IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE FAISAL ARAB
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

CIVIL APPEAL NO. 1460 OF 2013 AND
CIVIL PETITION NO. 133 OF 2012
(On appeal against the judgments dated 13.03.2013 & 01.12.2011 passed by the High Court of Sindh, Karachi in C.P. No. D-3336/2011 & Islamabad High Court, Islamabad in W.P. No. 2895/2011)

FBR through Chairman, Islamabad etc **(In both cases)**
... Appellants/Petitioners

VERSUS

M/s Wazir Ali and Company etc **(In CA 1460/2013)**
Shahid Aziz Zahidi and others **(In CP 133/2012)**

For the App/Petitioners: Mr. Abdul Hameed, ASC **(In CA 1460/2013)**

Mr. Babar Bilal, ASC **(In CP 133/2012)**

Mr. Masood Akhtar, Chief Legal Officer, FBR

For the Respondents: Nemo **(For Respondent No. 1 in CA 1460/2013)**

Ex-parte **(For respondent No. 2 to 4 in CA 1460/2013)**

Mr. M. Raheel Kamran Sh, ASC **(For respondent Nos. 1 to 13 in CP 133/2012)**

Date of Hearing: 09.03.2020

JUDGMENT

CIVIL APPEAL NO. 1460/2013

FAISAL ARAB, J.- The respondent is a partnership firm engaged in the business of importing goods and selling them in the local markets. During the course of tax year 2011, the respondent paid advance income tax at the import stage on the value of goods which tax in terms of Section 148 of the Income Tax Ordinance, 2001 ("2001 Ordinance") had become its final tax liability for that tax year. During the same tax year, Section 4A was

inserted in the 2001 Ordinance through the Income Tax (Amendment) Ordinance, 2011 dated 16.03.2011 whereby surcharge was imposed at the rate of 15% of the income tax payable under the 2001 Ordinance for the period commencing from the promulgation of the 2001 Ordinance till 30.06.2011. Section 4A of the 2001 Ordinance reads:

> '***4A. Surcharge: -*** *(1) Subject to this Ordinance, a surcharge shall be payable by every taxpayer at the rate of fifteen per cent of the income tax payable under this Ordinance including the tax payable under Part V of Chapter X of Chapter XIII, as the case may be, for the period commencing from the promulgation of this Ordinance, till the 30th June, 2011.*
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> *(2) Surcharge shall be paid, collected, deducted and deposited at the same time and in the same manner as the tax is paid, collected, deducted and deposited under this Ordinance including Chapter X or XII as the case may be:*
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> *Provided that this surcharge shall not be payable for the tax year 2010 and prior tax years and shall be applicable, subject to the provisions of sub-section (1), for the tax year 2011 only.'*

2. On 12.09.2011, FBR issued Circular No.11 of 2011, relevant portion of which reads *'However, it has been decided that the tax liability for the entire T/Y (Tax Year) 2011 may not be subjected to imposition of surcharge and the same be levied on the proportionate liability for a period of three and a half months.'* Thus, in terms of the Circular, the liability of surcharge was confined to a period of 3½ months (16.03.2011 to 30.06.2011) and the tax liability of the tax year 2011 was to be proportionately allocated to the 3½ month period. This Circular was then followed by the Federal Government's Notification SRO 977 (1) 2011 dated 19.10.2011 whereby in exercise of the power conferred by Sub-Section (2) of Section 53 of the 2001 Ordinance, Clause (11) was added in Part III of the Second Schedule which reads *'The amount of surcharge payable on the income tax liability for the tax year 2011 under Section 4A shall be computed on the proportionate amount of income tax liability for three and a half months.'*

3. Before the period for the filing of tax returns under Section 114 and the statement of income under Section 115 of the 2001 Ordinance for the tax year 2011 expired, the respondent

challenged FBR's Circular dated 12.09.2011 in the High Court of Sindh in its Constitutional jurisdiction. The main ground for the challenge was that the surcharge can only be computed on that tax liability that exclusively pertained to the income derived in the 3½ months period. It was thus maintained by the respondent that for the purpose of computing surcharge, all payments of advance income tax made at the import stage in the entire tax year 2011 should not be taken into consideration proportionately for the purposes of determining surcharge for the 3½ month period and the advance income tax paid in the said 3½ month period only could have been considered. On such basis, prayer was made to declare FBR's Circular unlawful and void *ab initio*.

4. The learned judges of the High Court in the impugned judgment gave the findings to the effect that Section 4A of the 2001 Ordinance does not envisage proportionate determination of the tax liability of the entire tax year 2011 for the purposes of calculating surcharge for the 3½ month period and only that income was to be taken into consideration which pertained to such period only. In other words, taxable income for 3½ month period falling between 16.03.2011 to 30.06.2011 alone was to be ascertained on which tax liability was to be worked out afresh and then on such tax liability surcharge was to be computed. The effect of the impugned judgement was that it split the entire tax year 2011 into two and then the income of the last 3½ month period only was taken into consideration for computing tax liability and on that limited tax liability of 3 ½ month period the surcharge was to be computed. In deciding so, the High Court invoked the principle that when two interpretations of a charging provision are reasonably possible, the one favouring the taxpayer is to be preferred and adopted. This principle was applied after taking into consideration the fact that most of the respondent's taxable income related to the first 8½ month period of tax year 2011 and not the remaining period of 3½ month and the interpretation which it put on Section 4A of the 2001 Ordinance was more beneficial to the respondent's case. Upon giving such findings, FBR's Circular dated 12.09.2011 was declared to be inconsistent with the provisions of

Section 4A of the 2001 Ordinance. Aggrieved by such decision, the department has preferred this appeal with the leave of this Court.

5. The whole of the 2001 Ordinance envisages that the income tax liability is to be determined on the basis of taxable income that is derived or legally presumed to have been derived in a whole tax year and not any part of it. Therefore, even for the purpose of computing surcharge under Section 4A of the Ordinance, the entire income tax liability of the tax year 2011 was to be taken into consideration which was then to be proportionately allocated to the 3½ month period and on that figure of proportionate tax liability surcharge was to be calculated. This is so as no provision of the 2001 Ordinance allows splitting of a tax year into two periods for the purposes of determining two separate taxable incomes of the same tax year and then on the income of one such period tax liability is to be computed. If that is done, it would be in derogation of the provisions of the 2001 Ordinance itself, most relevant being the provisions of Sections 4(1), 74, 114 and 115 of the 2001 Ordinance. When we read Section 4 (1) of the 2001 Ordinance, it clearly provides that income tax liability is to be determined for the entire period of a tax year not any part of it and tax year is specifically defined in Section 74 of the 2001 Ordinance which means a period of twelve months. This period normally ends on 30th June and may also end on any other date in case the same is allowed by the competent authority to be adopted. Nevertheless, a tax year under Section 74 of the 2001 Ordinance has to be of twelve months. It is for this reason that Section 114 of the 2001 Ordinance under which return of income is required to be filed covers entire tax year. Even in cases where payment of advance tax becomes a person's final tax liability and he is required to file only a statement of income under Section 115 of the 2001 Ordinance, that statement too has to be with regard to the tax year and not any part of it. Whatever method of computing taxable income is applicable to a person, either at the rates specified in the Schedule to the 2001 Ordinance or the advance tax deductions become his final tax liability, one thing is certain that income tax liability is determined on the actual or presumptive income of the whole tax year. Therefore, in cases

where advance tax deduction made on the basis of value of goods imported by a person is considered to be his final tax liability, the legally presumed taxable income of such a person would be the total value of goods imported in a given tax year. Hence in whichever mode the tax liability of a person is determined under the 2001 Ordinance, it is determined on a taxable income that pertains to a whole tax year. Splitting of taxable income of the same tax year would negate the very intention of the Legislature reflected from the provisions of Sections 4(1), 74, 114 and 115 of the 2001 Ordinance. Not only this, the provision of Section 4A (1) of the 2001 Ordinance also leads us to reach to the same conclusion. It reads as follows:-

> *"**4A. Surcharge: -** (1) Subject to this Ordinance, a surcharge shall be payable by every taxpayer at the rate of fifteen per cent of the income tax payable under this Ordinance including the tax payable under Part V of Chapter X of Chapter XIII, as the case may be, for the period commencing from the promulgation of this Ordinance, till the 30th June, 2011.*

6. As is evident from the contents of Section 4A(1) of the 2001 Ordinance, it starts with the phrase *'Subject to this Ordinance',* underlined to lay emphasis, which clearly points out that it does not have any overriding effect, hence, it cannot be in derogation of any provision of the 2001 Ordinance and, as already discussed, no provision of the 2001 Ordinance envisages splitting of a taxable income of a tax year. Secondly, Section 4A also contains the phrase *'.... at the rate of fifteen percent of the income tax payable under this Ordinance...'* underlined to lay emphasis, which further leads us towards the direction that surcharge is to be computed on the income tax that is determined in the manner provided under the 2001 Ordinance itself and not in any other manner. This leaves no room for computing tax liability of the tax year 2011 on a basis other than what is provided in the 2001 Ordinance. This then means that the whole basis for computing surcharge even for 3½ month period should be the income tax liability that is determined for the entire tax year, 2011 and then such tax liability is to be proportionately allocated for the 3½ month period for the purposes of computing surcharge without determining two separate taxable incomes of the same tax year and

then working out tax liability of 3½ months separately for the purposes of computing surcharge. In other words, there cannot be separate determination of taxable income for 8½ month period (from 1st July to 15th March) for which accounting is to be separately done and then a separate accounting is done for the remaining 3½ month period *(from 16th March to 30th June)* and on the basis of taxable income emerging for the 3½ month period, income tax liability is computed and on that surcharge payable Section 4A of the 2001 Ordinance is calculated.

7. As discussed above, when no provision of the 2001 Ordinance permit splitting of tax year for the purposes of determining two separate taxable incomes of the same tax year and the only way to compute surcharge was to allocate tax liability of the entire tax year 2011 proportionately to the 3½ month period then the question of more than one interpretation of Section 4A does not arise. Even for argument sake we assume that more than two interpretation of Section 4A were possible then how to deal with the situation where there are two sets of taxpayers, one to whom the proportionate basis would be more suitable as they may have derived all or substantial income in the last 3½ month period of the tax year 2011 in comparison to first 8½ month period of the tax year 2011. For them the interpretation of the learned judges of High Court which splits the tax year into two would not be of any benefit as proportionate determination of taxable liability would be more suitable to them. Whereas the other set of taxpayers like the respondent to whom the splitting of the tax year for the purposes of determination of taxable income and on that tax liability is computed separately would be more beneficial instead of proportionate allocation of tax liability. Both the situations can arise. This would mean to vary the interpretation in order to give beneficial interpretation. The Courts cannot put two separate interpretations of the same provision of law on the principle of beneficial interpretation, one of which is beneficial to one set of taxpayers and the other to another, though the taxing provision applies equally to both the sets of taxpayers without any distinction whatsoever. This would create an anomalous situation. We are clear in our minds that Section 4A does not admit more

than one interpretation as it was inserted in the 2001 Ordinance with the rider that it is subject to the other provisions of the said Ordinance and none of its provisions permit splitting of the period a tax year for the purposes of determining one tax liability for one period and the other for the other period of the same tax year. Therefore, the only way Section 4A would have become workable for the purposes of computing surcharge keeping within the four corners of the Ordinance was that the tax liability of the entire tax year 2011 was proportionately divided in order to notionally work out the tax liability for the 3½ month period that falls between 16.03.2011 and 30.06.2011 and then liability of surcharge is computed on such determination.

8. The respondent follows normal tax year of twelve months that ends every year on 30th June. Whatever advance tax was recovered from the respondent at the import stage during the entire tax year 2011 that had become his final tax liability for the entire tax year 2011. As income tax liability for the whole tax year had already stood determined then this tax liability was to be proportionately divided in order to determine the notional tax liability of 3 ½ month period and on that surcharge under Section 4A of the 2001 Ordinance was to be computed. For example, income tax liability of the respondent for the entire tax year 2011 is assumed to be Rs.120,000, the same was to be divided by 12 and then multiplied by 3½ which would have given proportionate income tax liability for the 3½ month period, which comes to Rs.35,000/-. (Rs.120,000 ÷ 12 x 3½ = Rs.35,000). On this proportionate tax liability 15% surcharge payable under Section 4A of the 2001 Ordinance was to be calculated. The Circular in question had only explained the only possible way the surcharge under Section 4A could be computed by remaining within the ambit of the provisions of the 2001 Ordinance.

9. We may also point out an important aspect of the case which had escaped the attention of the advocates of the parties as well as the learned judges of the High Court. When we read Section 4A (1) of the 2001 Ordinance, it states that surcharge was to be calculated *'.....for the period commencing from the promulgation of*

this Ordinance, till the 30th June, 2011.' This clearly means that Section 4A in its application came into effect right from the date of the promulgation of the 2001 Ordinance i.e. the year 2001 till 30.06.2011 which application was then restricted to only tax year 2011 by its proviso which reads '*Provided that this surcharge shall not be payable for the tax year 2010 and prior tax years and shall be applicable, subject to the provisions of sub-section (1), for the tax year 2011 only.'* The proviso makes Section 4A effective for the tax year 2011 only. By no means Section 4A is to be read to mean that it covers only a part of the tax year, 2011. Probably realizing the fact that Section 4A, in its application covers the entire tax year 2011 though inserted in the 2001 Ordinance on 16.03.2011 i.e. during the course of tax year 2011, FBR through its Circular No.11 of 2011 announced that the surcharge was to be paid with effect from 16.03.2011 i.e. the day Section 4A was inserted in the 2001 Ordinance till 30.06.2011 which was to be computed on the basis of proportionate tax liability of the tax year 2011. This Circular in effect granted concession to the taxpayers otherwise Section 4A had covered the entire tax year 2011 and not any part of it. Probably realizing the fact that FBR through its circulars cannot grant any concession, the same was followed by the Federal Government's Notification SRO 977 (1) 2011 dated 19.10.2011 which was issued in exercise of the power conferred on it under Sub-Section (2) of Section 53 of the 2001 Ordinance whereby Clause (11) was added in Part III of the Second Schedule. Clause (11) provided '*The amount of surcharge payable on the income tax liability for the tax year 2011 under Section 4A shall be computed on the proportionate amount of income tax liability for three and a half months.'* The said SRO which was issued by the Federal Government in exercise of powers contained in Section 53 of the 2001 Ordinance and granted exemption in the sense that it limited the application of Section 4A to only 3½ month period, which in terms of Section 4A covered the entire tax year 2011 and while extending such exemption, provided the mode in which the surcharge was to be computed i.e. on the basis of proportionate tax liability of the tax year 2011. Hence the said SRO 977 (1) 2011 dated 19.10.2011 on its own strength had the force of law and

never came under challenge. So has to be given effect to regardless of the FBR's Circular dated 12.09.2011, which only was challenge was challenged in the High Court.

10. The above are the detailed reasons of our short order dated 09.03.2020 whereby the delay was condoned, this appeal was allowed and the connected Civil Petition No. 133 of 2020 was converted into appeal and allowed. The short order reads as follows:-

> *"We have heard the C.P. No. 133 of 2013 and have arrived at the conclusion that the surcharge levied under Section 4A of the Income Tax Ordinance, 2001 added thereto by Income Tax (Amendment) Ordinance IV of 2011 levies a surcharge on the income tax payable for the entire tax year. Accordingly, for reasons to be recorded later, this petition is converted into appeal and allowed.*
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> *2. In Civil Appeal No. 1460 of 2013 leave was granted by order dated 02.12.2013 but subject to the question of limitation as the petition is admittedly barred by 09 days. According to the principle laid down in Mehreen Zaibun Nisa etc. versus Land Commissioner, Multan etc (PLD 1975 SC 397) and Province of Punjab versus Muhammad Tayyab (1989 SCMR 1621) when a common question of law is decided in one case, another case involving the same point that is time barred is liable to be heard on merits. Consequently, following the said principle, we condone the delay and insofar as the merits are concerned, for reasons to be recorded later, we allow this appeal."*

JUDGE

JUDGE

JUDGE

Islamabad, the
9th of March, 2020
Approved For Reporting
***K**hurram*