

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. 1301 of 2023

Sindh Revenue Board, Karachi VS M/s. Seaboard Logistics (SMC-Pvt.) Limited, Karachi

Dates of hearing: 16.09.2026 & 17.09.2026
Date of decision: 25.09.2026

Applicant: Through Mr. Fahad Hussain Areejo, Advocate.
Respondent: Through M/s. Abdul Rahim Lakhani and Mr. Atta Muhammad Qureshi, Advocates.

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 five connected references heard together. At the instance of the parties the connected matters are being heard and decided separately, and this judgment disposes of Spl. Sales Tax Reference Application No. 1301 of 2023.

I. THE CONTROVERSY AND THE QUESTIONS

1. The learned Appellate Tribunal, Sindh Revenue Board has deleted both the penalties imposed upon the respondent under section 43 of the Sindh Sales Tax on Services Act, 2011 (“**the Act, 2011**”) and the default surcharge levied under section 44, holding that neither levy could be visited upon a registered person in the absence of proof of wilful default and *mens rea*. The applicant Board assails that order upon both counts. Earlier batches of references have raised the one question or the other; here the two are invoked together.
2. Two questions were proposed in the memorandum of reference and were framed by this Court when the reference was admitted on 07.11.2025:

“(a) Whether the AT-SRB was justified to hold the registered person not liable to pay default surcharge under section 44 of the Sindh Sales Tax on Services Act, 2011 (on the facts and circumstances of the case) despite statutory provisions of section 44(1) of the Act, 2011 contain the words ‘willfully or otherwise’?”

“(b) Whether the AT-SRB was justified to hold the registered person not liable to pay penalties (on the facts and circumstances of the case) despite statutory provisions of section 43 of the Sindh Sales Tax on Services Act, 2011?”

3. The two questions are companions, but they are not the same question, and it is convenient to say at the outset that they do not receive the same answer.

II. THE FACTS

4. The respondent, M/s. Seaboard Logistics (SMC-Pvt.) Limited, is registered with the applicant Board in the service category of “*Terminal Operator*”, taxable under tariff heading 9819.9090 of the Second Schedule to the Act, 2011. It is obliged by section 17, read with the Sindh Sales Tax on Services Rules, 2011, to deposit the tax for each tax period by the due date prescribed, and by section 30, read with rules 12 and 13, to e-file the prescribed return in form SST-03.
5. For the tax period September 2022 the tax, admittedly Rs.9,123,222/-, was not deposited by the due date, nor was the return e-filed. A show-cause notice bearing No.SRB/COM-II/AC-32/TO/55781/2022 dated 25.10.2022 was accordingly issued, calling upon the respondent to show cause why penal action should not be taken under Serial Nos. 2 and 3 of the Table to section 43 and why default surcharge should not be imposed under section 44.
6. By its reply dated 18.11.2022 the respondent stated that a cheque for the amount had been drawn on 15.10.2022 but, through an oversight, had not been lodged until 28.10.2022; that the payment was made on 01.11.2022 and the return e-filed on 02.11.2022; and it sought condonation. By Order-in-Original No. 2747 of 2022 dated 24.11.2022 the Assistant Commissioner (Unit-32) imposed a penalty

of Rs.5,000/- under Serial No. 2 and of Rs.456,161/- under Serial No. 3 of the Table to section 43, together with default surcharge of Rs.81,584/- under section 44, recording that the respondent had furnished no reason why it was a habitual late filer and that wilful default was apparent from the case record.

7. The appeal preferred under section 57(1) was dismissed by the learned Commissioner (Appeals-II) by Order-in-Appeal No. 45 of 2023 dated 17.02.2023. A compliance history produced by the department before that forum was said to disclose seventy-five instances of late payment, of which twenty-six exceeded three days; the explanation that the respondent's accountant had been unwell was not accepted for want of any material in support; and, upon the surcharge, it was held that the words "*willfully or otherwise*" in section 44 render the levy obligatory.
8. In further appeal the learned Appellate Tribunal, Sindh Revenue Board, by its order dated 15.06.2023 in Appeal No. AT-34/2023, allowed the appeal, set aside both orders and held the respondent liable neither to penalty nor to default surcharge. Its reasoning, so far as material, was that upon the authorities neither levy could be imposed without a determination of wilful default and *mens rea*; that the show-cause notice had neither quantified the demand nor alleged habitual default; that the tax stood paid and the return filed before the Order-in-Original came to be passed; and that the recital in that order that the element of *mens rea* existed did not, without more, discharge the burden lying upon the department. Hence this reference at the instance of the Board.

III. SUBMISSIONS AT THE BAR

9. Mr. Fahad Hussain Areejo, learned counsel for the applicant Board, submitted that the first question is no longer open, the construction of section 44 having been settled by the judgment of this court in *Itecknologi*¹, with which the order impugned, resting as it does upon

¹ *Sindh Revenue Board v. M/s. Itecknologi Tracking Services (Private) Limited*, Spl. Sales Tax Reference Application No. 86 of 2025 and eleven connected references, decided on 21.08.2026 [2026 SHC KHI 1573].

the requirement of *mens rea*, cannot stand. Upon the second question he submitted that the learned Appellate Tribunal had erred in law in deleting the penalties in the facts and circumstances of this case, for *mens rea* had been established by the officer: the Order-in-Original had addressed the question and found wilful default, and the record before the learned Commissioner (Appeals) disclosed a settled pattern of late payment which the respondent had not explained.

10. Mr. Abdul Rahim Lakhani, learned counsel for the respondent, assisted by Mr. Atta Muhammad Qureshi, answered that the learned Appellate Tribunal is the last fact-finding forum under the Act, 2011; that it has, upon a consideration of the whole record, deleted both the default surcharge and the penalties; and that its order ought for that reason to be maintained.
11. In rebuttal learned counsel for the Board reiterated the submissions already made and read passages from the judgments of this court in *Itecknologi* and in *Fumicon*² to urge that upon the facts and circumstances of this case the learned Appellate Tribunal was not justified in deleting either levy.
12. We have heard learned counsel for the parties, examined the record of the reference with their assistance and considered the authorities.

IV. THE TWO PROVISIONS AND THE ANSWERS ALREADY GIVEN

13. Chapter VIII of the Act, 2011 makes a twofold provision for default. Section 43 is headed “*Offences and penalties*” and opens with the words “*Whoever commits any offence described in column (1) of the Table below shall ... be liable to the penalty mentioned against that offence in column (2) thereof*”. Section 44 provides that a registered person who does not pay the tax due or any part thereof, “*whether wilfully or otherwise*”, in time or in the manner specified, shall, in addition to the tax due and any penalty under section 43, pay default surcharge at Inter-Bank Rate plus three per cent per annum, the

²*Sindh Revenue Board v. M/s. Fumicon Services (Private) Limited*, Spl. Sales Tax Reference Application No. 67 of 2019 and three connected references, decided on 04.09.2026 [2026 SHC KHI 1646].

period of default being reckoned under sub-section (2) from the day following the due date to the day preceding the date on which the tax is actually paid.

14. Each of those provisions has lately been construed by this Bench. In *Itecknologi* it was held that the liability to default surcharge under section 44 is a strict statutory liability of a compensatory character, 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; that proof of wilfulness is not a condition of its imposition; and that neither the officers of the Board, nor the Commissioner (Appeals), nor the learned Appellate Tribunal is vested with any power to waive, reduce or defer it, the power to grant relief residing in the Board under section 45 and in a committee under section 65. The question arising upon section 43 was expressly left open.
15. That reserved question was answered in *Fumicon*. It was there held that a penalty under section 43 may not be imposed upon the mere occurrence of a default; that the department must establish, upon the record of the adjudication, that the default was wilful, contumacious, dishonest or otherwise attended by *mens rea*; that the burden lies in the first instance upon the department, and only upon its discharge does the registered person bear the burden of explanation; and that 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.
16. The two holdings are the two halves of a single scheme. 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. It follows that an order which treats the two levies as governed by one and the same requirement must be examined separately upon each, and that is the course we take.

V. THE FIRST QUESTION: DEFAULT SURCHARGE UNDER SECTION 44

17. Upon the first question the matter admits of little discussion. The learned Appellate Tribunal proceeded upon the view that default surcharge “*could not be mechanically imposed without determination of willful default, malafide intention to evade tax and mensrea on the part of tax payer*”, and it reached that view upon the line of authority of which *D. G. Khan Cement*³ is the leading example. That line was decided upon the text of section 34 of the Sales Tax Act, 1990 as it stood before the Finance Act, 2005 introduced into it the words “*whether wilfully or otherwise*”, and the Hon’ble Supreme Court in *Byco Petroleum*⁴ has held that it does not attend to that amendment and is for that reason no longer a safe guide upon the point. Section 44 of the Act, 2011 reproduces the amended provision in every respect material to this controversy. With respect, the view so taken is one which the language of section 44 does not admit, and it cannot stand with what was held in *Itechnologi*.
18. Two further matters weighed with the learned Appellate Tribunal upon this levy, and neither carries the respondent further. The first is that the tax had been paid and the return filed before the Order-in-Original was passed. Under section 44(2) the period of default runs from the day following the due date to the day preceding the date of actual payment. Payment made before the order does not therefore extinguish the surcharge; it fixes the period for which the surcharge is computed, and the sum of Rs.81,584/- was computed upon precisely that footing. The second is that the show-cause notice neither quantified the demand nor alleged habitual default. Whatever the force of that observation upon the penalties, to which we come presently, it does not touch the surcharge. The notice did call upon the respondent to show cause why default surcharge should not be imposed under section 44; the only facts material to that levy are the due date and the date of payment; neither was in dispute, and both were furnished by the respondent itself. The surcharge is, moreover,

³*D. G. Khan Cement Company Ltd. v. Federation of Pakistan* [2004 SCMR 456].

⁴*Commissioner Inland Revenue v. M/s. Byco Petroleum Pakistan Limited*, Civil Petitions Nos. 1221-K to 1257-K and 1290-K to 1299-K of 2022, order dated 05.07.2024.

computed by the arithmetic which the section itself prescribes, and its quantification calls for no separate charge.

19. The first question must accordingly be answered against the respondent.

VI. THE SECOND QUESTION: PENALTY UNDER SECTION 43

20. The second question stands upon an altogether different footing. It was not, and after *Fumicon* it could not be, contended before us that a penalty under section 43 follows upon default as a matter of course. What was urged is that in this case the element of *mens rea* was established by the officer, and that the learned Appellate Tribunal ought therefore to have sustained the penalties.
21. It is right to record that the adjudicating officer did address the question. The Order-in-Original states that the respondent had furnished no reason why it was a habitual late filer and that wilful default was apparent from the case record, and the learned Commissioner (Appeals) went further, setting out a compliance history said to disclose seventy-five instances of late payment. The learned Appellate Tribunal, before whom the whole record lay, was not satisfied that the material went far enough. It held that the recital that “*the element of mensrea existed against the appellant*” did not by itself establish wilful default; that the pattern of earlier delays upon which the department relied had not been put to the respondent in the show-cause notice, which confined itself to the tax period September 2022; and that the default of that period had been explained and made good within days of the notice and before the order. Upon that material it found that the department had not discharged the burden which section 43, as construed in *Fumicon*, casts upon it.
22. Upon the last of those matters we would add a word, for it is one of principle. A history of prior defaults, if it is to be relied upon in order to establish that the default of the period in question was wilful, must be distinctly put to the registered person in the show-cause notice, so that he may have the opportunity to explain it. It is not material

which may be introduced for the first time before an appellate forum⁵. The show-cause notice in this case confined itself to the tax period September 2022 and made no allegation of habitual default; the compliance history was brought on the record for the first time before the learned Commissioner (Appeals). The learned Appellate Tribunal was right to decline to rest a penalty upon it.

23. That is a finding of fact, or at its highest an inference of fact drawn from facts. Whether a particular default was wilful, contumacious or attended by *mens rea* is not a question of law, and this Court, seized of a reference under section 63 of the Act, 2011, decides “*the question of law raised by the reference*” and no other. That the learned Appellate Tribunal is the final fact-finding forum, and that its 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 Court⁶.
24. The recognised exceptions do not arise here. A finding rendered upon no evidence, a finding which is perverse or rests upon surmise and conjecture, and a material misreading or non-reading of the record each give rise to a question of law⁷; but such a question must be distinctly framed and raised in the reference application, and no question of that character has been proposed in this reference. Neither of the two questions before us alleges perversity or the absence of evidence. What this Court is invited to do is to hold, upon the same record which the learned Appellate Tribunal considered, that wilfulness was established. That is an invitation to re-try the facts, and it is one which the jurisdiction conferred by section 63 does not permit us to accept.
25. Nor does the passage read to us from *Fumicon* carry the matter further. What was there said, that the requirement of *mens rea* does

⁵*Messrs New Era Fabrics v. Appellate Tribunal Inland Revenue* [2025 PTD 1519], where a penalty referable to a provision with which the taxpayer had not been confronted by the notice was held bad on that ground.

⁶*Haji Ibrahim Ishaq Johri v. The Commissioner of Income Tax (West), Karachi* [1993 SCMR 287]; *The Collector of Sales Tax and Central Excise, Lahore v. Messrs Qadbros Engineering (Pvt.) Ltd.* [2023 SCMR 939]; *The Intelligence Officer, Directorate of Intelligence and Investigation, FBR v. Abdul Karim* [2025 SCMR 969].

⁷*Commissioner of Income-Tax v. Messrs Sindh Engineering (Pvt.) Ltd.* [2002 SCMR 527].

not disarm the officer but arms him with a discretion and directs its exercise, and that where the record discloses wilful, contumacious or dishonest default the officer may, and ordinarily should, impose a penalty proportionate to the gravity of the offence, was said in answer to a concern voiced on behalf of the Revenue as to the powers of the adjudicating officer. It presupposes a finding, upon the record, that the default was of that character. It does not enlarge the reference jurisdiction of this Court, and it affords no warrant for displacing the conclusion of the forum upon which the Act, 2011 has conferred the function of finding facts.

26. We would add that the view taken by the learned Appellate Tribunal was, upon this record, a view reasonably open to it. The demand related to a single tax period. The amount was substantial and had been provided for by a cheque drawn before the due date. The default was made good, and the return filed, within days of the show-cause notice and a fortnight before the Order-in-Original. Against that the department placed a recital of culpability and a history of earlier delays which the notice had not put in issue. The learned Appellate Tribunal weighed the one against the other and concluded that the burden had not been discharged. A view so reached is a possible view; it is not perverse; and it is not for this Court, in this jurisdiction, to substitute another. Whether the explanation tendered, that a cheque drawn before the due date was through an oversight not lodged in time, was satisfactory, and whether a lapse so described is to be characterised as inadvertence or as a want of care rising to culpability, were questions for the learned Appellate Tribunal to answer upon the material before it. It has answered them, and its answer is not shown to be one which no reasonable forum could reach.
27. What has been said governs the penalties under both Serial Nos. 2 and 3 of the Table to section 43. Serial No. 2 visits the failure to furnish a return within the due date and Serial No. 3 the failure to deposit the tax due in the time or manner laid down; they describe distinct offences, but each is an offence, and the requirement which *Fumicon* attaches to the one attaches equally to the other. The return

for the tax period September 2022 was e-filed on 02.11.2022, the day after the tax was deposited and three weeks before the Order-in-Original, and the department placed no material before the learned Appellate Tribunal to distinguish the quality of that default from the quality of the other. The deletion of the penalty of Rs.5,000/- stands upon the same footing as the deletion of the penalty of Rs.456,161/-.

28. The second question must accordingly be answered in favour of the respondent.

VII. THE OBSERVATIONS TOUCHING THE OFFICERS OF THE BOARD

29. The order impugned carries certain observations to the effect that, in imposing default surcharge without a determination of *mens rea*, the officers of the applicant Board and the learned Commissioner (Appeals) acted in disregard of binding precedent and were liable to disciplinary action. Those observations proceed upon the very view of section 44 which, for the reasons given in Part V above, cannot be sustained. They do not survive the modification which this judgment works upon the order, and they shall be treated as of no effect.

VIII. THE ANSWERS TO THE QUESTIONS

30. Question (a) is answered in the **negative**, in favour of the applicant Board and against the respondent. The learned Appellate Tribunal was not justified in holding the respondent not liable to default surcharge under section 44 of the Act, 2011. The liability under that section is a strict statutory liability of a compensatory character, attracted upon the non-payment of the tax due by the due date whether the default be wilful or otherwise, and proof of *mens rea* is not a condition of its imposition. The demand of Rs.81,584/- on that account is restored.
31. Question (b) is answered in the **affirmative**, in favour of the respondent and against the applicant Board. A penalty under section 43 of the Act, 2011 requires the department to establish, upon the

record of the adjudication, that the default was wilful, contumacious, dishonest or otherwise attended by *mens rea*. The learned Appellate Tribunal, having found as a fact that the department had not discharged that burden, committed no error of law in deleting the penalties imposed under Serial Nos. 2 and 3 of the Table to section 43, and that finding is not open to re-examination in this jurisdiction.

32. In terms of section 63(5) of the Act, 2011 the order of the learned Appellate Tribunal, Sindh Revenue Board dated 15.06.2023 in Appeal No. AT-34/2023 shall stand modified accordingly: the deletion of the penalties imposed under section 43 is maintained, and the deletion of the default surcharge levied under section 44 is set aside.

IX. ORDER

33. The reference application stands disposed of in the above terms, with no order as to costs. Office to place a copy of this judgment in the connected matters.
34. 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

J U D G E

Karachi,

Dated: 25th day of September 2026

Ayaz PS.