

IN THE HIGH COURT OF SINDH AT KARACHI

Special Sales Tax Reference Application ("SSTRA") Nos.763 to 770 of 2023

Date

Order with signature of Judge

PRESENT:

Mr. Justice Muhammad Junaid Ghaffar, ACJ

Mr. Justice Mohammad Abdur Rahman, J

HEARING OF CASE:

1. For order on office objection.
2. For hearing of CMA No.519/2023.
3. For Regular Hearing.

Dated: 30th April 2025

Mr. Ali Tahir, Advocate for Applicant in all Reference Applications.

Mr. Ghulam Rasool Korai, Advocate for Respondent in all Reference Applications.

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ORDER

Muhammad Junaid Ghaffar, ACJ: - Through these Reference Applications the Applicant department has impugned a common Order dated 03.10.2022 passed in STA No.63/KB-2022 and other connected matters; proposing the following questions of law:

1. *Whether on the facts and circumstances of the case, learned Appellate Tribunal Inland Revenue has erred in law by holding that not invoking section 11 of the Sales Tax Act, 1999 makes the entire proceeding null and void ab initio whereas Section 11 itself states that "after a notice to show cause to such person, make an order for assessment of tax, including imposition of penalty and default surcharge in accordance with sections 33 and 34" and especially since in the instant case there is no alleged violation of Section 11 and only the title of the show cause notice did not mention Section 11?*
2. *Whether on the facts and circumstances of the case, learned Appellate Tribunal Inland Revenue has erred in law by holding that not invoking section 11 of the Sales Tax Act, 1999 makes the entire proceeding null and void ab initio when the learned ATIR failed to appreciate that the Respondent-taxpayer failed to integrate all retail outlets system's with FBR's computerized system for real time reporting in the mode and manner prescribed in chapter XIVAA of the Sales Tax Rules, 2006, in terms of second proviso of sub section (9A) of the section 3 of the Act, read with clause (2) of rule 150ZEA of the Sales Tax Rules 2006, inserted vide SRO 1203(1)/2019 dated 10/19/2019 for which the Respondent-taxpayer was issued*

Show Cause Notice No. IPS/POS/Penalty/SCN/2021
dated 14/12/2021?

3. *Whether on the facts and circumstances of the case, learned Appellate Tribunal Inland Revenue has erred in law by holding that the Appellate Tribunal Inland Revenue, Islamabad Bench's order/judgment were binding upon the learned Appellate Tribunal Inland Revenue under Article 189 and 201 of the Constitutional of Islamic Republic of Pakistan 1973, when Article 189 merely states that "any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan" and Article 201 merely states that "subject to Article 189, any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all courts subordinate to it?"*

2. Heard learned counsel for the parties and perused the record.

3. The issue in hand that whether imposition of penalty under section 33 of the Sales Tax Act, 1990 is mandatory in nature, notwithstanding the fact that there is no liability or determination in respect of the principal amount of sales tax has already been dealt with and decided by this Bench in **New Era Fabric**¹, whereby, it has been held that since there is no corresponding amendment in Section 33 of the Act like the one in Section 34, *ibid*; or for that matter under Section 182 of the Income Tax Ordinance, 2001 the element of *mens rea* is essential for imposition of penalty under any clause of Section 33 of the Act in question and the general principle of law already enunciated by the Courts is applicable. The relevant finding in **New Era Fabric (Supra)** reads as under: -

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*

¹ Order dated 16.04.2024 in Special Sales Tax Reference Application No.160 of 2024 (New Era Fabric v Commissioner Inland Revenue)

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 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 Explanation² 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** 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 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.*, 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.**, and **ICI Pakistan** 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 Revenue must establish that it was dishonest, willful or malafide. In the case of **PIA** 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 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”. 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.

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* 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.

4. Since in these matters, no Show Cause Notice was issued for any short recovery nor any amount of sales tax was adjudicated upon and it is only the imposition of penalty which has been adjudicated, therefore, the ratio of the above Order squarely applies in the instant case. Accordingly, for the reasons assigned

thereof in ***New Era Fabric (Supra)*** the proposed questions are answered against the Applicant and in favour of the Respondent. As a consequence, thereof, these Reference Applications are hereby ***dismissed***. Let copy of this order be sent to the Appellate Tribunal Inland Revenue of Pakistan, Karachi, in terms of Subsection (5) of Section 47 of the Sales Tax Act, 1990.

ACTING CHIEF JUSTICE

JUDGE

Farhan/PS
