**APPELLATE TRIBUNAL INLAND REVENUE**
**(PAKISTAN) KARACHI BENCH, KARACHI**

**Present:** **Mr. Muhammad Jawed Zakaria, Judicial Member.**
**Ms. Farzana Jabeen, Accountant Member.**

**ITA No.175/KB/2012**
(Tax Year 2010)
U/s.221/161 & 205

M/s. Faysal Bank Limited…….Appellant

V e r s u s

The CIR, (Appeals-I), LTU, Karachi.....……Respondent

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| Appellant by | : | Mr. Asif Haroon, AR. |
| Respondent by | : | Mr. Zulifqar Ali Memon, DR. |
| Date of Hearing | : | 05.05.2014 |
| Date of Order | : | 28.05.2014 |

**O R D E R**

**MUHAMMAD JAWED ZAKARIA (JUDICIAL MEMBER):-** Through the above appeal the taxpayer / appellant has challenged the vires of the impugned consolidated order dated 30.09.2011 passed by the learned CIR (A-I), Karachi.

2. Brief facts of the case as gleaned from the record are that the appellant is a public limited company and engaged in consumer and corporate banking activities. The OIR initiated monitoring proceeding and passed the order u/s. 161/205 of the Income Tax Ordinance, 2001 to recover the tax not withheld/shortly deducted by the appellant raising demand of Rs. 78.909/- (M) and had also charged additional tax/ default surcharge at Rs. 13.414(M). Thus aggregating demand of Rs. 92.324(M) was subsequently paid by the appellant. Later on a rectification application was filed by the appellant on 30.06.2011 and the DCIR rectified the order thus reducing the demand to Rs. 40.808(M). Being aggrieved with the order of the Inland Revenue Officer, the appellant filed appeals before the CIR (A) against the orders passed by the OIR i.e. order u/s. 161/205 and rectified order passed u/s. 221 dated 30.06.2001. Being further dissatisfied with the order of the learned CIR (A) the instant appeal has been filed against the confirmation of default surcharge/additional tax. Hence the instant appeal before this Tribunal on the grounds set-forth in the Memo of appeal.

3. Mr. Asif Haroon, the learned counsel for the appellant at the very outset has not pressed the grounds of appeal No.1 through 10 as set-forth in the Memo of appeal as the financial grievance was redressed and settled, therefore for this particular year the appellant is not pressing these grounds and it cannot be made precedent for being not taken these grounds in future if necessity so arise. The learned D.R. has no objection,

therefore, the appeal on the grounds No. 1 through 10 stand dismissed. However, the ground No. 11 is agitated by the appellant which is reproduced as under:-

> *"Without prejudice to the above, the CIR(A) erred in confirming the levy of default surcharge on the ground of alleged failure to deduct tax, whereas the term 'fail itself implied and interpreted by superior courts [for instance 28 TAX 181 (LHC)], that there must be element of negligence of fault or refusal to act, which means that even if there is any short withholding of tax, the element of willful default or guilty intent on the part of the withholding agent must be established before default surcharge can be levied."*

4. The AR argued that the DCIR through show cause notice dated 13.04.2011 sought exempt account details of Rs. 4,224,902/- million within 05 working days. Later on another show cause notice was issued dated 25.04.2011 whereby exempt account details of Rs. 49.331/- million and tax challans of Rs. 44,402/- million were sought within 06 working days. The AR of the appellant argued that the appellant requested time for filing details vide letter No. AT 2290 dated May 9, 2011 and also elaborated the detailed reasons for seeking time. But the OIR had passed the order without allowing further time and this order is taken on rectified on the appellant's request.

5. The learned A.R. further vehemently argued that for invoking the provisions of section 161 and 205, *mens rea* is necessary and the OIR has to prove independently, the guilty intent on the part of the appellant, which the OIR has not proved in the instant case. Reliance was placed on the ITAT decision reported as 2003 PTD 346 (Trib) and *28 TAX 181 (LHC)]*, and various other case laws. **He, therefore, prayed for deletion of additional tax/default surcharge.**

6. The learned D.R. on the other hand strongly supported the orders of the officers below. He argued that the taxpayer company was required to withhold tax@ 10% on such payments under the provisions of Section 151 of the Income Tax Ordinance, 2001 and deposit such withheld amount into the state treasury. However, according to the annual statement filed under section 165 of Income Tax Ordinance, 2001, tax amounting to Rs. 815,784,580/- has been withheld on payment of profit on debt. Accordingly, letter bearing No. IRO/EC-Unit-3&4/Z-1/LTU/2011 dated March 17, 2011 was issued to the taxpayer to reconcile the tax deducted and deposited u/s. 151 of the Ordinance, supported by necessary evidences of deduction etc. It was further stated that in case of failure to do so, the defaulted amount would be recovered under the relevant provisions of law along with default surcharge. In response, the taxpayer furnished reconciliation of payments on account of profit on debt vide letter bearing No. AT 2053 dated April 7, 2011 through its authorized representative M/s. A.F. Ferguson & Co. CAs. The above reply and the supporting details submitted by the AR of the taxpayer have been examined by the OIR. It was noted that explanation furnished by the AR of the taxpayer was not factually correct and at the same time was also not supported by documentary evidences. In absence of supporting evidence, the OIR was not in agreement with the arguments extended by the AR of the taxpayer. However, as regards, the challans identified with respect to deduction u/s. 152 pertaining to non-residents and challans which were identified pertaining to Tax Year 2008, the explanation extended by the AR of the taxpayer is found in order is therefore accepted the contentions of the learned counsel is factually and legally incorrect that OIR has not given consideration to the details submitted by the appellant and due relief has already been given by him as far as evidences provided by the appellant.

7. We have heard the learned representatives of both the parties and have gone though the impugned order of the learned CIR (A) as well as case laws cited at bar.

8. As far as imposition of default surcharge u/s. 205 of the Income Tax Ordinance, 2001 is concerned we may hold that the language of the provision to Sections 161 and 205 clearly shows that **"SHALL BE LIABLE TO PAY DEFAULT SURCHARGE".** Thus, meaning thereby that default surcharge is to be imposed on "willful defaults" or the "defaults which are not willful". When the language of the law expressly uses the words "**SHALL BE LIABLE TO PAY DEFAULT SURCHARGE**" it leaves no room to say that only willful default and that too on establishment of mens-rea will lead to charge of the default surcharge. Due to these express words of the law, the intent of legislature is clearly apparent which cannot be eclipsed by any number of case laws. Since, the non-payment of Income Tax over a long period of time by the appellant proves the guilty mind and mens-rea on the part of the appellant and further that the appellant withheld the amount of tax for a long time intentionally and also committed willful default, hence, the action of officer levying default surcharge is confirmed on this score.

9. As far as contention of the learned counsel that for imposition default surcharge mens rea is an essential ingredient and in the absence of such default surcharge cannot be imposed, we do not agree with the assertions made by the AR. As the AR is confusing the additional tax (default surcharge) with the penalty for which establishing of mens rea may be required under the facts, circumstances and nature of penalty under the specific case as may be. But this is not so in the case of charging additional tax (default surcharge). Reliance in this regard is placed on the judgment of the learned ATIR reported as (2010) 101 Tax 208 (Trib) wherein the penalty and additional tax has been distinguished as under:

> *"Additional tax cannot be equated with penalty. The concepts behind the penalty and additional tax are distinct ones. Penalty is meant to penalized the assessee for not doing an act within stipulated time frame while additional tax is levied because assessee uses the Govt. money and takes its benefit or the government is deprived of this utility/ profits. If the tax is admittedly due and not paid on due date, it amounts to utilization of public exchequer and compulsion of payment of additional tax is quite in accordance with equity and natural prompt of justice. Assessee cannot be absolved this payment of additional tax qua late payment of admitted liability of tax on the plea of not being willful."*

10. The Government may have received its due shares of tax from the recipient, the same tax being double taxation on same receipt/income ought not to be further collected from the withholding agent. However default surcharge being additional tax to be levied, charged and collected on the default amount for the period during which it remained unpaid from the date of due as per the relevant provision but this is not doubly taxation on same receipt/income/payment, it is because the Government money was utilized in an unauthorized manner and the cost of such utilization has to be compensated in this way as the Government is also paying compensation for taxpayers' money in case of late payment of Refund.

11. In view of the abovementioned discussion, the taxpayer is treated as an assessee/taxpayer in default. We hereby uphold the order of CIR(A) being fair which does not call for any interference.

**12. In finale, we may observe that default surcharge is levied because the taxpayer utilized Govt. money and takes its benefit or the government is deprived of this utility/ profits. If the tax is admittedly due and not paid on due date, it amounts to utilization of public exchequer and compulsion of payment of default surcharge (additional tax) is quite in accordance with equity and natural prompt of justice. Taxpayer cannot be absolved this payment of default surcharge qua late payment of admitted liability of tax on the plea of not being willful. Default surcharge being additional tax to be levied, charged and collected on the default amount for the period during which it remained unpaid from the date of due as per the relevant provision but this is not doubly taxed, it is because the Government money was utilized in an unauthorized manner and the cost of such utilization has to be compensated in this way as the Government is also paying compensation for taxpayers' money in case of late payment of Refund. Default surcharge is compensation, as a commercial equivalent of the deprivation of the use of money. It is the compensation allowed by the law or of fixed by the parties for the use of forbearance for detention of money. It may be regarded either as representing the profit the deprived person might have made if he had the use of money or conversely the loss suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation [*one may refer to Westminster Bank Ltd. v. Riches (1947) 28 TC 159; 15 ITR (Supp.) 86 (HL)]*. Imposing the default surcharge as a sanction for the speedy collection of revenue. It is different from the penalty for a crime of fine or forfeiture provided as a punishment for the violation of the criminal or the penal laws. It is merely a method of enforcing payment of taxes. In *Helvering v. Mitchell* (303 US 390), it was held that civil sanctions provided primarily as safeguard for the protection of revenue and to reimburse the Government. Default Surcharge (Additional Tax) is a civil liability, remedial and coercive. It is merely a method for enforcing compliance with the provisions of law. It is different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal of penal laws. Thus, every wrong is not a crime. Some wrongs are of civil nature; while some more grave, criminal. Every wrong has to be punished. A penal provision consists of two parts; first, a statement of the prohibited act, omission or other course of conduct, and, second, a provision for sanction which is applicable in case breach of the prohibition. The prohibition alone is ineffective. For it is but lost labour to say: "Do this, and avoid that", unless we also declare:"This shall be consequence of non-compliance."With these observations, we conclude this appeal.**

13. Consequently, the appeal filed by the taxpayer stands dismissed.

**-sd-**
**(MUHAMMAD JAWED ZAKARIA)**
**JUDICIAL MEMBER**

**-sd-**
**(FARZANA JABEEN)**
**ACCOUNTANT MEMBER**