

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL TRIBUNAL

WP 6292-P/2019
Commissioner Inland Revenue, Peshawar Zone,
Regional Tax Office, Peshawar Vs. Syed Adnan Shah
& another.

Date of hearing **10.09.2020**

Mr. Rahman Ullah, Advocate, for the petitioner.

Respondent No.1 in person.

Mr. Saeed ul Haq, AR, for respondent No.2.

JUDGMENT

SYED ARSHAD ALI, J. Through this consolidated judgment we intend to dispose of the instant petition and all the petitions listed in Annexure-“A” attached hereto.

2. The facts relevant for the adjudication of these petitions are that the petitioners are tax payers and they were proceeded against under the Income Tax Ordinance, 2001 (*the Ordinance*) and resultantly various Orders-in-Original were passed against them. The said orders were challenged by the respondent/tax payers before the Commissioner Inland Revenue (Appeals). The objections and grievances of the tax payers on the proprietary of the Orders-in-Original of the assessing authority did not sustain before the learned Commissioner Inland Revenue (Appeal), hence, their appeals were

rejected. The respondents/tax payers preferred 2nd appeal(s) before the learned Income Tax Tribunal, (“**Tribunal**”) which was accompanied by miscellaneous application(s) for the grant of stay against the tax demand. The learned Tribunal while allowing said applications, passed a restraining order against the Department vide order dated 20.11.2018 for sixty (60) days, which was extended from time to time upto one hundred and eighty (180) days. According to petitioner the learned Tribunal, on 08.08.2019, once again extended the stay period for another sixty (60) days, thus, aggregating the same in total upto two hundred and forty (240) days, which is beyond the statutory period as provided under proviso to Section 131(5) of the Ordinance. Therefore, the petitioner has called into question the said orders of the learned Tribunal, before this Court, through the instant petition as well as connected writ petitions and sales tax references. It has also been averred in the petition that the main appeal of the respondent against the order of the learned Commissioner Inland Revenue (Appeals) is still pending adjudication before the competent forum i.e. Tribunal. It would be important to note that against the interim order of Tribunal, the tax reference is not maintainable, therefore, all the tax

references against the interim orders are converted into constitutional petitions in view of the law laid down by the apex court in the case “**Muhammad Akram Vs DCO, Rahim Yar Khan & others**” reported as [2017 SCMR 56]. The office shall accordingly make the necessary amendments in the memo of petitions and the relevant register.

3. The precise question for adjudication before this Court is the interpretation of Section 131 and 132 of the Ordinance. In order to comprehend the issue, we deem it appropriate to reproduce both the Sections herein below:-

.131. Appeal to the Appellate Tribunal.

(1) Where the [taxpayer] or Commissioner objects to an order passed by the Commissioner (Appeals), the [taxpayer] or Commissioner may appeal to the Appellate Tribunal against such order.

(2) An appeal under sub-section (1) shall be—

(a) in the prescribed form;

(b) verified in the prescribed manner;

(c) accompanied [, except in case of an appeal preferred by the Commissioner,] by the prescribed fee specified in sub-section (3); and

(d) preferred to the Appellate Tribunal within sixty days of the date of service of order of the Commissioner (Appeals) on the taxpayer or the Commissioner, as the case may be.

(3) The prescribed fee shall be two thousand rupees.]

(4) The Appellate Tribunal may, upon application in writing, admit an appeal after the expiration of the period specified in clause (d) of sub-section (2) if it is satisfied that the person appealing was prevented by sufficient cause from filing the appeal within that period.

(5) Notwithstanding that an appeal has been filed under this section, tax shall, unless recovery thereof has been stayed by the Appellate Tribunal, be payable in

accordance with the assessment made in the case:

Provided that if on filing of application in a particular case, the Appellate Tribunal is of the opinion that the recovery of tax levied under this Ordinance and upheld by the Commissioner (Appeals), shall cause undue hardship to the taxpayer, the Tribunal, after affording opportunity of being heard to the Commissioner, may stay the recovery of such tax for a period not exceeding one hundred and eighty days in aggregate [:]

Provided further that where recovery of tax has been stayed under this section, such stay order shall cease to have effect on expiration of the said period of one hundred and eighty days following the date on which the stay order was made and the Commissioner shall proceed to recover the said tax:]

Provided further that in computing the aforesaid period of one hundred and eighty days, the period, if any, for which the recovery of tax was stayed by a High Court, shall be excluded.]

S.132. Disposal of appeals by the Appellate Tribunal.—(1) The Appellate

Tribunal may, before disposing of an appeal, call for such particulars as it may require in respect of the matters arising on the appeal or cause further enquiry to be made by the Commissioner.

(2) The Appellate Tribunal shall afford an opportunity of being heard to the parties to the appeal and, in case of default by any of the party on the date of hearing, the Tribunal may proceed ex parte to decide the appeal on the basis of the available record.

(2A) The Appellate Tribunal shall decide the appeal within six months of its filing;

(3) Where the appeal relates to an assessment order, the Appellate Tribunal may, [without prejudice to the powers specified in sub-section

(2) make an order to —

(a) affirm, modify or annul the assessment order; or

(c) remand the case to the Commissioner or the Commissioner (Appeals) for making such enquiry or taking such action as the Tribunal may direct.]

(4) The Appellate Tribunal shall not increase the amount of any assessment [or penalty] or decrease the amount of

any refund unless the taxpayer has been given a reasonable opportunity of showing cause against such increase or decrease, as the case may be.

(5) Where, as the result of an appeal, any change is made in the assessment of an association of persons or a new assessment of an association of persons is ordered to be made, the Appellate Tribunal may authorize the Commissioner to amend accordingly any assessment order made on a member of the association and the time limit in sub-section (2) of section 122 shall not apply to the making of such amended assessment.

(6) Where the appeal relates to a decision other than in respect of an assessment, the Appellate Tribunal may make an order to affirm, vary or annul the decision, and issue such consequential directions as the case may require.

(7) The Appellate Tribunal shall communicate its order to the taxpayer and the Commissioner.]

(10) Save as provided in section 133, the decision of the Appellate Tribunal on an appeal shall be final.

4. The learned counsel for the petitioners has argued that the 2nd Proviso which was inserted in the Ordinance through Finance Act, 2018 has restricted the discretion of the worthy Tribunal to extend the stay/restraining order beyond the total period of one hundred and eighty (180) days, therefore, further extension in the restraining order by the Tribunal is beyond its jurisdiction. The learned counsel further maintained that the Tribunal has erred in relying upon the judgment of Islamabad High Court reported as “**Dowell Schlumberger (Wastern) SA Vs. FOP & others**” [2016 PTD 1702], as the said judgment was passed before the insertion of the

proviso restricting the discretion of the worthy Tribunal to grant any stay order restraining the FBR/Department from collection of determined tax and the said proviso is couched in negative language and thus mandatory. He has also placed reliance on the judgment of this Court in case of **“Commissioner Inland Revenue Vs. PESCO [2019 PTD 2228]**. On the other hand the learned counsel appearing on behalf of the tax payers has argued that the worthy Tribunal is the only independent quasi-judicial forum available to the tax payers for adjudication of their grievances and unless the said independent forum finally adjudicates upon the tax dispute between the tax payer and the Department, the recovery of huge tax amount cannot be passed on to tax payers. They have further maintained that the superior courts have remained liberal in restraining the Department from collection of taxes pending adjudication and their claims before the hierarchy established under the Ordinance, even when Commissioner Inland Revenue (Appeals), during proceedings before it, has refused to grant interim relief staying recovery of proceedings. They have placed reliance on the unreported judgment of the learned Lahore High Court passed in W.P. No.37861 of 2020.

5. Arguments heard and record of the case was perused with the able assistance of the learned counsels for the parties.

6. Admittedly the main appeals of the tax payers are pending before the Tribunal for the last 2-3 years. The close perusal of the Sections 131 & 132 of the Ordinance shows that the Tribunal is an independent quasi-judicial forum available to both, the tax payer and the Departments, against the orders of Commissioner of the income tax. The pendency of the appeal before the Tribunal *per se* is no ground to restrict or restrain the Department from recovering the disputed amount of tax, however, the 1st proviso to Section 131 of the Ordinance provides that the aggrieved person may file an application before the Tribunal for restraining the Department from recovery of the tax amount levied under the Ordinance and upheld by the Commissioner Appeals. While hearing the said application, if the Tribunal reaches at the conclusion that the recovery of the disputed amount would cause undue hardship to the tax payer, then the Tribunal has the jurisdiction to stay the recovery of the tax for a period not exceeding one hundred and eighty (180) days in aggregate.

7. Although, the 1st proviso to Section 131 of the Ordinance restrict the jurisdiction of the Tribunal to stay recovery of such a tax for a period not exceeding one hundred and eighty (180) days in aggregate, however, the learned Islamabad High Court in case **“Dowell Schlumberger (Wastern) SA vs. Federation of Pakistan & others”**[2016 PTD 1702], after examining the said proviso, has held the same to be directory and not mandatory keeping in view the time line provided in Section 132 for adjudication of main appeal as one hundred and eighty (180) days. In view of the legal position, as discussed above, we are not inclined to hold a different view as embedded by the learned Islamabad High Court.

8. Moving on to the effect of the second proviso which was inserted to Section 131 (5) of the Ordinance through the Finance Act, 2018 upon the period/statutory life of the interim relief. The close perusal of the language of the second proviso would show that it is explanatory in nature clarifying that after the expiry of one hundred and eighty (180) days, the stay order would cease to have any effect and, thus, the Department would be at liberty to recover the assessed tax. We cannot infer from the plain reading that it has restricted the jurisdiction of

the Tribunal in further extending the interim relief/stay order.

9. During the pendency of any proceedings/appeals, interim relief is always granted on the basis of equitable consideration, even if it is not specifically provided in a particular statute under which the *lis/appeal* has been referred. The mechanism of adjudication of the tax against the assessee has been elaborately provided under the Ordinance. The 1st right of the appeal to the assessee under Section 127 of the Ordinance is before the same hierarchy of the Tribunal whereas the 2nd appeal lies before the Tribunal which is an independent *quasi-judicial* forum to adjudicate the objections of the tax payers vis-à-vis the Tribunal if so brought before it against the order of Commissioner Inland Revenue. The various High Courts are of the opinion that at least one independent forum outside the regime of the Department should determine the tax dispute between the Department and the tax payer and until the same has not been finally determined by the aforesaid independent forum, then ordinarily no recovery is to be made from the tax payer. Reliance is placed on case “**Commodities (Private Ltd Vs. Federation of Pakistan & others**” reported as

[PLD 2020 Lahore 632] and “Mari Petroleum Company Ltd Vs Appellate Tribunal Inland Revenue& others [2016 PTD 2406]”.

10. If we peruse the time line provided for interim relief under Section 131 to 131(5) and 132(2) (a), then the intention of the law makers is clear that the Tribunal shall decide the appeal pending before it within a period of six months and during pendency of the appeal for the said period, the Tribunal has the jurisdiction to suspend the operation of recovery of assessed tax. However, if the Tribunal fails to decide the appeal within the said statutory period then the clog on the jurisdiction of the Tribunal to, not extend the interim relief for a further period, cannot be assumed. Needless to reiterate that interim relief is always granted on equitable consideration and in cases where the Court or Tribunal has the jurisdiction to grant final relief then it always has the jurisdiction to grant interim relief. However, the Tribunal while granting/refusing or extending the interim relief has to keep in mind the essential ingredient for granting the interim relief i.e. the hardship which the tax payer has to face if the said relief is not granted. However, if the delay in appeal

is attributable to the tax payer, then the tax payer is not entitled to the extension in interim relief.

11. The effect of insertion of 2nd proviso through Finance Act, 2018, upon the jurisdiction of Tribunal to extend the interim relief has also been elaborated by the learned Islamabad High Court in case **“Shalimar Recording & Broadcasting Company Vs the Commissioner Inland Revenue [2019 PTD 2082]**, for ready reference para-10 of the said judgment is reproduced below:

“10. By now it is an embedded principle of fiscal statutes that if a person sought to be taxed comes within the letter of the law then the latter must be taxed no matter how great the hardship appears to be. Conversely, if the State is seeking to recover the tax then it has to bring the subject within the letter of the law otherwise no fiscal burden can be imposed. It is also a settled principle of interpretation of a taxation statute that interpretation cannot be based on presumptions and that the Court has to look at the words of the statute and according interprets them. The interpretation ought to be in the light of what has been expressed. To recover a tax, it is the duty of the State to establish that the subject falls within the letter of law. The Tribunal is the last forum in this regard. Keeping in view the scheme of the Ordinance of 2001 and the abovementioned principles enunciated by the august Supreme Court of Pakistan in relation to the distinction between ‘mandatory’ and ‘directory’ provisions, this Court has no hesitation in declaring that the time line prescribed under Section 132(2A) and the second proviso to Section 131(5) are directory and not mandatory. However, it is noted that if the delay in deciding the appeal beyond the time prescribed under Section 132(2A) is attributed to the person who has preferred the appeal and not the Department or the Tribunal then the latter would be at liberty to vacate an order staying the recovery after affording an opportunity of hearing. The judgment of the august Supreme Court in the case of *Messrs Super Asia* supra is distinguishable because in that case the Tribunal had not passed an order within the prescribed time despite being vested with power to grant extension. The said enunciation of law was regarding delay in adjudicating a show cause notice and not disposal of an appeal by an appellate forum.”

12. We are also mindful of the hardship of the FBR/Department which has the sole mandate to

collect and recover the taxes for the Government exchequer to run the affairs of the country and any undue delay, more particularly, in the current financial situation, is not appropriate that the matter of adjudication of the same be unnecessarily delayed. The Ordinance itself has provided a time line for adjudication of appeals for the Tribunal and, thus, the Tribunal is under statutory obligation to adhere to the said time line unless there is a good reason for delay in disposal of the appeal.

13. In view of what has been stated above, we hold that the impugned orders extending the interim relief for further period is with lawful authority, however, the Learned Tribunal is directed to decide all the subject appeals within a period of three months from the receipt of this judgment.

Announced
10.09.2020

J U D G E

J U D G E

Annexure-“A”

1. **WP No.6292-P/2019** (CIR Vs Syed Adnan Shah & another)
2. **WP No.6293-P/2019** (CIR Vs Syed Adnan Shah & another)
3. **WP No.6933-P/2019** (CIR Vs M/S Peshawar health care (Pvt) LTD & another)
4. **TR No.28-P/2019** (CIR Vs M/S Karapa Flour Mills)
5. **TR No.32-P/2019** (CIR Vs M/S Lucky Holdings)
6. **TR No.35-P/2019** (CIR Vs M/S Karapa Flour)
7. **TR No.36-P/2019** (CIR Vs M/S Gadoon Textile Mills)
8. **WP No.5879-P/2019** (CIR Vs Shah Faisal Afridi)
9. **WP No.5880-P/2019** (CIR Vs Ahmad Ghani)
10. **WP No.5881-P/2019** (CIR Vs M/S Gandaf Flour Mills & another)
11. **WP No.5883-P/2019** (CIR Vs M/S Gandaf Flour Mills & another)
12. **WP No.5888-P/2019** (CIR Vs Muhammad Javed& another)
13. **WP No.5889-P/2019** (CIR Vs M/S Mobile Sales & Distribution & another)
14. **WP No.6615-P/2019**(CIR Vs M/S Muhammad Javed& another)
15. **WP No.6616-P/2019**(CIR Vs Gulab Nabi Prop: Cenna Public School & another)
16. **WP No.6709-P/2019**(CIR Vs Gulab Nabi Prop: Cenna Public School & another)
17. **WP No.6716-P/2019**(CIR Vs M/S Marwa Steel Re-Rolling Mills (Pvt) Ltd & another)
18. **WP No.6720-P/2019**(CIR Vs Gulab Nabi Prop: Cenna Public School & another)
19. **WP No.1335-P/2020**(CIR Vs M/S Water & Sanitation Services Hayatabad Peshawar & another)
20. **WP No.1508-P/2020**(CIR Vs M/S Lucky Holdings & another)
21. **WP No.1553-P/2020**(CIR Vs M/S Water & Sanitation Services Hayatabad Peshawar & another)
22. **WP No.1554-P/2020**(CIR Vs M/S Mobile Sales & Distribution & another)
23. **WP No.1563-P/2020**(CIR Vs M/S Gadoon Textile & another)
24. **WP No.6938-P/2019**(CIR Vs M/S Peshawar Health Care & another)
25. **STR No.16-P/2019** (CIR Vs M/S Al-Hafiz Crystoplast)
26. **WP No.6941-P/2019** (CIR Vs M/S Water & Sanitation Services, Hayatabad, Peshawar & another)
27. **WP No.6942-P/2019** (CIR Vs Muhammad Javed)
28. **WP No.6943-P/2019**(CIR Vs M/S Peshawar Health Care & another)
29. **WP No.6944-P/2019**(CIR Vs M/S Peshawar Health Care & another)
30. **WP No.6945-P/2019**(CIR Vs M/S Friend Glass Pvt Ltd & another)
31. **WP No.6946-P/2019** (CIR Vs Muhammad Nawaz)