

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. 06 of 2025

Sindh Revenue Board, Karachi VS M/s. Horizon Oil Company, Multan,
Punjab.

Dates of hearing: 16.09.2026 & 17.09.2026

Date of decision: 25.09.2026

Applicant: Through Mr. Fahad Hussain Areejo, Advocate.

Respondent: Through Mr. Khaqan Babar, Advocate.

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 (“the Act, 2011”), was heard along with four connected references. At the instance of the parties the connected matters have been heard and are being decided separately, and this judgment disposes of Spl. Sales Tax Reference Application No. 06 of 2025 alone.

I. THE CONTROVERSY AND THE QUESTIONS

1. Chapter VIII of the Act, 2011 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 Tracking Services*¹ 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”, of which proof of *mens rea* is no part; the question upon section 43 was expressly left open. In *Fumicon*

¹ Sindh Revenue Board v. Messrs Itecknologi Tracking Services (Private) Limited and eleven connected references, Spl. Sales Tax Reference Application No. 86 of 2025 and others, decided on 21.08.2026.

*Services*² this court answered the question so reserved, and held that a penalty under section 43 may not be imposed upon the mere occurrence of a default, the department being required to establish that the default was willful, contumacious, dishonest or otherwise attended by *mens rea*. In each of those batches only one of the two provisions was in issue. In the present reference both are in issue together, and the two holdings must accordingly be applied side by side to a single set of facts.

2. What gives this reference a character of its own is that the learned Appellate Tribunal did not proceed upon the absence of *mens rea* at all. It set aside both the default surcharge and the penalty upon a different ground altogether, namely that the principal amount of tax, though deposited after the due date, stood deposited before the order-in-original came to be passed, so that no tax was payable when that order was made. It is that ground which we are required to examine.
3. Upon admission of the reference on 15.04.2026 three questions were proposed on behalf of the applicant Board. 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 being in part overlapping, we consider the controversy to be comprehended within the following three questions, which we accordingly frame:

(i) Whether the liability to pay default surcharge under section 44 of the Act, 2011, having accrued upon the failure to deposit the tax by the due date, is displaced by the circumstance that the tax stood deposited before the order-in-original was passed?

(ii) Whether a penalty under Serial No. 3 of the Table to section 43 of the Act, 2011 may be deleted upon the ground that no tax was payable at the date of the order-in-original; and, if not, what remains to be determined before such a penalty may be sustained?

(iii) Whether proceedings against a person who withholds tax and fails to deposit it are governed by section 47(1B)

²Sindh Revenue Board v. Messrs Fumicon Services (Private) Limited and three connected references, Spl. Sales Tax Reference Application No. 67 of 2019 and others, decided on 04.09.2026.

of the Act, 2011 rather than by section 23 thereof, and what turns upon the answer?

II. THE FACTS

4. The respondent, M/s Horizon Oil Company, is e-signed up with the applicant Board as a withholding agent in terms of the Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (“the Withholding Rules, 2014”). Upon receipt of taxable services it is required to deduct the Sindh sales tax in the manner prescribed by rule 3 of those Rules, and to deposit the amount so withheld into the Sindh Government’s head of account B-02384 by the due date prescribed by sub-rule (7)(iii) thereof.
5. Upon scrutiny of Annexure-C to the monthly returns filed by its service provider, M/s AB Sattar Carriage Company, for the tax periods from April 2019 to January 2023, the Assistant Commissioner (Unit-24) found that as against Sindh sales tax of Rs.10,980,938/- shown to have been withheld by the respondent, the respondent’s payment profile disclosed deposits of Rs.6,961,167/-, leaving a difference of Rs.4,019,771/- undeposited. A show-cause notice dated 11.04.2023 was accordingly issued, calling upon the respondent to show cause why that amount should not be determined under sub-section (1B) of section 47 of the Act, 2011, why default surcharge should not be charged under section 44, and why penalty should not be imposed under Serial No. 3 of the Table to section 43.
6. In the course of the adjudication the respondent deposited Rs.3,500,000/- through five Computerised Payment Receipts. By Order-in-Original No. 5900 of 2023 dated 22.11.2023 the officer adjudged the remaining amount of Rs.519,771/-, charged default surcharge under section 44 and imposed penalty under Serial No. 3 of the Table to section 43. That balance was thereafter deposited on 04.01.2024, so that the whole of the principal amount came to rest in the Provincial exchequer.
7. The respondent’s appeal was disposed of by Order-in-Appeal No. 294 of 2024 dated 31.05.2024, by which the order-in-original was

maintained, the learned Commissioner (Appeals-II) holding that the word “shall” in section 44 leaves the defaulter no escape from the surcharge, and that the respondent, having charged and collected the tax from its service provider and retained it instead of depositing it into the Sindh exchequer, could not be heard to ask for waiver of the penalty.

8. In second appeal the respondent produced, for the first time, a further Computerised Payment Receipt dated 09.05.2023 for Rs.500,000/-. Upon a report called for from the Assistant Commissioner it was found, and candidly admitted before the learned Appellate Tribunal, that if that receipt were taken into account the entire principal amount stood paid before the order-in-original was passed. It is right to record, at this stage, that the figures of penalty and of default surcharge appearing at the several stages of this record do not tally with one another, a matter to which we shall return at the close of this judgment.
9. By the order impugned, dated 30.10.2024 in Appeal No. AT-210/2024, the learned Appellate Tribunal, Sindh Revenue Board 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 IMPUGNED

10. Upon the penalty, the learned Appellate Tribunal reproduced section 23 of the Act, 2011, identified the four situations in which an assessment may be made under sub-sections (1) and (1A) of that section, and reasoned that, the penalty being there linked to the determination of tax, the existence of a tax payable is a condition precedent to its levy. Guidance was taken from *General Tyres* and *Arfat Oil*³, decisions upon section 182 of the Income Tax Ordinance, 2001, and the conclusion was recorded that late payment of tax does not entail a penalty, a penalty being leviable only where tax remains payable up to the date upon which the order-in-original is passed.

³Commissioner Inland Revenue, Zone-III, Karachi v. Messrs General Tyres and Rubber Co. of Pakistan Ltd., Karachi [2013 PTD 387]; Commissioner Inland Revenue v. Messrs Arfat Oil Industries [2020 PTD 1908].

11. Upon the default surcharge, the learned Appellate Tribunal accepted, in terms, that the surcharge is “a strict liability that must be applied upon the occurrence of a default”. It nevertheless held that the words “in addition to the tax due and any penalty under section 43”, appearing in section 44(1), indicate that the surcharge may be enforced only where there is a tax liability coupled with penalty; and, having answered the question of penalty in the negative, it found no justification for the surcharge either.

IV. SUBMISSIONS AT THE BAR

12. Mr. Fahad Hussain Areejo, learned counsel for the applicant Board, submitted that the character of the liability to default surcharge is no longer open to debate, this Court having held that the levy under section 44 of the Act, 2011 is automatic and attaches upon the occurrence of the default, and that the learned Appellate Tribunal had deleted it upon assumptions which the section does not bear. Upon the penalty, he submitted that the element of *mens rea* is in fact established upon this record, and was so found by the learned Commissioner (Appeals-II); and that the learned Appellate Tribunal had set the penalty aside upon considerations which are extraneous to section 43 and which have no place in law.
13. Mr. Khaqan Babar, learned counsel for the respondent, supported the order impugned. He submitted that the whole of the principal amount stood deposited before the order-in-original came to be passed, and that the deposit so made is itself the answer upon *mens rea*, a person who pays before any order is made against him not being one who can be said to have acted willfully.
14. In rebuttal, learned counsel for the applicant Board submitted that public money had been retained, without lawful authority, for some four years, and that the principal amount came to be deposited only after proceedings had been initiated and not before. The provisions of the Act, 2011 with which this reference is concerned being compliance-oriented, he submitted that the imposition of a penalty in

addition to default surcharge is necessary if the statute is to operate as a deterrent.

15. We have heard learned counsel for the parties, examined the record of the reference with their assistance, and considered the law and the authorities cited at the Bar as well as such further authority as our own research has yielded.

V. THE STATUTORY SCHEME

16. The architecture of the Act, 2011 was set out at some length in *Itecknologi* and need not be rehearsed. Section 8 is the charging provision. Section 9 identifies the person liable and, by sub-section (3), empowers the Board to specify by notification the services in respect of which the liability shall rest upon the provider, the recipient or any other person. Section 17 requires that the tax in respect of a taxable service provided during a tax period shall be paid by the due date prescribed for payment, and the Withholding Rules, 2014 fasten upon the withholding agent the obligation to deduct the tax and to deposit what he has deducted. Chapter VIII then provides for default in the twofold manner already described, while 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.
17. Section 43, so far as material, is in these terms:

“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. The sections referred to in column (3) are meant for illustrative purposes only and the corresponding offence described in column (1) may fall and be prosecuted under other sections of this Act as well.”

Serial No. 3 of the Table describes the offence as that of a person who “fails 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 there under”, and prescribes, by clause (a), a penalty of ten thousand

rupees per month or a fraction thereof or five per cent of the total tax payable for that period, whichever is higher; by clause (b), liability upon conviction by a Special Judge to imprisonment, fine or both where the tax due is not paid even after the expiry of sixty days from a notice for payment; and, by clause (c), that “no penalty shall be payable if any miscalculation is made for the first time during a year”.

18. Section 44, which stands beside it, provides:

“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: —

(a) the person liable to pay any amount of tax or charge, shall pay default surcharge at the rate of Inter-Bank Rate plus three per cent per annum of the amount of tax due; and

(b) in case, the default is on account of tax fraud, the person who has committed tax fraud shall pay default surcharge at the rate of two per cent per month, of the amount of tax evaded, till such time the entire liability including the amount of default surcharge is paid.

(2) For the purpose of calculation of default surcharge, 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.

Explanation. — For the purpose of this section tax due does not include the amount of penalty.”

VI. QUESTION (i): THE DEFAULT SURCHARGE

19. The construction placed upon section 44(1) below rests upon the words “in addition to the tax due and any penalty under section 43”, which were read as importing a condition, so that the surcharge becomes exigible only where a tax liability subsists and a penalty accompanies it. With respect, we are unable to adopt that reading, for four reasons.

20. First, the office which the words perform. They answer the question, additional to what? They mark out the surcharge as a liability over

and above the tax and over and above any penalty, lest it be supposed to stand in substitution for either. The Explanation to the section is directed to the same end, for it fixes the base upon which the surcharge is computed by excluding penalty from “tax due”. Neither the phrase nor the Explanation is expressed as a condition, and to read a condition into a fiscal provision is to add to what the Legislature has enacted.

21. Secondly, sub-section (2). The period of default is to 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”. The computation is anchored at one end to the due date and at the other to the date of actual payment. The provision therefore presupposes that payment has been made; the date of payment is the terminus of the reckoning, not the event which extinguishes the liability. Upon the construction adopted below the sub-section would have little field left to it, for wherever the tax is paid before the order the surcharge would be effaced by the very payment upon which its computation depends. A construction which leaves a sub-section with no work to do is not one which can readily be attributed to the Legislature.
22. Thirdly, the opening words. Section 44(1) begins, “Notwithstanding the provisions of section 23”. The liability to surcharge is thus insulated in terms from the machinery of assessment. It arises from the default and not from the order, and what an order-in-original records as outstanding upon the day it is made cannot govern a liability which the Legislature has detached from that order.
23. Fourthly, the character of the levy. As this court held in *Itecknologi*, the surcharge under section 44(1)(a) is measured by the Inter-Bank Rate plus three per cent per annum and runs with time; it is referable to the cost of money and to the duration of the delay, and not to the gravity of any wrong.⁴ It is, upon its face, the price of the use of the exchequer’s money for the period during which the person retained

⁴The same characterisation underlies *Commissioner of Income Tax v. National Refinery Limited* [2010 PTD 737] and *Commissioner Inland Revenue, Lahore v. Saritow Spinning Mills Ltd., Lahore* [2016 PTD 786]; and see *Messrs Attock Refinery Limited v. The Collector of Sales Tax* [2021 PTD 1680].

it. So understood, payment furnishes no answer to the surcharge; payment is what stops it running.

24. The present case illustrates the point with some force. The respondent is not a person who bore this tax. It withheld the tax from the consideration payable to its service provider and thereafter held money which was destined for the Provincial exchequer. Between April 2019 and January 2023 it withheld Rs.10,980,938/- and deposited Rs.6,961,167/-. The balance was deposited only after the show-cause notice had issued, and the last instalment of it some months later still. For the whole of that period the Province was kept out of money which was never the respondent's working capital, and it is that period, and nothing else, which section 44 charges.
25. We would add a further consideration. The relief which was in substance sought, and in substance granted, is relief from an accrued fiscal liability upon grounds of subsequent compliance. The Act, 2011 provides for such relief, and provides for it elsewhere. Section 45 empowers the Board, and the Board alone, to exempt a registered person or a class of registered persons from the whole or any part of the penalty and default surcharge; section 65(1)(b) opens the alternate dispute resolution machinery to a dispute pertaining to the extent of waiver of default surcharge and penalty. Where a statute confers a dispensing power, designates its repository and prescribes the manner of its exercise, the necessary implication is that the power is not to be exercised by anybody else or in any other manner. That reasoning, set out in *Itecknologi*, applies with undiminished force here.
26. Question (i) is accordingly answered in favour of the applicant Board.

VII. QUESTION (ii): THE PENALTY

27. The penalty was deleted upon the ground that no tax was payable when the order-in-original was passed. That ground, with respect, cannot be sustained, and for three reasons.

28. First, the offence described in column (1) of Serial No. 3 is that of failing to deposit the amount of tax due, or any part of it, “in the time or manner laid down under this Act or the rules made there under”. The offence is complete when the time so laid down passes without the deposit being made. It is defined by reference to the due date; the date of the order-in-original does not enter into its description at all. Payment afterwards is a matter which goes to the exercise of the discretion and to the measure of the penalty. It does not undo the act which the Legislature has described as an offence.
29. Secondly, the entry itself shows that the Legislature addressed its mind to what may happen after the due date has passed. Clause (b) provides for escalation into prosecution where the tax due remains unpaid even after the expiry of sixty days from a notice for payment, and clause (c) withholds penalty altogether where a miscalculation is made for the first time during a year. Subsequent payment and blameless error have thus each been given a consequence of their own. Had payment before the order been intended to efface the offence, the Legislature, having descended to this degree of detail, would have said so.
30. Thirdly, section 43 is not, in terms, dependent upon section 23. It opens with the words “Whoever commits any offence described in column (1) of the Table below”, and the entry at Serial No. 3 speaks of “any person”; it does not speak of an assessment, nor of an amount found outstanding in an order. The section itself declares that the provisions referred to in column (3) “are meant for illustrative purposes only”. The link which was drawn between the penalty and a determination of tax under section 23 is therefore not one which the penal provision itself makes.
31. Nor, with respect, do *General Tyres* and *Arfat Oil* carry the respondent so far. Both were decided upon section 182 of the Income Tax Ordinance, 2001, and upon the penalty for late filing of a return, which that provision computes as a percentage of the tax payable. In each of them the assessee had no tax payable at all, so that the base of the computation being nil, the penalty was nil also.

The reasoning is one of arithmetic and is confined to a penalty so computed. It does not reach a case in which tax was undoubtedly due, was in fact withheld, and was deposited long after the day upon which it ought to have been deposited.

32. It does not follow, however, that the penalty must be restored. What held in *Fumicon* governs the matter. A penalty under section 43 of the 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. A discretion of that order is to be exercised in a fair, transparent and structured manner, and in a measure commensurate with the loss occasioned to the exchequer; and proportionality, as the Hon'ble Supreme Court has lately emphasised, is not a matter of impression but a structured principle which demands cogent reasoning and a transparent evaluation of the nature, gravity and context of the default, assessed against the penalty imposed.⁵ What the requirement forbids is the imposition of a penalty by mere arithmetic, without any determination of the quality of the conduct.
33. The submission made in rebuttal, that these are compliance-oriented provisions and that a penalty must therefore be imposed in addition to default surcharge if the statute is to deter, requires a word. That section 43 is meant to secure compliance, and to deter the person who would otherwise treat the due date as a matter of convenience, we accept without reservation. It is indeed because the section punishes and deters, rather than compensates, that culpability was held in *Fumicon* to be an ingredient of it. But a provision which deters is not on that account a provision which dispenses with fault.

⁵Saadat Ali Khan v. The State [2018 SCMR 387] = [2018 PTD 483] (upon section 37-A(3) of the Sales Tax Act, 1990); District and Sessions Judge (Authority), Jhang v. Ghulam Shabbir [2026 SCMR 357].

Deterrence operates upon conduct which is blameworthy, and a penalty visited upon a default which is neither willful nor negligent deters nothing, there being nothing in such a default to be deterred from. If the submission means that a penalty is exigible irrespective of culpability, it is foreclosed by what we have already decided. If it means that, where culpability is established, the officer ought not lightly to withhold the penalty which the Legislature has prescribed, it is well founded, and we return to it at the close of this judgment.

34. We turn then to the submission that the element of *mens rea* is in fact available upon this record, and was so found by the learned Commissioner (Appeals-II). The passage relied upon is that in which the learned Commissioner recorded that the appellant before him had charged and collected sales tax from its clients and, instead of depositing the same into the Sindh exchequer, had kept the said government money with himself. We do not suggest that the passage is without significance, and the material to which learned counsel drew our attention in rebuttal, that the retention ran for some four years and that the deposits began only after the proceedings had been initiated, is material of substance. The passage must, however, be read with the premise upon which it rests. The learned Commissioner had immediately before recorded that non-payment of sales tax within the time prescribed under the law attracts the offence described at Serial No. 3; that is to say, the matter was approached upon the footing that the offence stands committed upon the default itself. The observations which follow were made in the course of rejecting a plea for waiver, and not in the course of determining whether the ingredients of the offence were present. An observation so made, upon a premise which for the reasons already given is incomplete, is not the determination which section 43 requires.
35. As for the remaining stages, the order-in-original imposed the penalty as a matter of computation, taking a percentage of the amount and adding a further sum to it, and records no finding upon the quality of the respondent's conduct at all; and the learned

Appellate Tribunal, for the reasons already noticed, did not reach the question. The enquiry which section 43 requires has therefore not been made at any stage.

36. 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. In the jurisdiction conferred by section 63 of the Act, 2011 this Court decides the question of law arising out of the order of the learned Appellate Tribunal; that forum is the final arbiter of facts, and factual controversies are not amenable to adjudication in a reference.⁶ We are accordingly in no position to pronounce upon it, and we expressly refrain from doing so. The material urged in rebuttal may or may not, upon examination, establish what the applicant Board says it establishes; that examination is not ours to make. Nothing in this judgment is to be read as an opinion, one way or the other, upon whether the respondent's default was culpable.
37. The course to be followed is that which the Hon'ble Supreme Court itself observed in *Byco Petroleum*⁷. Their Lordships decided the question of construction which arose upon section 34 of the Sales Tax Act, 1990 and, the separate question upon section 33 not having been addressed, remitted it for decision by the forum competent to decide it. So here. The ground upon which the penalty was deleted cannot be sustained; but the question upon which the fate of the penalty depends has never been answered. In terms of section 63(5) of the Act, 2011 the order of the learned Appellate Tribunal shall stand modified in conformity with this judgment, and in giving effect to it that forum will determine, upon the material already on the record of the adjudication and in the light of *Fumicon*, whether the applicant Board has established that the respondent's default was willful, contumacious, dishonest or otherwise attended by *mens rea*;

⁶Haji Ibrahim Ishaq Johri v. The Commissioner of Income Tax (West), Karachi [1993 SCMR 287]; The Intelligence Officer, Directorate of Intelligence and Investigation, FBR v. Abdul Karim [2025 SCMR 969], where it was held 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".

⁷Commissioner Inland Revenue v. Messrs 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.

and, if it has, what penalty is proportionate to the gravity of the default so found, stating the reasons upon which that assessment rests.

38. Should that forum be of the view that the record as it stands does not permit the determination to be made, it is not without a remedy. Clause (b) of sub-section (5) of section 61 of the Act, 2011 empowers the learned Appellate Tribunal, in deciding an appeal, to remand the case to the officer of the SRB or to the Commissioner (Appeals) SRB for making such inquiry or taking such action as it may direct; and sub-section (6) of that section secures to the taxpayer a reasonable opportunity of showing cause before the amount of any penalty or default surcharge is increased. Which of these courses is to be adopted is a matter for that forum, and we say nothing upon it.

VIII. QUESTION (iii): SECTIONS 23 AND 47(1B)

39. Section 23 of the Act, 2011 is the general machinery of assessment, addressed to the case of a registered person who “has not paid the tax due on taxable services provided by him or has made short payment”. Sub-section (1B) of section 47, inserted by the Sindh Finance Act, 2016, is addressed in terms to the case in hand: where any person required to withhold tax under a provision of the Act or the rules “fails to withhold the tax or fails to deposit the withheld or deducted amount of the tax in the prescribed manner, an officer of the SRB shall determine the amount in default and order its recovery in the prescribed manner”. A provision so drawn, and drawn later in time, is the provision under which a defaulting withholding agent is to be proceeded against, and it is under that provision that the show-cause notice in this case was in fact issued.
40. Little, however, turns upon the answer so far as the present controversy is concerned, and we say so in order that the question be not thought to carry more than it does. The determination of the amount in default is not in issue: the amount was determined, it was accepted, and it has been paid. What is in issue is the surcharge and the penalty, and neither of them depends upon the provision under which the determination is made. Section 44 says as much in its

opening words, and section 43 makes the same point in its own way by declaring the sections named in column (3) to be illustrative only. The answer to the third question is therefore that the proceedings were rightly founded upon section 47(1B) of the Act, 2011, and that the recourse to section 23, whichever view be taken of it, does not support the conclusion which was drawn from it.

41. One matter is best placed beyond doubt. In support of its case upon section 23 the applicant Board has contended that the respondent, being a withholding agent, is not a registered person for the purposes of the Act, 2011. Clause (71) of section 2 defines a registered person to mean a person who is registered or is liable to be registered under the Act “or any other person or class of persons notified by the Board in the official Gazette”. It has not been suggested by either side that section 44, which speaks of a registered person, is on that account inapplicable to a withholding agent, and both sides have argued this reference upon the footing that Chapter VIII applies. The point neither arises nor was raised, and we express no opinion upon it.

IX. THE ANSWERS TO THE QUESTIONS

42. For the foregoing reasons the questions framed in paragraph 3 above are answered as follows.
43. Question (i) is answered in favour of the applicant Board. The liability to pay default surcharge under section 44 of the Act, 2011 accrues upon the failure to pay the tax due by the due date and runs, under sub-section (2) of that section, from the day following the due date to the day preceding the date of actual payment. It is not displaced, and the amount which has accrued is not effaced, by the circumstance that the tax stood paid before the order-in-original was passed. The words “in addition to the tax due and any penalty under section 43” are words of accumulation and not of condition. No power to waive, reduce or defer that liability upon such a ground resides in an officer of the Board, in the Commissioner (Appeals) or in the learned Appellate Tribunal; relief, if any, lies with the Board under section 45 or with a committee under section 65.

44. Question (ii) is answered in the negative. The offence described at Serial No. 3 of the Table to section 43 of the Act, 2011 is complete upon the failure to deposit the tax due within the time laid down, and is not undone by payment made thereafter. The penalty could not therefore be deleted upon the ground that no tax was payable at the date of the order-in-original. The penalty cannot, however, be restored by this Court, for a penalty under section 43 requires a determination that the default was willful, contumacious, dishonest or otherwise attended by *mens rea*, and no such determination has been made at any stage. That determination is to be made by the learned Appellate Tribunal in the manner set out in paragraphs 37 and 38 above.
45. Question (iii) is answered by holding that proceedings against a person who withholds tax and fails to deposit it are governed by subsection (1B) of section 47 of the Act, 2011, but that nothing in the answer affects the liability to default surcharge under section 44 or the incidents of a penalty under section 43.
46. We should also record, as foreshadowed earlier, that the amounts of penalty and of default surcharge stated in the order-in-original, in the order-in-appeal, in the report called for by the learned Appellate Tribunal and in the order impugned do not tally with one another. No question upon computation has been proposed in this reference and we express no opinion upon the correct figures. We should not, however, leave the forum below at large upon the manner of computation, and it is convenient to state it. When the order conforming to this judgment comes to be passed, the default surcharge is to be computed under section 44(2) of the Act, 2011 separately for each of the tax periods from April 2019 to January 2023, running in each case from the day following the due date prescribed for that tax period to the day preceding the date upon which the tax due for that period was actually paid, and upon so much of the tax for that period as remained undeposited during that interval. Credit is to be given for every payment established upon the record, including the Computerised Payment Receipt dated

09.05.2023 which was produced for the first time before the learned Appellate Tribunal and which was therefore not before the officer when the order-in-original was made. The allocation of the several payments to the several tax periods is a matter of account upon the record, and is for the forum below. The penalty, if any is ultimately found exigible, is to be fixed in the manner indicated above.

47. For the avoidance of doubt, nothing in this judgment detracts from what was held in *Itecknologi* and in *Fumicon*. The two sections occupy distinct fields. Default surcharge is a strict and compensatory liability attracted upon the occurrence of default, in respect of which questions of intention are irrelevant and in respect of which subsequent payment marks the end of the period charged rather than the end of the charge. Penalty under section 43 is a punitive liability of which culpability is an essential ingredient.
48. The two provisions having now fallen for consideration together, it is convenient to state shortly how they work in combination, for the answer is not the same at both ends. Where the default is found to have been willful, contumacious, dishonest or otherwise attended by *mens rea*, both provisions are attracted: the surcharge, because it attaches to the delay irrespective of the state of mind of the defaulter; and the penalty, because the ingredient which section 43 requires is then present. In such a case the officer will ordinarily impose a penalty, in a measure proportionate to the gravity of the default. The words "shall be liable to" leave him a discretion, and we do not say that the penalty follows of necessity; but it is a discretion to be exercised judicially, and a decision to withhold a penalty where a culpable default stands established calls for reasons as much as a decision to impose one.
49. Where, upon the other hand, the default is found not to have been willful, the position is not symmetrical, and it is in that asymmetry that the scheme of Chapter VIII is to be seen. The surcharge is attracted all the same. It is not a punishment but the price of the use of the exchequer's money for the period of the delay, and that price is payable by the innocent defaulter and the culpable defaulter alike,

for the Province has been kept out of its money in either case and the time value of that money does not vary with the state of mind of the person who retained it. The penalty is not attracted, for the Legislature has made culpability an ingredient of the offence, and has provided in section 44 a complete compensatory answer to the default which is innocent. The person who deposits late answers to the exchequer in surcharge; he answers in penalty only when his default is his fault.

X. ORDER

50. 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.
51. This reference application stands disposed of in the above terms, with no order as to costs. The connected references, which at the instance of the parties were heard separately, shall be decided by separate judgments.

J U D G E

J U D G E

Karachi,
Dated: 25th day of September 2026

Ayaz PS.