stands disposed of in the above terms. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Appellate Tribunal, Sindh Revenue Board, Karachi, as required by section 63(5) of the Act.

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<sup>28</sup> Collection of excess sales tax. (1) Any person who has collected or collects any tax or charge, whether under misapprehension of any provision of this Act or otherwise, which was not payable as tax or charge or which is in excess of the tax or charge actually payable and the incidence of which has been passed on to the person to whom the service is provided, shall pay the amount of tax or charge so collected to the Government. (2) Any amount payable to the Government under sub-section (1) shall be deemed to be an arrear of tax or charge payable under this Act and shall be recoverable accordingly. (3) The burden of proof that the incidence of tax or charge referred to in subsection (1) has been or has not been passed to the person to whom the service is provided shall be on the person collecting the tax or charge.

<sup>29</sup> *Collector of Sales Tax vs. Messrs Mega Tech Pvt Ltd* reported as 2005 SCMR 1166; *Iqbal Hussain vs. Pakistan* reported as 2010 PTD 2338.

<sup>30</sup> *Pakistan Tobacco vs. Karachi Municipal Corporation* reported as PLD 1967 SC 241; *Chairman District Council vs. Ali Akbar* reported as 1970 SCMR 105; *State Life Insurance Corporation vs. Mercantile Mutual Insurance* reported as 1993 SCMR 1394; *S. Zafar Ejaz vs. Chairman, Steel Mills Corporation* reported as 1998 PLC (C.S.) 777.