

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. 53 of 2024

Sindh Revenue Board, Hyderabad VS M/s. Z.I. Enterprises, Hyderabad

Dates of hearing: 16.09.2026 & 17.09.2026

Date of decision: 25.09.2026

Applicant: Through Mr. Zulifqar Ali Bhutto, Advocate.

Respondent: *Nemo*

J U D G E 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, was heard along with four connected references, in each of which the applicant Board assails the deletion by the learned Appellate Tribunal, Sindh Revenue Board of default surcharge, of penalty, or of both. At the insistence of the parties the connected references are being heard and decided separately, one by one, and this judgment disposes of Spl. Sales Tax Reference Application No. 53 of 2024.

I. THE CONTROVERSY AND THE QUESTIONS

1. Chapter VIII of the Sindh Sales Tax on Services Act, 2011 (“the Act, 2011”)¹ makes a twofold provision for default. Section 43 provides for offences and penalties; section 44 for default surcharge. Each has lately been construed by this Bench. In *Itecknologi*² this court held the liability to default surcharge under section 44 to be a strict statutory liability of a compensatory character, attracted upon the occurrence of default “whether wilfully or otherwise”, in respect of

¹ The Sindh Sales Tax on Services Act, 2011.

² 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.

which questions of intention are irrelevant. In *Fumicon*³ it was held that a penalty under section 43 may not be imposed upon the mere occurrence of a default, and that the department must establish, upon the record of the adjudication, that the default was willful, contumacious, dishonest or otherwise attended by *mens rea*. The present reference is the first before us in which both levies were deleted by a single order of the learned Appellate Tribunal. It requires both of those holdings to be applied to one set of facts.

2. The reference was admitted on 28.10.2025 upon the question relating to default surcharge. The statement of the case had, however, also proposed a question upon the deletion of the penalty; that deletion arises out of the very order of the learned Appellate Tribunal which is before us; the applicant Board pressed both matters at the hearing and the respondent met both. The remedy by way of reference 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.⁴ 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 questions proposed in the statement of the case being several and overlapping, 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 the tax due stood paid before the Order-in-Original was passed?

(ii) Whether, in the facts and circumstances of the case, the learned Appellate Tribunal erred in law in deleting the penalty imposed under Serial No. 3 of the Table to section 43 of the Sindh Sales Tax on Services Act, 2011?

³ Sindh Revenue Board v. M/s. Fumicon Services (Private) Limited and connected references, Spl. Sales Tax Reference Application No. 67 of 2019 and three others, decided on 04.09.2026.

⁴ Messrs Squibb Pakistan (Pvt.) Ltd. v. Commissioner of Income Tax [2017 SCMR 1006]; reaffirmed in Haseeb Waqas Sugar Mill Limited v. Government of Pakistan [2026 SCMR 833].

II. FACTS

3. The respondent, M/s. Z.I. Enterprises (SNTN 1759819-2), is registered with the applicant Board in the service category of services provided or rendered by persons engaged in contractual execution of work or furnishing supplies, taxable under tariff heading 9809.0000 of the Second Schedule to the Act, 2011. In terms of section 17 of the Act, 2011 read with rule 14 of the Sindh Sales Tax on Services Rules, 2011, the tax for a tax period was to be deposited by the fifteenth day of the month following that period.
4. Upon scrutiny of the respondent's online tax profile the Assistant Commissioner (Unit-34), Hyderabad found that in various tax periods between March 2019 and June 2022 the respondent had provided taxable services to five recipients, M/s. B. Braun Pakistan (Private) Limited, M/s. Martin Dow Marker Limited, M/s. Glaxo Smithkline Pakistan Limited, M/s. Otsuka Pakistan Limited and M/s. Glaxo Smithkline Consumer Healthcare Pakistan Limited, upon which Sindh sales tax of Rs.7,182,453/- was chargeable; that the recipients, as withholding agents, had withheld and deposited Rs.1,436,490/-, being one-fifth of that sum; and that the balance of Rs.5,745,963/-, which it lay upon the respondent to deposit, had not been paid. A show-cause notice dated 25.10.2022 was accordingly issued under section 23(1) of the Act, 2011, calling upon the respondent to show cause why that amount should not be assessed and recovered, together with default surcharge under section 44 and penalties under Serial Nos. 3 and 6(d) of the Table to section 43.
5. The respondent neither appeared nor was represented upon the dates fixed by the assessing officer, being 31.10.2022, 07.11.2022, 27.04.2023, 09.05.2023 and 19.05.2023. A written submission dated 02.11.2022, filed on its behalf by M/s. Zaheer & Company, stated that the amount of Rs.5,745,963/- had been deposited on 01.11.2022 through the Computerised Payment Receipts there set out, and that deposit was verified by the assessing officer from the online record. No explanation for the delay in payment was

tendered. By Order-in-Original No. 4771 of 2023 dated 22.06.2023 the Assistant Commissioner, recording that the principal amount stood paid, imposed a penalty of Rs.120,000/- under Serial No. 3 of the Table to section 43 and charged default surcharge of Rs.745,958/- under section 44.

6. By Order-in-Appeal No. 308 of 2023 dated 08.11.2023 the learned Commissioner (Appeals-I) reduced the penalty from Rs.120,000/- to Rs.30,000/- and confirmed the default surcharge in full. In further appeal under section 61 of the Act, 2011 the learned Appellate Tribunal, Sindh Revenue Board, by its order dated 11.03.2024 in Appeal No. AT-150/2023, allowed the appeal and set aside both the penalty and the default surcharge. Hence this reference at the instance of the Board.

III. THE ORDER OF THE LEARNED APPELLATE TRIBUNAL

7. The learned Appellate Tribunal framed as its first point for determination whether the penalty and the default surcharge, imposed in terms of Serial No. 3 under sections 43 and 44 of the Act, 2011 respectively, were justified, and answered it in the negative. Upon the penalty the order proceeds upon two grounds, and it is necessary for what follows to keep them distinct.
8. The first is that the tax covered by the show-cause notice had been paid before the Order-in-Original was made, so that, in the words of the order, “there was no amount due at the time of passing *the Original Order*”; and that where a taxpayer responds to a show-cause notice and complies with the law, “the case must be closed”, the notice being liable to be vacated rather than made the occasion of a charge.
9. The second is a finding upon the record of the adjudication. The learned Tribunal held that *mens rea* is the basic ingredient for the imposition of any penalty prescribed under the law; that the expression imports deliberate negligence or willful default, something more than mere non-compliance with a statutory provision; and that to establish it the department must show that the

non-compliance rested upon *mala fide* intentions. Upon that footing it recorded that a “perusal of the show-cause notice, order-in-original and order in appeal shows that there was no allegation against the appellant in respect of deliberate/willful default to defraud the Government”, and that there was “no mention of *mens rea* or *mala fide* intention to defraud the government in *the Original Order*”. It fortified itself by the authorities noticed in its order.⁵

10. Upon the default surcharge the learned Tribunal reasoned that the words “in addition to the tax due and any penalty under section 43” in section 44(1) denote that the liability to surcharge is coupled with a subsisting liability to tax; that at the time of the Order-in-Original the assessing officer found no liability of tax due; and that “in such circumstances, there remains no justification in imposing the penalty of ‘default surcharge’”.

IV. SUBMISSIONS AT THE BAR

11. Learned counsel for the applicant Board submitted, in the first place, that the question of default surcharge is no longer open, having been concluded in favour of the Revenue by the judgment of this Court in *Itecknologi*, in which section 44 was held to create a strict liability attracted upon the occurrence of default; that the construction placed by the learned Appellate Tribunal upon the words “in addition to” cannot stand with that judgment; and that no forum under the Act, 2011 is vested with power to waive or reduce the surcharge.
12. In the second place it was submitted that in the facts and circumstances of this case the learned Appellate Tribunal erred in law in deleting the penalty. Learned counsel read to us several passages from judgment in *Fumicon*, and in particular the passage in which we observed that 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

⁵ Assistant Commissioner, SRB, Karachi v. Messrs Falcon-I (Pvt.) Ltd. [2020 PTD (Trib.) 141], which in turn drew upon Commissioner of Income Tax v. Habib Bank Limited [2007 PTD 901] and Pakistan through the Secretary, Ministry of Finance v. Hardcastle Waud (Pakistan) Ltd. [PLD 1967 SC 1].

of the offence. The present, it was urged, is such a case: the defaults extend over some eleven tax periods between March 2019 and June 2022, the earliest of them running for upwards of three years; not a rupee of the tax was deposited until after the show-cause notice had issued; the respondent appeared upon none of the five dates fixed before the assessing officer; and no explanation for the default was tendered at any stage of the adjudication. A default of that description, it was submitted, cannot be characterised as innocent, and the learned Appellate Tribunal ought to have sustained the penalty.

13. In reply, learned counsel for the respondent supported the order of the learned Appellate Tribunal. It was urged that the default was not willful; that *mens rea* was neither alleged nor established at any stage of the adjudication, the burden in that behalf lying in the first instance upon the department; that the tax was deposited in full, and the exchequer has suffered nothing; and that the learned Appellate Tribunal, being the final forum of fact, having found the element wanting, its order calls for no interference in the exercise of this Court's reference jurisdiction.
14. In rebuttal it was urged that the deletion of the surcharge could not in any event survive *Itecknologi*; that willfulness is seldom capable of direct proof and is ordinarily to be inferred from conduct; and that a default persisting through eleven tax periods, unexplained before the assessing officer and remedied only under the compulsion of a notice, speaks for itself.
15. We have heard learned counsel for the parties, examined the record of the reference with their assistance, and considered the authorities cited at the Bar as well as such further authority as our own research has yielded.

V. THE DEFAULT SURCHARGE

16. The first question does not detain us long, for it is concluded by *Itecknologi*. This court there held that the liability to pay default surcharge under section 44 of the Act, 2011 is a strict statutory

- liability of a compensatory character, attracted 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 willfulness 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 that liability upon grounds of hardship, equity or absence of intention, the power to grant relief residing in the Board under section 45, in a committee under section 65(1)(b) and, so far as the due date itself is concerned, in the Board under section 17(3). Learned counsel for the respondent did not, and could not, contend otherwise.
17. The ground upon which the learned Appellate Tribunal proceeded is, with respect, not one which the language of section 44 will bear. The words “in addition to the tax due and any penalty under section 43” identify the surcharge as a liability additional to the tax and to the penalty; they do not make it conditional upon a liability to tax subsisting at the date of the order. The matter is placed beyond argument by section 44(2), which directs that the period of default “shall be reckoned from the day following the due date prescribed for the tax period to which the default relates to the day preceding the date on which the tax due is actually paid”. A provision which measures the levy by reference to the date of actual payment necessarily contemplates that payment has been made: payment is the terminus of the computation, not an answer to it. Upon the contrary view the surcharge would be exigible only from a person who had not paid at all, and late payment, which is the very default the section is designed to price, would escape it altogether. That cannot have been intended.
18. In the present case the tax for the periods March 2019 to June 2022 was deposited on 01.11.2022. The surcharge of Rs.745,958/- computed upon that delay, charged by the assessing officer and confirmed by the learned Commissioner (Appeals-I), was therefore exigible, and the order deleting it cannot be sustained. The

quantification of the surcharge was not assailed before us, and nothing in this judgment precludes the correction of any arithmetical error in the computation should one be shown to exist.

VI. THE PENALTY: THE FIRST GROUND

19. We turn to the penalty, and first to the ground that none could be imposed because the tax stood paid before the Order-in-Original was made. That ground, with respect, cannot be supported. Serial No. 3 of the Table to section 43 describes the offence as a failure “to deposit the amount of tax due or any part thereof in the time or manner laid down under this Act or the rules made thereunder”. The offence is complete when the due date passes without payment. What the Serial visits with penalty is the failure to pay in time, not the continuance of non-payment down to some later date. Payment made thereafter, whether before or after the show-cause notice, is a circumstance of weight, and may well be decisive, in the exercise of the discretion which section 43 confers; but it does not undo the offence. Were it otherwise the Serial would be reduced to a dead letter, for every default could be cured, and the penalty defeated, by payment at any time before the order.
20. The same consideration answers the observation that upon compliance following a show-cause notice “the case must be closed” and the notice vacated. Section 23(1) of the Act, 2011 requires the officer, upon making an assessment, to impose a penalty and charge default surcharge “in accordance with sections 43 and 44”; the provision plainly contemplates that those consequences may follow although the tax has by then been recovered. We would add only this, that the words “in accordance with sections 43 and 44” carry into that exercise everything which those sections require, and, for section 43, that includes the element which held in *Fumicon* to be essential.

VII. THE PENALTY: THE SECOND AND INDEPENDENT GROUND

21. The order of the learned Appellate Tribunal does not, however, rest upon that ground alone. It rests also upon a distinct finding: that

neither the show-cause notice, nor the Order-in-Original, nor the Order-in-Appeal contained any allegation or finding that the default was deliberate or willful. That finding is directed to precisely the matter which, in *Fumicon*, held must appear before a penalty under section 43 can stand. It is convenient to recall the terms in which we answered the question there framed:

“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.”

22. A decision may rest upon more than one ground, and where one of them is in law sufficient to support the conclusion, the conclusion stands although another is not. We applied that principle in *Fumicon* when the Board sought to confine *New Era Fabrics* to its facts, and it applies with equal force to the order now before us. The infirmity in the first ground does not touch the second; and the second is by itself sufficient to sustain the deletion of the penalty.
23. We have examined each of the three orders for ourselves, and the finding is borne out at every tier. The show-cause notice dated 25.10.2022 recites that the respondent failed to declare the tabulated invoices and to deposit the tax, states that this is “in contravention of section 3, 9 and 17 of the Act”, and requires the respondent “to explain as to why penalties mentioned at Sr. No. 3 and 6d of the Table in section 43 should not be imposed upon them for contravention of above mention provision of Act”. What is put in issue is the contravention; willfulness, contumacy and *mala fides* are nowhere alleged. The Order-in-Original sets out the tabulation of the invoices, records the deposit made on 01.11.2022 and proceeds to impose the penalty; it records no finding upon the quality of the default. And the Order-in-Appeal, in reducing the penalty, states its reason in terms: “considering their compliance during proceedings of the case i.e. payment of principle amount of

tax, the penalty imposed under Sr. 3 of the Table under section 43 of the 2011-Act of Rs 120,000/- is reduced to Rs 30,000/- only.”

24. That last passage repays attention, for it is an illustration of the distinction drawn in Part VI above rather than an exception to it. The learned Commissioner (Appeals-I) treated the payment of the principal as a matter going to the measure of the penalty, and reduced it accordingly; he did not treat it as an answer to the charge, and he did not address the culpability of the default at all. His approach upon quantum was, if we may respectfully say so, the orthodox one. But it leaves the question of culpability precisely where the show-cause notice and the Order-in-Original had left it, which is to say unaddressed. The finding of the learned Appellate Tribunal that no allegation and no finding of deliberate or willful default appears at any stage of the adjudication is therefore literally accurate, and no question alleging that it was reached upon no evidence, or that it is perverse, has been proposed in this reference.
25. It is right that we should distinguish, lest the two be thought inconsistent, the course we have taken in a connected reference of this batch,⁶ in which the penalty was not restored but the question of culpability was remitted to the learned Appellate Tribunal to be determined when passing the order conforming to our answer. The difference is not one of standard but of what the order under reference contained. There the learned Appellate Tribunal deleted the penalty upon the payment ground alone, and the question of culpability was never reached at any tier, so that when that ground was held bad there remained no finding upon which the deletion could rest and the matter had to go to the forum competent to make one. Here the learned Appellate Tribunal did reach the question, examined the record of the adjudication and recorded a finding upon it. Where a finding exists it concludes the matter in this jurisdiction; where none exists there is nothing for this Court to affirm, and a

⁶ Spl. Sales Tax Reference Application No. 06 of 2025, Sindh Revenue Board v. M/s. Horizon Oil Company, decided separately in this batch.

remit is the only course open. The rule is the same in both; it is the record that differs.

VIII. THE SUBMISSION UPON THE FACTS

26. What was pressed upon us on behalf of the applicant Board was not that the learned Appellate Tribunal misread the record, but that upon the record it ought to have found willfulness: that a default extending over eleven tax periods and, in its earliest instance, upwards of three years, unexplained before the assessing officer and remedied only after a show-cause notice, can bear no other character. The submission is not without force as an argument upon the merits, and had it been addressed to the assessing officer in the first instance, or to the learned Appellate Tribunal, it might well have prevailed. It cannot be addressed to us.
27. Section 63 of the Act, 2011 is explicit at every stage: the application must state “any question of law arising out of such order”; the Court proceeds only where “satisfied that a question of law arises out of the order”; and what the Court decides is “the question of law raised by the reference”. The learned Appellate Tribunal is the final forum for the determination of facts, and its findings of fact are not open to re-examination in this jurisdiction unless it be shown that there was no evidence upon which it could arrive at them, or that they are perverse or rest upon surmises and conjectures, and unless a question of that character is distinctly raised in the reference application.⁷ 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 drawn from facts. No question alleging perversity, an absence of evidence, or a misreading or non-reading of the record has been proposed here.
28. We would add, as this court observed in *Fumicon*, that the number of defaults measures persistence and does not, of itself, establish willfulness; defaults many in number may be born of a single

⁷ Haji Ibrahim Ishaq Johri v. The Commissioner of Income Tax (West), Karachi [1993 SCMR 287]; Messrs Middle East Construction Company v. The Collector of Customs [2023 SCMR 838]; Commissioner Inland Revenue v. Messrs Khudadad Heights [2025 SCMR 716].

continuing cause and are then, in point of culpability, one default long continued. Whether the respondent's default was of that character, or of the character which the applicant Board attributes to it, was a matter for the department to put in issue and to establish before the assessing officer. It was not established there, and it is not open to be established for the first time in this Court.

29. It was urged in rebuttal that the burden had in any event shifted: the show-cause notice called upon the respondent to show cause why penalty should not be imposed, and the respondent, having shown none beyond the fact of payment, must be taken to have failed to discharge it. The submission mistakes the order in which the two burdens arise. What was held in *Fumicon* is that the burden lies in the first instance upon the department, and that only upon its discharge does the registered person bear the burden of explanation. The burden which shifts is a burden of explaining an allegation made; it is not a burden of anticipating and negating an allegation never made. A notice which puts in issue the contravention of sections 3, 9 and 17, and requires the registered person to explain why penalty should not follow "for contravention of above mention provision of Act", puts the fact of the default in issue and nothing more. Non-appearance in answer to such a notice may well justify the officer in taking the default as established, as the assessing officer did; it cannot supply a further finding which the notice never sought and which the officer never made. Had the Order-in-Original addressed the matter and concluded, upon the respondent's silence and upon the length and pattern of the retention, that the default was willful, a question of an altogether different complexion would have arisen before the learned Appellate Tribunal, and before us. That course was open to the department at every stage, and was not taken.
30. Nothing in what we have said diminishes the power of the officer. Where the record discloses willful, contumacious or dishonest default he may, and ordinarily should, impose a penalty proportionate to the gravity of the offence, recording his reasons for

so finding; where the default is shown to have been inadvertent, or the product of circumstances beyond the registered person's control, he is equally empowered, and indeed obliged, to abstain. What he may not do is impose the penalty without addressing the question at all. The requirement is not an impediment to the enforcement of the Act; it is the discipline of a discretion which the Legislature has confided to him.

IX. THE TWO LEVIES

31. The result is, in form, a divided one, but it is no more than the working of a scheme which the Legislature itself divided. Default surcharge is compensatory. The respondent collected the tax from the recipients of its services and retained public money beyond the due date, and the surcharge, running with time at a rate tied to the cost of money, is no more than the price of that retention; it makes the exchequer whole and asks no question as to intention. A penalty compensates no one; it punishes, and it deters, and punishment presupposes blameworthiness which the department must establish. A registered person who pays late but without fault answers to the exchequer in surcharge; he answers in penalty only when his default is his fault. The respondent answers here in the one and not in the other, not because the two levies have been weighed against one another, but because each has been applied according to its own terms.

X. THE ANSWERS TO THE QUESTIONS

32. Question (i) 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 was attracted upon the occurrence of the default and was unaffected by the deposit of the tax before the Order-in-Original was made. The learned Appellate Tribunal was not justified in deleting it, and its order, to the extent that it sets aside the default surcharge, shall stand modified in terms of section 63(5) of the Act, 2011; the default surcharge of Rs.745,958/- as confirmed by the learned Commissioner (Appeals-I) stands restored.

33. Question (ii) is answered in the negative, in favour of the respondent and against the applicant Board. The learned Appellate Tribunal, having found upon the record of the adjudication that no allegation and no finding of willful or *mala fide* default was made at any stage, committed no error of law in setting aside the penalty imposed under Serial No. 3 of the Table to section 43 of the Act, 2011, and its order to that extent calls for no interference.
34. For the avoidance of doubt, nothing in this judgment is to be read as approving the first of the two grounds upon which the learned Appellate Tribunal proceeded. Payment of the tax after the due date, whether before or after the show-cause notice or the Order-in-Original, does not of itself take a case out of Serial No. 3 of the Table to section 43 or out of section 44 of the Act, 2011. It is a circumstance relevant to the exercise of the discretion conferred by the former, and it is irrelevant to the operation of the latter.

XI. ORDER

35. 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 references.
36. 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.