

ORDER SHEET  
**IN THE HIGH COURT OF SINDH, KARACHI**

Special Sales Tax Reference Application No.160 of 2024

Date

Order with signature of Judge

**Hearing/ Priority Case**

- 1) For orders on office objections
- 2) For regular hearing
- 3) For hearing of CMA No.3675 of 2024.

**16.04.2025**

Mr. Taimoor Ahmed Qureshi, Advocate for Applicant  
Barrister Syed Ahsan Ali Shah, Advocate for Respondent

Through this Reference Application, the Applicant has impugned Order dated 05.08.2024 passed in STA No.855/KB/2023 by the Appellate Tribunal, Inland Revenue of Pakistan, Karachi Bench, proposing the following question of law:-

“Whether on the facts and in the circumstances of the case, the assessing officer was justified to impose penalty u/s 33(1) of the Sales Tax Act, 1990 without establishing mens rea?”

2. Heard learned Counsel for the Parties and perused the record. After briefly hearing both learned Counsel on 19.03.2025, we had passed the following order: -

“In this matter the only question involved is that ***“Whether in the facts and circumstances of the case the assessing officer was justified to impose penalty u/s 33(1) of the Sales Tax Act, 1990 without establishing mens rea?”*** and on perusal of the Show Cause Notice it reflects that the same has been issued under the then Section 11(1) of the Sales Tax Act, 1990, confronting the Applicant as to why penalty may not been imposed under Section 33 of the Act. On perusal of Section 33 Clause (1) under which the penalty has been imposed it reflects that it is only applicable for violation of section 26 ibid, whereas admittedly no Show Cause Notice has been issued under Section 26 of the Act. Both learned Counsel are directed to come prepared on this issue and assist the Court on the next date.

Adjourned to 16.04.2025. Interim order passed earlier to continue till next date of hearing.”

3. Today, Respondent’s Counsel has not been able to controvert the above fact that the Show Cause Notice was

issued under Section 11(1) of the Sales Tax Act, 1990, confronting the Applicant as to why penalty may not be imposed for alleged violation of non-filing of certain sales tax returns; however, clause (1) of Section 33 *ibid* is only relevant when there is violation of Section 26, whereas, admittedly, no such separate show cause notice for violation of section 26 was issued. In that case no penalty could have been imposed for violation of Section 11(1) as it is not a relevant clause. The Adjudicating Authority was required to confront the Applicant as to under which specific clause, the penalty is supposed to be imposed. The law to this effect stands settled that while issuing Show Cause Notice especially in respect of imposition of penalty, the very specific allegation is to be leveled in the Show Cause Notice by incorporating the relevant penalty clause and not in a general manner by mentioning the section pertaining to a penalty clause. Applicant's Counsel, in support has relied upon various orders / judgments<sup>1</sup>.

4. In this case the Show Cause Notice has been issued under Section 11(1) of the Sales Tax Act, 1990 and in the body of the Show Cause Notice, it has been stated that non-filing of the Sales Tax Returns is violation of Section 26 of the Sales Tax Act, 1990, which is liable for penalty under Section 33 (*ibid*). It has been further stated in the Show Cause Notice that the short levied amount of sales tax can be recovered under Section 11(1) of the Act with assessment of tax along with default surcharge under Section 34 of the Act to be calculated at the time of payment of such tax. Insofar as any short recovery of sales tax is concerned, admittedly no such order has been passed by the Adjudicating Authority inasmuch the Applicant had never made any sales in the default period. This fact stands admitted by the Respondent that no sales were ever made during the period in question; hence, no liability of sales tax has

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<sup>1</sup> Haris Trading Co. versus Deputy Collector of Customs, Export (2021 PTD 1901), Messrs Khatri Brothers versus Federation of Pakistan and 3 others (2014 PTD 966), Commissioner (Legal Division) versus Pakistan Services Limited (2023 PTD 773) and an un-reported Order dated 07<sup>th</sup> October 2024 passed by this Court in Special Customs Appeal No. 30 of 2004 Pakistan International Airlines Corporation v Collector of Customs (Preventive), Karachi.

been finally determined. In the Order-in-Original, it has been observed by the Adjudication Authority that non-filing of Returns is a willful default liable for imposition of penalty under Section 33(1) of the Act, for violating Section 26 (ibid) and is recoverable under Section 11(1) of the Act. However, Section 33(1) of the Act cannot be invoked for alleged violation of Section 11(1) ibid, whereas primarily the Show Cause Notice was issued under such provision. It was not a Notice under Section 26; whereas, the Adjudication Authority has not passed any order regarding any short recovery of the tax as there is no short levy of the principal amount of sales tax. The only issue is that certain Returns were not filed, and the stance of the Applicant is that they were under the impression that since no business activity is being carried out, the Returns are not required to be filed. One must take note of the fact that Section 33 of the Act by itself is not a charging provision, nor the purpose is of generating any revenue; rather it is for strict compliance with the relevant provisions of the Act in question. If for some reasons, the Returns were not filed and when there is no short levy of sales tax, then imposition of such a harsh and maximum penalty would not otherwise be justified. In such a case, one must investigate the conduct of the taxpayer for committing such a default as imposition of penalty and the quantum thereof, must have a direct nexus with the gravity of the offence so committed. It must not always be imposed in such situations, when admittedly no tax has been short levied. It is also a matter of fact that unlike Section 182 of the Income Tax Ordinance, 2001, there is no Explanation<sup>2</sup> in Section 33 (ibid) or any other provision; whereby, it has been provided that *mens rea* is not to be proved for imposing such penalty. A somewhat similar issue had arisen in respect of the amended provision of section 34 of the Act, wherein the law was amended by insertion of words “willful or otherwise” and the Hon’ble Supreme Court in **Byco**<sup>3</sup> while setting aside the observations of this Court has been pleased to hold that post amendment it is a strict liability provision and leaves no margin for any inadvertent mistake and is attracted on the occurrence of default; whether be it deliberate or unintentional or

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<sup>2</sup> For the removal of doubt, it is clarified that establishing mens rea is not necessary for levying of penalty under this section. (added by Finance Act, 2021)

<sup>3</sup> Commissioner Inland Revenue v Byco Petroleum Pakistan Ltd (order dated 05.07.2024 in CP No.122-K of 2022)

inadvertent. At the same time to the extent of Section 33 of the Act it was observed that since no such corresponding amendment has been made, therefore section 33 of the Act, become more important and it is to be seen whether at all section 33 *ibid* is also to be read as a strict liability clause and since in the High Court judgment there was no specific finding to this effect, the matter was remanded to the High Court. A careful perusal thereof persuades to hold that at least to the extent of Section 33, there is no specific finding of the Hon'ble Supreme Court in this regard, and it was left open for this Court to decide this issue independently of the amendment in Section 34 of the Act.

5. For imposition of penalty, the jurisprudence that has evolved over the years is that penalty can only be imposed where there is willful evasion of duties and taxes. In *Hardcastle Waud (Pakistan) Ltd.*,<sup>4</sup> while dilating on Item 3-B of Section 167 of the Sea Customs Act, 1878, the Hon'ble Supreme Court held that it was incorrect to say that the said item created an offence of absolute liability and was an exception to the general rule that *mens rea* was an essential element in the commission of a criminal offence. It ruled that "*even in the case of a statutory offence the presumption is that mens rea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out.*" Similar view has been expressed in respect of the unamended provision of section 34 of the Act, regarding levy of additional tax before insertion of the words "willful or otherwise" in ***D.G. Khan Cement Company Ltd.***,<sup>5</sup> and ***ICI Pakistan***<sup>6</sup> and the Apex Court held that in order to impose additional tax it should be seen whether the evasion or non-payment of tax was willful or *malafide*. Therefore, every case should be decided on its own merits, whereas default on the part of the registered person would not *ipso facto* make him liable for penalty and the

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<sup>4</sup> "Pakistan, through the Secretary, Ministry of Finance, Rawalpindi etc. v. Hardcastle Waud (Pakistan) Ltd., Karachi" (PLD 1967 SC 1),

<sup>5</sup> D.G. Khan Cement Company Ltd., The Federation of Pakistan, etc." (2004 SCMR 456)

<sup>6</sup> Deputy Collector of Customs v ICI Pakistan (2006 SCMR 626)

Revenue must establish that it was dishonest, willful or *malafide*<sup>7</sup>. In the case of **PIA**<sup>8</sup> while dealing with imposition of penalties in terms of Section 156(1) of the Customs Act, 1969 (which is more or less similar to s.33 *ibid*) this Court<sup>9</sup> has observed that “...As to imposition of penalty it may be of relevance to observe that penalty in this case has been levied in terms of clauses (9), (10A) and (14) of Section 156(1) of the Customs Act, 1969, which uses the words that “*such person shall be liable to penalty*” and such words are to be found in other statutes also and have been construed by the High Courts of the sub-continent for a very long time and the consistent view of the Courts was that these words confer discretion on the Courts and do not make it incumbent upon the Courts to impose it mandatorily<sup>10</sup>”. It is trite law that penalty is to be imposed when there is a guilty mind present with an element of *Mensrea*. The same is lacking in this case. It is also a settled proposition that punishment disproportionate to the gravity of offence / guilt is as much illegal as the act itself calling for its imposition. A mere fact that on account of some misconception no sales tax return was filed due to no business in the relevant period would not *ipso facto* mean that the tax was avoided intentionally and element of *mens-rea* was present. This, in and of itself, is not a ground to sustain imposition of penalty, as for that some corroborative material to the contrary must be on record. Moreso when it has been determined by the department that there is no tax liability against the Applicant. Per settled law, the authority while imposing any penalty has to keep in mind the gravity of the charge in the attending circumstances<sup>11</sup>.

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

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<sup>7</sup> Coca Cola Beverages Ltd v Customs and Excise Appellate Tribunal (PTCL 2018 CL 348)

<sup>8</sup> Order dated 7.10.2024 in Special Custom Ref No.30 of 2024

<sup>9</sup> Speaking through one of us Muhammad Junaid Ghaffar, J:

<sup>10</sup> Shamroz Khan v Muhammad Amin (PLD 1978 SC 89)

<sup>11</sup> G.M. Pakistan Railways v Muhammad Rafique (2013 SCMR 372)

on the part of the Applicant in non-filing of its Sales Tax Returns for the period in question, in addition to the fact that there is no short levied amount of sale tax determined against the Applicant, therefore, the maximum penalty so imposed cannot be sustained.

7. In view of the above, the proposed question is answered in favour of the Applicant and against the Respondent; and consequently, thereof, the impugned orders passed by the forums below stand set-aside. This Reference Application is ***allowed***. Let a copy of this order be sent to the Appellate Tribunal Inland Revenue of Pakistan, Karachi Bench in terms of subsection (5) of Section 47 of the Sales Tax Act, 1990.

**ACTING CHIEF JUSTICE**

**J U D G E**

Qurban/PA\*