IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Agha Faisal
Mr. Justice Dr. Shah Nawaz Memon

Spl. Sales Tax Reference Application No. 67/2019
Sindh Revenue Board, Karachi VS M/s. Fumicon Services (Pvt) Ltd., Karachi

Spl. Sales Tax Reference Application No. 02/2024
Sindh Revenue Board, Karachi VS M/s. Pak Arab Engineering (Pvt.) Ltd., Karachi

Spl. Sales Tax Reference Application No. 21/2024
Sindh Revenue Board, Karachi VS M/s. Niazi Sons Construction Company, Multan

Spl. Sales Tax Reference Application No. 158/2025
Sindh Revenue Board, Karachi VS M/s. Visa Express Private Limited, Karachi

Date of hearing: 01.09.2026
Date of decision: 04.09.2026

Applicants: Through Messrs. Fahad Hussain, Summiya Kalwar and Shamshad Ahmed, Advocates.

Respondents: Through Messrs. Abdul Rahim Lakhani, Atta Muhammad Qureshi and Sarmad Aziz, Advocates.

J U D G M E N T

DR. SHAH NAWAZ MEMON, J.: — These four connected reference applications, preferred by the Sindh Revenue Board under section 63 of the Sindh Sales Tax on Services Act, 2011, raise a single and recurring question of law. We propose to decide them by this common judgment.

I. THE CONTROVERSY AND THE QUESTION

1. Section 43 of the Sindh Sales Tax on Services Act, 2011 ("the Act, 2011") is the provision by which the Legislature has prescribed penalties for the offences described in the Table to that section. In each of these references the respondent registered person was visited with penalties under Serial No. 2 and/or Serial No. 3 of that Table, the one for failure to furnish returns within the due date, the other for failure to deposit the amount of tax due in the time or manner laid down. In each, the learned Appellate Tribunal, Sindh Revenue Board deleted the penalties upon the reasoning that the department had not established that the default was willful, contumacious or otherwise attended by *mens rea*. It is those orders which the applicant Board assails.

2. Being satisfied under section 63(3) of the Act, 2011 that a question of law arises out of the orders of the learned Appellate Tribunal, and the several statements of case

having proposed a number of overlapping questions, we consider that the controversy is comprehended within the following single question, which we accordingly frame:

> *"Whether, for the imposition of a penalty under section 43 of the Sindh Sales Tax on Services Act, 2011, the department is required to establish that the default of the registered person was willful, that is to say, attended by an element of mens rea?"*

3. The question is the natural companion of the one we lately answered in *Sindh Revenue Board v. M/s. Itecknologi Tracking Services (Private) Limited and connected references* (Spl. Sales Tax Reference Application No. 86 of 2025 and eleven others, decided on 21.08.2026), in which we held the liability to default surcharge under section 44 of the Act, 2011 to be a strict statutory liability of a compensatory character, attracted upon the occurrence of default "whether wilfully or otherwise". We were at pains there to record, in paragraph 57 of that judgment, that nothing in it was to be read as an expression of opinion upon section 43, which deals with offences and penalties, or upon the ingredients which must be established before a penalty under that section may be imposed; the question was left open, as the Hon'ble Supreme Court had left it open in *Byco Petroleum* in relation to the analogous section 33 of the Sales Tax Act, 1990. That reserved question now arises directly and must be answered.

4. At the very outset of the hearing, learned counsel for the applicant Board, with commendable fairness, conceded that the imposition of a penalty under section 43 of the Act, 2011 does require the element of *mens rea* to be established, and confined their endeavours to demonstrating that upon the facts of their respective references that element was present. The concession was, in our respectful view, rightly made; but a concession of counsel upon a pure question of law does not conclude the matter, for it is for the Court to satisfy itself as to the true construction of the statute, and the question framed governs a large number of pending and future references. We therefore proceed to answer it on the merits.

II. FACTS

5. The facts of the individual references differ in detail but not in substance, and it is unnecessary to burden this judgment with all of them. It is sufficient to take Spl. Sales Tax Reference Application No. 67 of 2019 as illustrative, and to record that the pattern in the remaining three references is the same: penalties imposed under Serial Nos. 2 and/or 3 of the Table to section 43, maintained or not pursued before the Commissioner (Appeals), and thereafter deleted by the learned Appellate Tribunal for want of proof of willful default.

6. The respondent in Reference No. 67 of 2019, M/s. Fumicon Services (Private) Limited, is registered with the applicant Board in the service category of

"Fumigation Services", taxable under tariff heading 9822.1000 of the Second Schedule to the Act, 2011 with effect from 01.07.2014 read with Notification No. SRB-3-4/10/2014 dated 01.07.2014. Upon scrutiny of its online tax profile, it was observed that the respondent had provided taxable services to various recipients but had failed to deposit Sindh sales tax of Rs. 109,299/- for the tax periods November 2015, January 2016 to April 2016 and June 2016 to November 2016, and had further failed to e-file the prescribed monthly returns for the tax periods July 2016 to November 2016. Notices dated 03.01.2017, 11.01.2017 and 19.01.2017 having elicited no compliance, a show-cause notice dated 26.01.2017 was issued requiring the respondent to show cause why the said tax should not be assessed under section 23 and recovered under section 47(1A) of the Act, 2011, along with default surcharge under section 44 and penalties under Serial Nos. 2 and 3 of the Table to section 43.

7. By Order-in-Original No. 186 of 2017 dated 23.06.2017 the Assistant Commissioner assessed the tax at Rs. 109,299/- and imposed a penalty of Rs. 1,315,654/- under Serial No. 3 and a penalty of Rs. 412,329/- under Serial No. 2 of the Table to section 43, the working annexed to the order proceeding by multiplying the prescribed amounts by the number of months for which each default had continued. The respondent's appeal was dismissed by the learned Commissioner (Appeals) for non-prosecution by Order-in-Appeal No. 80/2018 dated 21.05.2018.

8. In further appeal, the learned Appellate Tribunal, Sindh Revenue Board, by its order dated 16.10.2018 in Appeal No. AT-48/2018, recorded that against the assessed liability of Rs. 109,299/- the respondent had by then deposited Rs. 255,488/- and had e-filed all of the returns, facts confirmed by the departmental representative through a reconciliation dated 11.10.2018; that the defaults had been attributed by the respondent's director to personal and health reasons and to the departure of the employees who operated its electronic filing; and that nowhere in the Order-in-Original had it been established that the non-compliance was willful. The learned Tribunal held, in words which may be reproduced:

> *"… nowhere in the order in original it was stated or established that the willfulness, malafide and mensrea was present. It is now well settled principal of law that penalty can only be imposed if non-payment of tax on the part of appellant is proved as malafide, willful, contumacious and having an element of mensrea, which is lacking in this case. 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, malafide and mensrea cannot entail penalty. … the prime duty is of the department to prove mensrea and only then the burden is shifted upon the appellant to explain the reason of non-payment of tax and non-filing of e-returns."*

9. Upon that reasoning, fortified by *Pakistan v. Hardcastle Waud (Pakistan) Ltd.* (PLD 1967 SC 1) and the other authorities noticed in its order, and having also found the month-wise multiplication of the penalty under Serial No. 2 to be contrary to the earlier view of the Tribunal, the learned Appellate Tribunal allowed the appeal and set aside the penalties imposed under Serial Nos. 2 and 3 of the Table to section 43. Hence this reference at the instance of the Board. The orders impugned in the connected references proceed upon the same footing.

III. SUBMISSIONS AT THE BAR

10. Mr. Fahad Hussain, learned counsel, led the arguments on behalf of the applicant Board, and the other learned counsel appearing for the Board in the connected references adopted his submissions and made their own additions with reference to their respective records. As already recorded, it was not contended that section 43 creates a strict liability; the submissions were addressed to the facts. It was urged that in the references before us the element of *mens rea* was in fact available upon the record: in one of the references, the registered person had failed to file its monthly returns on some sixty successive occasions, a persistence which, it was submitted, is itself the surest evidence of willful and contumacious default; in Reference No. 67 of 2019 the registered person had appeared before the assessing officer, agreed to deposit the tax and file the returns, and had then failed to do so; and that upon such records the learned Appellate Tribunal ought to have sustained the penalties.

11. On behalf of the respondents the arguments were led by Mr. Abdul Rahim Lakhani, learned counsel, and the remaining learned counsel adopted his submissions and supplemented them. It was submitted that the concession on the law was rightly made and reflects the settled jurisprudence; that whether *mens rea* existed in a given case is quintessentially a question of fact; that the learned Appellate Tribunal is the final fact-finding forum under the Act, 2011 and has returned a concurrent finding that willful default was not established; and that this Court, seized of a reference under section 63, answers questions of law arising out of the order of the Tribunal and does not sit in appeal over its findings of fact, none of which has been assailed before us by any question alleging perversity or absence of evidence. Reliance was placed upon the judgment of this Court in *Messrs New Era Fabrics v. Appellate Tribunal Inland Revenue* (2025 PTD 1519), holding that in the absence of any amendment in section 33 of the Sales Tax Act, 1990 corresponding to that made in section 34, the general principle that penalty requires *mens rea* continues to govern that provision.

12. In rebuttal, learned counsel for the Board sought to distinguish *New Era Fabrics* upon its facts: the proceedings there, it was pointed out, had been initiated by a show-cause notice under section 11(1) of the Sales Tax Act, 1990, and the decisive

infirmity was that a penalty referable to section 26 of that Act had been imposed without any notice under that provision; the case, it was urged, was not one of late filing of returns simpliciter and affords no guidance here.

13. We have heard learned counsel for the parties, examined the records of the references with their assistance, and perused the law and the authorities cited at the Bar as well as such further authority as our own research has yielded.

IV. THE STATUTORY SCHEME

14. The architecture of the Act, 2011 was set out at some length in *Itecknologi* and need not be rehearsed in full. Section 8 is the charging provision; section 9 identifies the person liable; section 17 fixes the time, manner and mode of payment, requiring the tax for a tax period to be paid by the due date; and section 30, read with rules 13 and 14 of the Sindh Sales Tax on Services Rules, 2011, obliges the registered person to furnish a true and correct return for each tax period by the prescribed date. Chapter VIII then makes a twofold provision for default: section 43 provides for offences and penalties; section 44 for default surcharge. Sections 45 and 65(1)(b) house the dispensing powers, exemption by the Board, and alternate dispute resolution extending to the extent of waiver of default surcharge and penalty.

15. Section 43, which lies at the heart of this controversy, opens as follows:

> *"43. Offences and penalties. — **Whoever commits any offence** described in column (1) of the Table below **shall**, in addition to and not in derogation of any punishment to which he may be liable under any other law, **be liable to the penalty mentioned against that offence in column (2) thereof**. <u>The sections referred to in column (3) are</u> meant for illustrative purposes only and <u>the **corresponding offence** described in column (1)</u> may fall and be prosecuted under other sections of this Act as well."*

16. Serial No. 2 of the Table, as it stood at the relevant time, provided that where any person fails to furnish a return within the due date, "such person shall be liable to a penalty of 10,000 rupees per month or a fraction thereof; provided that if a return is filed within ten days of the due date, a penalty of 300 rupees for each day of default shall be paid." Serial No. 3 provided that where any person fails to deposit the amount of tax due or any part thereof in the time or manner laid down under the Act or the rules, such person "shall be liable to pay a penalty of 10,000 rupees per month or a fraction thereof or five per cent of the total tax payable for that period … whichever is higher"; that upon continued non-payment for sixty days after notice the person shall further be liable, upon conviction by a Special Judge, to imprisonment which may extend to three years or fine or both; and, by clause (c), that "no penalty shall be payable if any miscalculation is made for the first time during a year."

17. Section 44(1), construed in *Itecknologi*, stands in instructive contrast and may be juxtaposed:

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

V. THE PRESUMPTION OF MENS REA IN PENAL PROVISIONS

18. The starting point of principle is not in doubt. A provision which visits a subject with a penalty is penal in character and is to be construed strictly; and the presumption of the law is that a mental element is an ingredient of every offence, statutory offences included, unless the Legislature has excluded it by express words or necessary implication. The rule was stated for Pakistan in *Pakistan through the Secretary, Ministry of Finance v. Hardcastle Waud (Pakistan) Ltd.* (PLD 1967 SC 1), where it was held that:

> *"Even in the case of a statutory offence the presumption is that mens rea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out."*

19. The principle has been applied to fiscal penalties throughout the sub-continent. It is sufficient to recall the celebrated statement in *Hindustan Steel Ltd. v. State of Orissa* (AIR 1970 SC 253), which has been cited with approval by the superior Courts of this country: an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding; penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law, or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation; penalty will not be imposed merely because it is lawful to do so, and whether it should be imposed at all is a matter of discretion to be exercised judicially upon a consideration of all the relevant circumstances; where the breach flows from a bona fide belief, a technical or venial default does not attract penalty.

20. The jurisprudence of the Hon'ble Supreme Court of Pakistan upon the sales tax statute itself is to the same effect. In *D. G. Khan Cement Company Ltd. v. Federation of Pakistan* (2004 SCMR 456) and in *Deputy Collector Central Excise v. ICI Pakistan* (2006 SCMR 626) it was held, with reference to the then section 34 of the Sales Tax Act, 1990, that before the levy of additional tax it must be seen whether the evasion or non-payment was willful or mala fide, and that default would not ipso facto render the registered person liable: every case must be decided upon its own merits, the Revenue establishing that the default was dishonest, willful or mala fide. The words "shall be liable to", which section 43 employs, have for their part long been construed in this sub-continent as conferring a discretion rather than commanding

an inexorable imposition, as this Court noticed in *Pakistan International Airlines Corporation v. Collector of Customs (Preventive)* (Special Customs Appeal No. 30 of 2004) with reference to the cognate provisions of section 156(1) of the Customs Act, 1969. And it is equally settled that a punishment disproportionate to the gravity of the guilt is as much illegal as an unwarranted punishment: *Shamroz Khan v. Muhammad Amin* (PLD 1978 SC 89); *G. M. Pakistan Railways v. Muhammad Rafique* (2013 SCMR 372).

VI. THE LEGISLATIVE HISTORY: SECTION 34 AMENDED, SECTION 33 LEFT AS IT WAS

21. It is against that jurisprudence that the legislative history acquires decisive significance. Confronted with the line of authority requiring willfulness for the levy of additional tax, the Federal Legislature intervened, but it intervened in one provision only. By the Finance Act, 2005 it substituted section 34 of the Sales Tax Act, 1990, the default surcharge provision, and inserted into it the words "whether willfully or otherwise", thereby excluding the mental element in terms. The effect of that amendment has been authoritatively declared by the Hon'ble Supreme Court in *Commissioner Inland Revenue v. M/s. Byco Petroleum Pakistan Ltd.* (Civil Petitions Nos. 1221-K to 1257-K and 1290-K to 1299-K of 2022, order dated 05.07.2024):

> *"5. … Section 34 post amendment is a strict liability provision and leaves no margin for any inadvertent mistake. …"*
>
> *"7. In view of what has been discussed above, we hold that Section 34 of the Act, 1990 regarding default surcharge is a strict liability clause and is attracted on the occurrence of default whether it be deliberate or unintentional or inadvertent. However, to the extent of Section 33 the case is remanded to the High Court for a fresh decision on the issue. …"*

22. Two features of *Byco* must be underscored. First, the strict liability there declared is the creature of the amendment: it was because the Legislature inserted "whether willfully or otherwise" that the earlier line of authority, *D. G. Khan Cement* and the cases following it, ceased to be a safe guide upon section 34. Secondly, their Lordships were careful not to extend that declaration to section 33, the penalty provision, in which no such words were ever inserted; the question of its construction was remanded for independent decision. The distinction drawn by the Hon'ble Supreme Court between the two provisions, surcharge upon the one hand, penalty upon the other, is therefore not an accident of pleading but a deliberate feature of the decision.

23. Upon the remanded question this Court has since spoken. In *New Era Fabrics* (2025 PTD 1519) a learned Division Bench of this Court (Muhammad Junaid Ghaffar, ACJ and Muhammad Abdur Rahman, J.) held:

> *"6. Since there is no corresponding amendment in Section 33 of the Act, therefore, the general principle of law i.e. for imposition of penalty an element of mens rea must be present would still be attracted in this case. …"*

24. It was further observed in that case that section 33 is not a charging provision and generates no revenue; that its purpose is to compel compliance; that the quantum of a penalty must bear a direct nexus with the gravity of the offence; and that, unlike section 182 of the Income Tax Ordinance, 2001, the sales tax statute contains no Explanation dispensing with proof of *mens rea*. Each of those observations holds with equal force for section 43 of the Act, 2011, which is in pari materia with section 33 of the Act, 1990 in every respect material to this controversy.

VII. THE ACT OF 2011: A LATER STATUTE, ENACTED WITH KNOWLEDGE

25. The Act, 2011 was passed by the Provincial Assembly of Sindh on 06.06.2011, assented to on 10.06.2011 and came into force on 01.07.2011, six years after the Finance Act, 2005, and well after *D. G. Khan Cement* and *ICI Pakistan* had settled the pre-amendment position. The Legislature is presumed to know the existing state of the law, including the judicial exposition of statutes in pari materia, and to legislate with that knowledge. What the Provincial Legislature did with that knowledge is apparent upon the face of Chapter VIII. When it enacted section 44 it reproduced the amended section 34 of the Act, 1990 in every material, the non obstante opening, the trigger, the imperative "shall … pay", the automatic arithmetic of the levy, and, above all, the critical words "whether wilfully or otherwise". When, in the very same Chapter, it enacted section 43, it employed none of those words, nor any equivalent, nor any Explanation excluding the mental element. The differential treatment of two adjacent sections of one Chapter, drafted at one time by one hand, cannot be put down to inadvertence. It is a conscious choice, and it is a choice which speaks: the mental element, deliberately excluded from section 44, is deliberately retained in section 43.

26. The internal features of section 43 all point the same way. First, its heading is "Offences and penalties", and its operative words are "Whoever commits any offence …"; the provision speaks the language of criminality, and its third column contemplates that the offences described "may fall and be prosecuted under other sections of this Act as well". Secondly, the sanction is expressed by the words "shall be liable to" a penalty, words which, upon the long-settled construction noticed above, confer a discretion and do not command imposition in every case. Thirdly, several of the entries, including Serial No. 3 itself, escalate upon persistence into prosecution before, and imprisonment upon conviction by, a Special Judge; the civil penalty and the criminal punishment are steps upon a single ladder of culpability, and it would be incongruous that the first step be climbed without fault while the

last cannot be climbed without proof beyond reasonable doubt. Fourthly, clause (c) of Serial No. 3 exempts from penalty a miscalculation made "for the first time during a year", the Legislature itself grading liability by blameworthiness, an exercise unintelligible in a regime of strict liability. Fifthly, there is in section 43 no non obstante clause and no self-executing formula of computation; the officer must determine whether the offence described has been committed, a determination which, as the authorities show, comprehends the quality of the default and not its bare occurrence.

27. The purposes of the two provisions are, moreover, radically different, and purpose illuminates construction. Default surcharge, as we held in *Itecknologi*, is compensatory: the registered person collects the tax from the recipient of the service and retains public money beyond the due date, and the surcharge, Inter-Bank Rate plus three per cent, running with time, is no more than the price of that retention; it makes the exchequer whole. There is nothing to which a penalty under section 43 corresponds in that way. A penalty compensates no one; it punishes, and it deters. Punishment presupposes blameworthiness. To punish a person for a default which was neither willful nor negligent nor contumacious is not to enforce the statute but to visit misfortune with retribution, and the Legislature, which provided a complete compensatory mechanism in section 44 for the innocent default, cannot be taken, without clear words, to have intended the penal mechanism of section 43 to operate upon the very same innocent default.

28. A further consequence deserves to be spelt out, for it answers a concern legitimately voiced on behalf of the Revenue. The requirement of *mens rea* does not disarm the officer; it arms him with a discretion and directs its exercise. Where the record discloses willful, contumacious or dishonest default, the officer may, and ordinarily should, impose the penalty, in a measure proportionate to the gravity of the offence. Where the default is shown to have been inadvertent, or the product of circumstances beyond the registered person's control, the officer is equally empowered, indeed obliged, to abstain. What the requirement forbids is the mechanical imposition of the maximum, by mere arithmetic upon a tabulation of defaults, without any determination of the quality of the conduct, which is precisely what the record of Reference No. 67 of 2019 discloses, where against a principal liability of Rs. 109,299/- penalties approaching sixteen times that sum were computed by multiplication and were sought before the Tribunal to be enhanced to more than thirty-six times the principal. The gravity-nexus principle recognised in *Shamroz Khan* and *G. M. Pakistan Railways* is the discipline of that discretion.

29. We note, finally, that this construction is in complete harmony with the observation of the Hon'ble Supreme Court in *Directorate of Intelligence and Investigation-FBR v. Taj*

International (Pvt.) Ltd. (2025 PTD 1270) that penal provisions "are only attracted once the Revenue Authorities can establish that the default in payment of tax was willful and there was element of mens-rea on the part of taxpayer". In *Itecknologi* we held that observation, directed as it is at penal provisions, to be no guide to the compensatory levy under section 44; by the same token it is a sure guide to the penal levy under section 43. The two holdings are the two halves of one coherent scheme.

VIII. NEW ERA FABRICS IS NOT DISTINGUISHABLE

30. The attempt of learned counsel for the Board to confine *New Era Fabrics* to its facts does not persuade us. Two strands run through that decision. The first is procedural and particular: the show-cause notice there had issued under section 11(1) of the Act, 1990, and a penalty referable to a violation of section 26 could not be imposed without a notice confronting the taxpayer with that provision. The second is a strand of principle: that in the absence of any amendment in section 33 corresponding to the amendment of 2005 in section 34, the general principle requiring *mens rea* for the imposition of penalty continues to govern. The second strand was not an aside; it was the Court's answer to the very question which the Hon'ble Supreme Court had remanded in *Byco*, and it is carried into the formal conclusion of the judgment. A decision may rest upon two grounds, and each is authoritative. The strand of principle applies to section 43 of the Act, 2011 with undiminished force, resting as it does upon the very contrast, an amended surcharge provision beside an unamended penalty provision, which the Sindh Legislature reproduced in sections 44 and 43. The distinction pressed by the Board, that *New Era* was not a case of late filing simpliciter, addresses the first strand and leaves the second untouched.

IX. THE REFERENCE JURISDICTION DOES NOT EXTEND TO QUESTIONS OF FACT

31. There remain the individual submissions by which learned counsel for the Board sought to sustain the penalties upon the facts, the sixty unfiled returns in one reference, the broken assurances in another. The submissions fail at the threshold, for they invite this Court to do what, in the exercise of its reference jurisdiction, it cannot do. Section 63 of the Act, 2011 is explicit at every stage: the application must state "any question of law arising out of such order" (sub-section (1)); the Court proceeds only where "satisfied that a question of law arises out of the order" (sub-section (3)); and what the Court decides is "the question of law raised by the reference" (sub-section (5)). It is true that, upon the identically structured provisions of the federal fiscal statutes, the Hon'ble Supreme Court has held in *Messrs Squibb Pakistan Pvt. Ltd. v. Commissioner of Income Tax* (2017 SCMR 1006), lately

reaffirmed in *Haseeb Waqas Sugar Mill Limited v. Government of Pakistan* (2026 SCMR 833), that the remedy is appellate in nature and is not to be needlessly narrowed, so that every question of law arising out of the order of the Tribunal may be raised whether or not it was argued below. But the width so recognised is a width of law, not of fact. The very passage which enlarges the remedy delimits it: the challenge "is limited to questions of law only", and, decisively for present purposes, "[t]he facts as stated in the Tribunal's order have to be taken as recorded", it being from those facts, so taken, that any question of law must be made out.

32. That the learned Appellate Tribunal is the final fact-finding forum, whose findings of fact are not open to re-examination in this jurisdiction, is settled by a long and unbroken line of authority of the Hon'ble Supreme Court. In *Haji Ibrahim Ishaq Johri v. The Commissioner of Income Tax (West), Karachi* (1993 SCMR 287) it was held:

> *"It hardly needs any emphasis that as a final fact-finding body the Tribunal's finding of fact is conclusive, and the High Court cannot go behind it, unless it is shown that there was no evidence on which the Tribunal could properly arrive at its conclusions or the Tribunal misdirected itself in law. Even in the case of no evidence the High Court cannot disturb the finding recorded by the Tribunal, unless it is assailed through a question of law expressly raised in the reference application. … In exercise of its jurisdiction … the High Court has merely to enunciate the law applicable to the facts found by the Tribunal."*

33. Their Lordships added, adopting the Privy Council in *Commissioner of Income Tax v. Laxminarain Badridass* (5 ITR 170), that "it is not possible to turn a mere question of fact into a question of law by asking whether as a matter of law the officer came to a correct conclusion upon a matter of fact." The modern restatements are to the same effect, and they are emphatic. In *Army Welfare Trust v. Collector of Sales Tax* (2017 SCMR 9) the judgment of a High Court was set aside for the very reason that it "not only decided a pure question of fact but did so without any evidence". In *Messrs Middle East Construction Company v. The Collector of Customs* (2023 SCMR 838) it was held that "it is also well settled that the Tribunal is the last forum for the determination of facts", that the High Court's reference jurisdiction "is limited to a question of law", and that it does not lie within its jurisdictional domain to determine the facts for itself. In *The Collector of Sales Tax and Central Excise, Lahore v. Messrs Qadbros Engineering (Pvt.) Ltd.* (2023 SCMR 939), collecting *Pakistan Match Industries (Pvt.) Ltd. v. Assistant Collector* (2019 SCMR 906) and *Commissioner Inland Revenue v. Messrs Sargodha Spinning Mills (Pvt.) Ltd.* (2022 SCMR 1082), the rule was stated thus: "The Appellate Tribunal is therefore the final fact-finding body and its findings of facts are conclusive; the High Court cannot disturb them unless it is shown that there was no evidence on which the Appellate Tribunal could arrive at its conclusion and record such findings, or the same are perverse or based on surmises and conjectures." In *Commissioner Inland Revenue v. Messrs Khudadad Heights* (2025 SCMR 716) it was reiterated that the Tribunal is the last fact-finding forum

and that a factual question can be raised neither in the reference jurisdiction nor before the Hon'ble Supreme Court; and in *The Intelligence Officer, Directorate of Intelligence and Investigation, FBR v. Abdul Karim* (2025 SCMR 969) that "the Reference jurisdiction is contoured to decide the questions of law only arising out of the orders of the last appellate jurisdiction i.e. Tribunal, which is the last fact finding forum." This Court has applied the same rule to its own referential jurisdiction: the learned Tribunal is the final arbitrator of facts, and factual controversies are not ordinarily amenable to adjudication in a reference, Messrs *Packages Limited v. Customs Appellate Tribunal* (2024 PTD 1532).

34. The recognised exceptions themselves prove the rule. A finding rendered upon no evidence, a finding which is perverse or rests upon surmises and conjectures, or a material misreading or non-reading of evidence, gives rise to a question of law, as does the non-exercise or mis-exercise of jurisdiction by the Tribunal (*Commissioner of Income-Tax v. Messrs Sindh Engineering (Pvt.) Ltd.*, 2002 SCMR 527); but, as *Johri* itself insists, such a question must be distinctly framed and raised in the reference application. No question of that character has been proposed in any of these references. What is pressed before us is not that the learned Tribunal misread the record, but that upon the record it ought to have found willfulness, which is precisely the enquiry the authorities place beyond us, for whether a particular default was willful, contumacious or attended by *mens rea* is quintessentially a question of fact, or at its highest an inference of fact from facts. The Hon'ble Supreme Court in *Byco* observed the same discipline: it decided the pure question of construction and, as to the penalty provision, remanded, it did not itself embark upon the facts. Even otherwise, the central factual submission proves less than it asserts. The number of defaults measures persistence; it does not, of itself, establish willfulness. Defaults many in number may be born of a single continuing cause, the distress of a business, the incapacity of its principal, the departure of the staff who alone operated the electronic systems, and are then, in point of culpability, one default long continued. In the illustrative reference the learned Tribunal weighed exactly such an explanation, alongside the facts that the tax had been deposited in a sum exceeding the assessed liability and that every return had by then been filed. A view so reached is a possible, indeed a plausible, view; it is not perverse; and it is not for this Court, in this jurisdiction, to substitute another.

X. THE ANSWER TO THE QUESTION

35. For the foregoing reasons, the question framed in paragraph 2 above is answered in the affirmative, in favour of the respondents and against the applicant Board, in the following terms. A penalty under section 43 of the Sindh Sales Tax on Services Act, 2011 may not be imposed upon the mere occurrence of a default. The

department must establish, upon the record of the adjudication, that the default was willful, contumacious, dishonest or otherwise attended by *mens rea*; the burden lies in the first instance upon the department, and only upon its discharge does the registered person bear the burden of explanation. The officer's power under section 43 is a discretion, to be exercised judicially: to impose a penalty, proportionate to the gravity of the offence, where the default is culpable; and to abstain where it is not. The learned Appellate Tribunal, having found as a fact in each of these references that willful default was not established, committed no error of law in deleting the penalties, and its orders do not call for interference in terms of section 63(5) of the Act, 2011.

36. For the avoidance of doubt, nothing in this judgment detracts from what was held in *Itecknologi* in relation to section 44 of the Act, 2011. The two sections occupy distinct fields: default surcharge is a strict, compensatory liability, attracted upon the occurrence of default "whether wilfully or otherwise", in respect of which questions of intention are irrelevant; penalty under section 43 is a punitive liability, of which culpability is an essential ingredient. The registered person who pays late but innocently answers to the exchequer in surcharge; he answers in penalty only when his default is his fault.

XI. ORDER

37. Let a copy of this judgment be sent under the seal of this Court and the signature of the Registrar to the learned Appellate Tribunal, Sindh Revenue Board, in terms of section 63(5) of the Act, 2011.

38. The reference applications stand disposed of in the above terms, with no order as to costs. Office to place copy of this judgment in the connected cases.

J U D G E

J U D G E

Karachi,
Dated: 04th day of September 2026

Ayaz PS.