

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Abdur Rahman

Mr. Justice Dr. Shah Nawaz Memon

Spl. Sales Tax Reference Application No. 436 of 2018

Sindh Revenue Board, Karachi

Versus

M/s. Glaxo SmithKline Pakistan Limited, Karachi

Dates of hearing: 16.09.2026 & 17.09.2026

Date of decision: 25.09.2026

Applicant: Through Mr. Shamshad Ahmed Narejo, Advocate.

Respondent: Through Mr. Ahmed Shahmeer, Advocate.

J U D G M E N T

DR. SHAH NAWAZ MEMON, J.: — This reference application, preferred by the Sindh Revenue Board under section 63 of the Sindh Sales Tax on Services Act, 2011, is one of a group of connected references heard together in which the applicant Board assails the deletion, by the learned Appellate Tribunal, Sindh Revenue Board, of both default surcharge and penalty. At the insistence of the parties the connected matters are being decided separately, and this judgment disposes of the reference at hand.

I. THE CONTROVERSY AND THE QUESTIONS

1. Two distinct levies fall for consideration. The first is default surcharge under section 44 of the Sindh Sales Tax on Services Act, 2011 (“the Act, 2011”), which attaches where a registered person does not pay the tax due, or any part of it, “*whether wilfully or otherwise*”, in the time or manner specified. The second is penalty under section 43, which prescribes the penalties for the offences described in the Table to that section. In the adjudication out of which this reference arises the respondent was visited with both. The learned Appellate

Tribunal deleted both, upon the reasoning that the department had not established that the default was willful, mala fide or otherwise attended by *mens rea*. It is that order which the applicant Board assails.

2. Being satisfied under section 63(3) of the Act, 2011 that questions of law arise out of the order of the learned Appellate Tribunal, and the statement of case having proposed a single composite question embracing both levies, we consider that the controversy is comprehended within the following two questions, which we accordingly frame:

(i) Whether the learned Appellate Tribunal was justified in deleting the default surcharge levied under section 44 of the Sindh Sales Tax on Services Act, 2011 upon the ground that mens rea on the part of the respondent had not been established?

(ii) Whether the learned Appellate Tribunal was justified in deleting the penalty imposed under section 43 of the Act, 2011 upon the ground that no mens rea had been established in the Order-in-Original?

3. Both questions have since been answered by this Court. The first is concluded by our judgment in *Itecknologi Tracking Services*¹, in which the liability under section 44 was held to be a strict statutory liability of a compensatory character. The second is concluded by our judgment in *Fumicon Services*², in which the question expressly left open in *Itecknologi* was taken up and it was held that a penalty under section 43 may not be imposed upon the mere occurrence of a default. What remains is to apply those two holdings to the record of this reference.

II. FACTS

4. The respondent, M/s. Glaxo SmithKline Pakistan Limited, is registered with the applicant Board under SNTN S-0710501-7 in the

¹*Sindh Revenue Board v. M/s. Itecknologi Tracking Services (Private) Limited* [Spl. Sales Tax Reference Application No. 86 of 2025 and eleven others, decided on 21.08.2026].

²*Sindh Revenue Board v. M/s. Fumicon Services (Private) Limited* [Spl. Sales Tax Reference Application No. 67 of 2019 and three others, decided on 04.09.2026].

- service category of franchise services, taxable under tariff heading 9823.0000 of the Second Schedule to the Act, 2011 read with rule 36 of the Sindh Sales Tax on Services Rules, 2011. It is the recipient of franchise services from foreign based franchisers, under authority to manufacture, package, sell and market licensed products under their trade marks, and pays royalty and technical fee in consideration.
5. Upon examination of the respondent's audited financial statements it was found that for the tax periods July 2011 to December 2012 royalty of Rs. 346,052,064/- stood booked; that Sindh sales tax had been discharged upon royalty of Rs. 63,413,780/-; that upon royalty of Rs. 195,509,750/- Federal excise duty of Rs. 19,550,975/- had been paid to the Federal Board of Revenue; and that upon royalty of Rs. 87,128,534/-, carrying Sindh sales tax of Rs. 8,712,853/-, neither levy had been discharged. A show-cause notice dated 22.05.2013 issued under section 23(1) read with section 47(1A)(a) of the Act, 2011, calling upon the respondent also to show cause against default surcharge under section 44 and penalties under section 43.
 6. By Order-in-Original No. 324 of 2013 dated 16.12.2013 the learned Assistant Commissioner (Franchise) assessed Sindh sales tax of Rs. 8,712,853/- as recoverable from the respondent, with default surcharge under section 44 to be calculated at the time of payment; directed that the sum of Rs. 19,550,975/- deposited with the Federal Board of Revenue be recovered from that Board; and, in the concluding paragraph of the order, recorded that the respondent had failed to deposit the tax in the time or manner laid down and that, "*taking a lenient view*", a penalty of Rs. 10,000/- was imposed under Serial No. 3 of the Table to section 43, no adverse inference being drawn against the respondent under Serial Nos. 6(d) and 11 of that Table. The appeal of the respondent was dismissed by the learned Commissioner (Appeals) by Order-in-Appeal No. 43 of 2014 dated 20.05.2014.
 7. In further appeal, being Appeal No. AT-58/2014, the respondent pressed only the grounds relating to default surcharge and penalty.

Its explanation for the delay was that the global merger of Bristol-Myers Squibb with the Glaxo group, given effect in Pakistan by an order of this Court dated 17.03.2010, had left it uncertain as to whom the franchise fee was payable; that its accounts, maintained upon the accrual basis, carried a provision for the fee; that the Trade Mark Licence Agreement with GlaxoSmithKline Trading Services Limited was executed on 07.11.2013 with effect from 01.01.2011; and that payment to the applicant Board followed on 17.03.2014.

8. The learned Members of the Tribunal differed. The learned Judicial Member, upon a review of the authorities, held that neither default surcharge nor penalty could be imposed without proof of willfulness, mala fide and *mens rea*, and that the Order-in-Original contained no such finding. The learned Member (Technical), while not differing upon penalty, took the view upon default surcharge that section 44 speaks in terms of “*shall pay*”; that the surcharge is in the nature of the opportunity cost of money retained beyond the prescribed due date; and that waiver or exemption of default surcharge lies with the appropriate forum under section 45 of the Act, 2011, for which she drew upon *Saritow Spinning Mills*³. The difference so arising was referred to the learned Chairman, who by order dated 03.09.2018 agreed with the learned Judicial Member, held that neither levy could be imposed without establishing *mens rea* and that the Tribunal had jurisdiction to waive both, allowed the appeal and set aside the orders of the fora below. Hence this reference.

III. SUBMISSIONS AT THE BAR

9. Mr. Shamshad Ahmed Narejo, learned counsel for the applicant Board, submitted upon the first question that the issue of default surcharge is already covered by the judgment of this Court in *Itecknologi*, the levy under section 44 having been held to be strict and to require no proof of willfulness, so that the ground upon which the learned Appellate Tribunal proceeded cannot be sustained. Upon the second question, and by reference to the judgment of this Court upon penalty in *Fumicon*, it was urged that the learned

³*Commissioner Inland Revenue, Lahore v. M/s. Saritow Spinning Mills Limited* [2016 PTD 786].

Appellate Tribunal erred in law in holding that no *mens rea* had been established in the Order-in-Original, it being contended that the material upon the record was sufficient to sustain the penalty.

10. Mr. Ahmed Shahmeer, learned counsel for the respondent, in reply submitted that since *mens rea* has not been established, penalty cannot be imposed, in view of the judgment of this Court in *Fumicon*. That the Order-in-Original records no finding of willfulness, contumacy or mala fide was not seriously denied at the Bar.
11. We have heard learned counsel for the parties, examined the record of the reference 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 FIRST QUESTION: DEFAULT SURCHARGE UNDER SECTION 44

12. The first question no longer admits of argument. In *Itecknologi* this Court, upon a consideration of the language and purpose of section 44 and of the legislative history of the cognate section 34 of the Sales Tax Act, 1990, held as follows:

“The liability to pay default surcharge under section 44 of the Sindh Sales Tax on Services Act, 2011 is a strict statutory liability of a compensatory character. It is attracted upon the occurrence of default, that is to say, upon the non-payment or short payment of the tax due by the due date, whether the default be deliberate, unintentional or inadvertent. Proof of wilfulness, or of mens rea, is not a condition of its imposition. Neither the officers of the Sindh Revenue Board, nor the Commissioner (Appeals), nor the learned Appellate Tribunal is vested with any power to waive, reduce or defer that liability upon grounds of hardship, equity or absence of intention; the power to grant relief resides, under the Act, 2011, in the Board under section 45 and in a committee under section 65, and, so far as the due date itself is concerned, in the Board under section 17(3).”

13. The words “*whether wilfully or otherwise*” in section 44(1) are the Legislature’s own exclusion of the mental element, and they

reproduce the words inserted into section 34 of the Act, 1990 by the Finance Act, 2005, the effect of which has been authoritatively declared⁴. The earlier line of authority requiring willfulness for the levy of additional tax⁵ was addressed to the provision as it stood before that amendment, and is no longer a safe guide upon a provision which carries those words. The surcharge is, moreover, compensatory and not punitive: the registered person who retains public money beyond the due date pays, in the surcharge, no more than the price of that retention.

14. It follows that the deletion of default surcharge upon the ground of absence of *mens rea* cannot be sustained in law, and that the consequential holding that the Tribunal may waive the surcharge does not accord with the scheme of the Act, 2011, under which relief of that character is reserved to the fora named in sections 45, 65 and 17(3). We record, with respect, that the view taken upon this levy by the learned Member (Technical) is in accord with the position since settled by this Court in *Itecknologi*.

V. THE SECOND QUESTION: PENALTY UNDER SECTION 43

15. Upon penalty the law is equally settled, and it points the other way. In *Fumicon* this Court answered the question left open in *Itecknologi* in these 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

⁴*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]; *Messrs New Era Fabrics v. Appellate Tribunal Inland Revenue* [2025 PTD 1519].

⁵*D. G. Khan Cement Company Ltd. v. Federation of Pakistan* [2004 SCMR 456]; *Deputy Collector Central Excise v. ICI Pakistan Ltd.* [2006 SCMR 626].

*the gravity of the offence, where the default is culpable;
and to abstain where it is not.”*

16. The distinction between the two sections is not a matter of degree but of kind. Section 44 excludes the mental element in terms; section 43, enacted in the same Chapter and at the same time, does not, and employs instead the language of offence and of liability to a penalty. 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.
17. What follows from the law so stated is a question upon the record of this adjudication. The Order-in-Original proceeds, in its operative paragraph, upon the single circumstance that the respondent *“failed to deposit the said amount of sales tax on franchise services ... in the time or manner laid down”*, and imposes upon that footing, *“taking a lenient view”*, a penalty of Rs. 10,000/- under Serial No. 3 of the Table to section 43. There is in it no determination that the failure was willful, contumacious, dishonest or mala fide, and none was pointed out to us; the omission, as we have noticed, was not seriously denied at the Bar. The very moderation of the sum, imposed by way of leniency rather than graded by reference to the gravity of any culpable conduct, confirms that the quality of the default was not adjudged at all. A penalty visited upon the bare fact of late payment, without any finding upon the culpability of the taxpayer, is precisely what *Fumicon* holds section 43 not to authorise.
18. Nor is the record silent as to the circumstances in which the default arose. It was the same Order-in-Original which recorded that a substantial part of the levy upon the royalty, Rs. 19,550,975/-, had been paid to the Federal Board of Revenue in the Federal excise mode, and which directed its recovery from that Board rather than from the respondent; that the incidence of the franchise levy had passed from the Federation to the Province with effect from 01.07.2011 upon the Eighteenth Amendment to the Constitution and the 7th NFC Award; and that the respondent's liability was bound up with a licence agreement executed in November 2013 with effect

from January 2011. A person who pays the levy to the wrong exchequer, and whose remaining liability awaited the settlement of the instrument which measured it, may be in default; but default and culpability are not the same thing, and it was the latter which the section required to be found.

VI. THE REFERENCE JURISDICTION AND THE FINDING BELOW

19. The submission pressed upon us on behalf of the applicant Board is, in substance, that upon this record the learned Appellate Tribunal ought to have found willfulness. The submission encounters a difficulty of jurisdiction. 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. Section 63 of the Act, 2011 is explicit at every stage that what is brought before this Court is a question of law arising out of the order of the learned Tribunal, and that what this Court decides is that question. The facts as stated in the order of the Tribunal have to be taken as recorded.
20. 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. It was held in *Johri*⁶ that as a final fact-finding body the Tribunal's finding of fact is conclusive, that the High Court cannot go behind it unless it is shown that there was no evidence upon which the Tribunal could properly arrive at its conclusion or that it misdirected itself in law, and that even in a case of no evidence the finding cannot be disturbed unless it is assailed through a question of law expressly raised in the reference application; the modern restatements are to the same effect⁷. No question alleging perversity, or the absence of evidence, or the misreading or non-reading of the record, has been proposed in this reference. What is urged is not that the learned Tribunal misread the Order-in-Original, but that upon that order it ought to

⁶*Haji Ibrahim Ishaq Johri v. Commissioner of Income Tax (West), Karachi* [1993 SCMR 287].

⁷*The Collector of Sales Tax and Central Excise, Lahore v. Messrs Qadbro Engineering (Pvt.) Ltd.* [2023 SCMR 939]; *The Intelligence Officer, Directorate of Intelligence and Investigation, FBR v. Abdul Karim* [2025 SCMR 969].

have found willfulness, which is the very enquiry the authorities place beyond us.

21. Upon the question of law which does arise, therefore, the answer is that the Order-in-Original had to contain a determination of culpability before a penalty under section 43 could be imposed, and the learned Appellate Tribunal, in holding that it contained none, proceeded upon a correct view of the law. Its conclusion upon penalty calls for no interference.

VII. THE ANSWERS TO THE QUESTIONS

22. For the foregoing reasons, the first question framed in paragraph 2 above is answered in the negative, in favour of the applicant Board and against the respondent. The liability to default surcharge under section 44 of the Act, 2011 is a strict statutory liability of a compensatory character, attracted upon the occurrence of default whether it be deliberate, unintentional or inadvertent; absence of *mens rea* furnished no ground for its deletion, and no power to waive it resides in the fora under the Act save as provided in sections 45, 65 and 17(3). The demand of default surcharge made in the Order-in-Original shall accordingly stand restored, its computation being a matter of arithmetic upon the dates of payment.
23. The second question is answered in the affirmative, in favour of the respondent and against the applicant Board. A penalty under section 43 of the Act, 2011 may be imposed only where the department has established, upon the record of the adjudication, that the default was willful, contumacious, dishonest or otherwise attended by *mens rea*. The Order-in-Original contains no such determination, and the learned Appellate Tribunal committed no error of law in deleting the penalty of Rs. 10,000/- imposed under Serial No. 3 of the Table to section 43.
24. In terms of section 63(5) of the Act, 2011, the order of the learned Appellate Tribunal, Sindh Revenue Board dated 03.09.2018 in Appeal No. AT-58/2014 shall stand modified to the extent of the default surcharge and shall stand maintained to the extent of the

penalty, and the learned Tribunal shall pass such order as is necessary to dispose of the case conformably to this judgment.

VIII. ORDER

25. The reference application stands disposed of in the above terms, with no order as to costs.
26. 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.

J U D G E

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Karachi,

Dated: 25th day of September 2026

Ayaz PS.