

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 3195 of 2018

Shalimar Recording and Broadcasting Company
Vs
The Commissioner, Inland Revenue (Appeals), etc.

DATE OF HEARING: 08-03-2019.

PETITIONERS BY: M/s Shahid Mehmood Khokhar, Saad M. Hashmi, Sardar Abdul Wahab Farid, Nauman Rafique, Sufyan Qayyum, Adnan Haider Randhawa and Riffat Hussain Malik Advocates.

RESPONDENTS BY: M/s Barrister Waqar Ahmed Butt, Saeed Ahmed Zaidi, Syed Ishfaq Hussain Naqvi, Sultan Mazhar Sher, Manzoor Hussain, Waris Khokhar, Riaz Hussain and Azam Bopera Advocates.

Ch. Saifullah Gondal, A.A.G.

ATHAR MINALLAH, CJ.- Through this consolidated judgment I shall decide 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 taxpayers and they were proceeded against under the Income Tax Ordinance, 2001 [hereinafter referred to as the "**Ordinance of 2001**"], the Sales Tax Act 1990 [hereinafter referred to as the "**Act of 1990**"] or the Federal Excise Act 2005 [hereinafter referred to as the "**Act of 2005**"], as the case may be. The petitioners had exercised their statutory right of appeal provided under section 131 of the Ordinance of 2001. The Appellate Tribunal Inland Revenue [hereinafter referred to as the "**Tribunal**"], in exercise of powers conferred under sub section (5) of section 131, had stayed the recovery of the adjudicated tax. The appeals could not be decided or disposed of within the time specified under sub section (2A) of section 132 of the Ordinance of 2001 i.e. within six months of filing of the appeal. The learned Tribunal, having regard to the second proviso of sub section (5) of section 131 of the Ordinance of 2001, declared that it was not empowered to extend the time beyond one hundred and eighty days from the date when the order for staying the recovery of tax was passed. Admittedly, the appeals preferred by the petitioners are pending before the learned Tribunal. The petitioners have invoked the jurisdiction of this Court under Article 199 of the Constitution being aggrieved on account of refusal on the part of the learned Tribunal to extend the injunctive orders passed pursuant to powers exercised under sub section (5) of section 131 of the Ordinance of 2001.

3. The learned counsels for the petitioners have contended that; the statutory right of appeal provided under section 131 of the Ordinance of 2001 cannot be defeated by treating the timeframe provided therein as mandatory; the time prescribed for deciding an appeal is six months from the date of its filing while the validity of an order passed under section 131 (5) has been provided under the second proviso thereto i.e. 180 days from the date of passing the injunctive order; there are two timeframes prescribed in section 131 read with section 132 i.e. the time for deciding an appeal and validity of the injunctive order; in case the time prescribed in each case is to be treated as mandatory then it would give rise to an odd and absurd situation i.e. the right of appeal will abate and thus will stand defeated; the legislature could not have intended that a statutory right of appeal would become a nullity if it is not decided within the time prescribed under sub section (2A) of section 132, particularly when the delay is attributed either to the Tribunal or to the Department; a taxpayer would, therefore, be left without a remedy despite not being at fault; the principles and law enunciated by the august Supreme Court in the case titled "The Collector of Sales Tax, Gujranwala and others v. Messrs Super Asia Mohammad Din and Sons and others" [2017 PTD 1756] are distinguishable because in that case the apex Court has interpreted section 11 and the repealed section 36 of the Act of 1990; reliance has been placed on the case titled "Dowell Schlumberger (Western) S. A. v. Federation of Pakistan and

others" [2016 PTD 1702]; absurdity cannot be attributed to the legislature; the Department has misinterpreted the provisions of the Ordinance of 2001, particularly the second proviso of section 131(5); reliance has also been placed on the case titled "Sun-Rise bottling Company (Pvt.) Ltd. through Chief Executive v. Federation of Pakistan and 4 others" [2006 PTD 535], "Messrs Pearl Continental Hotel, Lahore through Director Finance and another v. Customs, Excise and Sales Tax Appellate Tribunal, Lahore and another" [2005 PTD 1368] and an unreported judgment of this Court, dated 13-07-2018, passed in W.P. No. 2567/2018, titled "Pakistan Telecom Mobile Limited v. Federation of Pakistan through Chairman, Federal Board of Revenue and others".

4. The learned counsels for the Department, on the other hand, have argued that; the second proviso of section 131 (5) was inserted through the Finance Act 2018 [hereinafter referred to as the "**Act of 2018**"]; the said amendment was made after this Court had rendered judgment reported as "Dowell Schlumberger (Wastern) S. A. v. Federation of Pakistan and others" [2016 PTD 1702]; the legislature has expressly restricted the period of validity of an injunctive order passed by the learned Tribunal; the legislature has used unambiguous language in making its intent obvious i.e. to treat the provisions as mandatory and not directory; equity and taxation are strangers insofar as fiscal statutes are concerned; the intent of the legislature is to

protect public revenue and to prevent the abuse of taxation statutes; the timeframe prescribed under sub section 132 (2A) is also mandatory; it is essential for proper and safe administration to interpret the provisions of sections 131 and 132 as mandatory; the use of "shall" in section 131(5) makes it obvious that the provisions thereof are of a mandatory nature; the judgment of the august Supreme Court in the case of "Super Asia" supra is distinguishable because it pertains to the stage when show cause notices have not been decided; the amendment made through the Act of 2018 was inserted with the intent to make the provisions as mandatory regarding recovery of tax.

5. The learned counsels have been heard and the record perused with their able assistance.

6. The controversy raised through all these petitions is essentially regarding the interpretation of the second proviso of sub section (5) of section 131 of the Ordinance of 2001, which was inserted vide the Finance Act 2018. The precise question which has emerged for consideration is whether the time prescribed in the second proviso to sub section (5) of section 131 of the Ordinance of 2001 is 'mandatory' or 'directory'. In order to answer this question it would be beneficial to examine the relevant provisions and the scheme of the Ordinance of 2001.

7. The Ordinance of 2001 is a fiscal statute which was notified in the official gazette on 13-09-2001 pursuant to the promulgation of Ordinance of XLIX of 2001. The legislation was enacted with the object and purpose of consolidating and amending the law relating to income tax and to provide for matters ancillary thereto or connected therewith. Section 2 defines various expressions. 'Appellate Tribunal' is defined in sub section (2 a) of section 2 as meaning the Appellate Tribunal Inland Revenue established under section 130. From a plain reading of the Ordinance of 2001 as a whole it is obvious that it is a self contained comprehensive fiscal statute. The tax or duty is levied under the Ordinance of 2001, the Act of 1999 or the Act of 2005 as the case may be. The respective statutes have prescribed the mechanism for determining the tax liability and the manner in which it is to be paid or recovered. In case a tax payer has a grievance regarding determination made by an assessing officer or any other order passed under one of the fiscal statutes then in such an eventuality the legislature has provided statutory forums for resolution under the Ordinance of 2001. The first right of appeal is provided under sub section (1) of section 127. The appeal lies before the Commissioner (Appeals). The latter is one of the officers of Inland Revenue. It is a forum established within the Department for scrutinizing the validity or otherwise of an order passed by officers of the Inland Revenue. In case the taxpayer or the Commissioner, as the case may be, objects to an order passed by the Commissioner

(Appeals) under section 129 then a right of a second appeal has been provided under section 131 of the Ordinance of 2001 before the learned Appellate Tribunal established under section 130 *ibid*. This statutory right is not confined to the tax payer but is open to be availed by the Department as well. Sub section (5) of section 131 starts with a non obstante clause and provides that notwithstanding that an appeal has been filed before the learned appellate Tribunal, tax shall be payable in accordance with the assessment made unless recovery thereof has been stayed. The first proviso provides that pursuant to filing an application, if the learned Tribunal is of the opinion that recovery of tax levied under the Ordinance of 2001 and upheld by the Commissioner (Appeals) shall cause undue hardship to the taxpayer then, after affording an opportunity of hearing to the parties, it may stay the recovery of tax for a period not exceeding one hundred and eighty days in aggregate. The first proviso was interpreted by this Court in the case titled "Dowell Schlumberger (Wastern) S. A. v. Federation of Pakistan and others" [2016 PTD 1702] and it was held that the time prescribed therein was directory and not mandatory because any other interpretation would have led to absurdity which cannot be attributed to the legislature. The legislature, in its wisdom, through the Finance Act 2018 has inserted the second proviso which is reproduced as follows:

"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."

8. The third proviso contemplates that in computing the period of one hundred and eighty days, the period, if any, for which the tax was stayed by a High Court, shall be excluded. Section 132 describes the powers and procedure to be adopted while the learned Appellate Tribunal deals with an appeal. Sub section (2A) of section 132, which was inserted through the Finance Act 2005, provides that the learned appellate Tribunal shall decide the appeal within six months of its filing. It is noted that the time prescribed for the validity of an order passed regarding recovery of tax and deciding an appeal is the same. Section 131, therefore, cannot be read in isolation and has to be examined and interpreted in the context of other provisions relating to the Tribunal so that the legislative intent and the scheme could be discovered. Both the sections have prescribed time limitations. If the time specified in the second proviso of section 131 is treated as mandatory and otherwise in the case of sub section (2A) of section 132 then it would give rise to an anomalous and odd situation. The appeal may not have been decided within the

time prescribed under section 132(2A) because of the acts or omissions on the part of the Department or the learned Tribunal and yet the tax payer would be exposed to hardship by depositing the liability. Likewise, if the time prescribed under sub section (2A) of section 132 is treated as mandatory then it would lead to an even more preposterous consequence because in such an eventuality the party which has exercised the statutory right of appeal will be left without a remedy because the proceedings would have abated on the lapse of time. The statutory right of appeal would become redundant. Losing the right of appeal before the Tribunal is of a greater significance having regard to the scheme of the Ordinance of 2001. It is the first forum outside the Department and its hierarchy for examining the acts and omissions of the officers entrusted with the onerous task of revenue collection. The pivotal role of the Tribunal is further highlighted keeping in view the remedy of filing a reference before a High Court under section 133 of the Ordinance of 2001. It is noted that the scope of a reference is confined to a question of law and it is not comparable to the scope of a right of appeal. In the scheme of the Ordinance of 2001 the learned Tribunal is the exclusive forum outside the tax Department which has the status of an appellate forum for questions of law as well as fact. The learned Tribunal has, therefore, a pivotal role and status within the scheme of the Ordinance of 2001. This importance is further manifested by the fact that it is the final forum outside the Department which is empowered to

adjudicate questions of fact as an appellate forum. Being the last independent forum for the determination of questions of fact, the Tribunal undoubtedly carries a heavy burden of discharging its functions in a fair, just and transparent manner, particularly in observing the requirements of due process and deciding appeals. The levy, charge or payment of a tax or duty inevitably imposes a financial burden and, therefore, the role of the learned Tribunal as the last statutory independent forum assumes greater importance. The role of the learned Tribunal becomes even more crucial because it is competent to hear and decide appeals arising from three distinct fiscal statutes i.e. the Ordinance of 2001, Act of 1990 and the Act of 2005. The legislature has thus envisaged a significant role of the learned Tribunal in the scheme of the Ordinance of 2001 in ensuring that the interests and rights of both the taxpayers as well as the exchequer are safeguarded and that they remain protected from being saddled with illegal, arbitrary or unwarranted imposition of financial burden. The legislature, therefore, could not have intended to deprive a taxpayer from such an important appellate remedy by making the time prescribed under section 132(2A) as mandatory even when the default is not on the part of the appellant. Likewise, the third proviso to section 131(5) cannot be interpreted in isolation. It has nexus with section 132(2A).

9. In a recent judgment, the august Supreme Court has eloquently highlighted the principles and law in order to discern whether a provision is to be treated as mandatory or directory. The relevant portions from the judgment reported as "The State through Regional Director ANF v. Imam Bakhsh and others" [2018 SCMR 2039] are reproduced as follows:

"To distinguish where the directions of the legislature are imperative and where they are directory, the real question is whether a thing has been ordered by the legislature to be done and what is the consequence, if it is not done. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. The duty of the court is to try to unravel the real intention of the legislature. This exercise entails carefully attending to the scheme of the Act and then highlighting the provisions that actually embody the real purpose and object of the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceedings. Thus, some parts of a statute

may be mandatory whilst others may be directory. It can even be the case that a certain portion of a provision, obligating something to be done, is mandatory in nature whilst another part of the same provision, is directory, owing to the guiding legislative intent behind it. Even parts of a single provision or rule may be mandatory or directory. -----

"In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man. According to Maxwell, "Where the prescription of statute relates to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed or in other words as directory only." ----

Reliance is also placed on the cases of "Malik Umar Aslam v. Mrs Sumaira Malik and others"[2014 SCMR 45], "Maulana Nur-ul-Haq v. Ibrahim Khalil"[2000 SCMR 1305], "Ghulam Hussain v. Jamshaid Ali and others"[2001 SCMR 1001] and "In the matter of Human Rights Cases Nos.4668/2006, 1111/2007 and 15283-G/2010"[PLD 2010 S.C. 759].

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 accordingly interpret 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 in relation to the distinction between 'mandatory' and 'directory' provisions, this Court has no hesitation in declaring that the time 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 M/S Super Asia supra is distinguishable because in that case the Department 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 appellant forum.

11. For the above reasons all these petitions are allowed in terms of the above declarations. In each case the learned Tribunal will be expected to afford an opportunity to determine whether the delay in deciding the appeal beyond the prescribed time is attributable to the appellant and thereafter pass such order as it may deem appropriate in the circumstance.

CHIEF JUSTICE

Approved for reporting.

Tanveer Ahmed.

<u>“ANNEXURE-A”</u>		
1.	W.P. No. 2526/2018	Pakistan Telecommunication Company Ltd Vs. Pakistan, through Secretary Revenue, etc.
2.	W.P. No. 2527/2018	Pakistan Telecommunication Company Ltd Vs. Pakistan, through Secretary Revenue, etc.
3.	W.P. No. 3192/2018	Shalimar Recording and Broadcasting Company Vs. The Commissioner Inland Revenue, etc.
4.	W.P. No. 3193/2018	Shalimar Recording and Broadcasting Company Vs. The Commissioner Inland Revenue, etc.
5.	W.P. No. 3194/2018	Shalimar Recording and Broadcasting Company Vs. The Commissioner Inland Revenue, etc.
6.	W.P. No. 3202/2018	Naseem Soap Factory Vs. The Appellate Tribunal Inland Revenue, Islamabad, etc.
7.	W.P. No. 3241/2018	M/s Askari Bank Limited Vs. Additional Commissioner Inland Revenue, etc.
8.	W.P. No. 3242/2018	M/s Askari Bank Limited Vs. Additional Commissioner Inland Revenue, etc.
9.	W.P. No. 3243/2018	M/s Khan Brothers cotton Industries and Oil Mills Vs. Federation of Pakistan, etc.
10.	W.P. No. 3267/2018	National Testing Service Pakistan Vs. The Commissioner Inland Revenue, etc.
11.	W.P. No. 3268/2018	National Testing Service Pakistan Vs. The Commissioner Inland Revenue, etc.
12.	W.P. No. 3269/2018	National Testing Service Pakistan Vs. The Commissioner Inland Revenue, etc.
13.	W.P. No. 3270/2018	National Testing Service Pakistan Vs. The Commissioner Inland Revenue, etc.
14.	W.P. No. 3271/2018	National Testing Service Pakistan Vs. The Commissioner Inland Revenue, etc.
15.	W.P. No. 3272/2018	National Testing Service Pakistan Vs. The Commissioner Inland Revenue, etc.
16.	W.P. No. 3273/2018	National Testing Service Pakistan Vs. The Commissioner Appeals-I, etc.
17.	W.P. No. 3274/2018	National Testing Service Pakistan Vs. The Commissioner Appeals-I, etc.
18.	W.P. No. 3275/2018	National Testing Service Pakistan Vs. The Commissioner Appeals-I, etc.
19.	W.P. No. 3276/2018	National Testing Service Pakistan Vs. The Commissioner Appeals-I, etc.
20.	W.P. No. 3277/2018	National Testing Service Pakistan Vs. The Commissioner Appeals-I, etc.
21.	W.P. No. 3278/2018	Pir Abdul Rahim Naqshbandi Vs. Federation of Pakistan, etc.
22.	W.P. No. 3280/2018	Pir Abdul Rahim Naqshbandi Vs. Federation of Pakistan, etc.
23.	W.P. No. 3281/2018	Kh. Ameer Sultan M/s Madina Bartan Store Vs. Federation of Pakistan, etc.
24.	W.P. No. 3282/2018	Kh. Manzoor Sultan Vs. Federation of Pakistan, etc.
25.	W.P. No. 4195/2018	Abdul Qayyum Vs. Federation of Pakistan, etc.
26.	W.P. No. 4379/2018	M/s Khushhali Microfinance Bank Ltd. Vs. The Appellate Tribunal Inland Revenue, Islamabad, etc.
27.	W.P. No. 4385/2018	M/s BRAC Pakistan Vs. The Appellate Tribunal Inland

		Revenue, etc.
28.	W.P. No. 4386/2018	M/s Khushhali Microfinance Bank Ltd. Vs. The Appellate Tribunal Inland Revenue, etc.
29.	W.P. No. 4387/2018	M/s Khushhali Microfinance Bank Ltd. Vs. The Appellate Tribunal Inland Revenue, etc.
30.	W.P. No. 4401/2018	M/s Khushhali Microfinance Bank Ltd. Vs. The Appellate Tribunal Inland Revenue, etc.
31.	W.P. No. 4404/2018	M/s Khushhali Microfinance Bank Ltd. Vs. The Appellate Tribunal Inland Revenue, etc.
32.	W.P. No. 4407/2018	M/s Khushhali Microfinance Bank Ltd. Vs. The Appellate Tribunal Inland Revenue, etc.
33.	W.P. No. 4408/2018	M/s BRAC Pakistan Vs. The Appellate Tribunal Inland revenue, etc.
34.	W.P. No. 4756/2018	M/s Redco Construct Pakistan Pvt. Ltd Vs. The Federation of Pakistan, etc.
35.	W.P. No. 4897/2018	Sharjeel Javaid Vs. The Appellate Tribunal Inland Revenue, etc.
36.	W.P. No. 4905/2018	M/s Al Saleh Pharmacy Vs. The Appellate Tribunal Inland Revenue, etc.
37.	W.P. No. 4909/2018	M/s Askari Bank Limited Vs. The Additional Commissioner Inland Revenue, etc.
38.	W.P. No. 4910/2018	Help in Need Vs. The Appellate Tribunal Inland Revenue. Etc.
39.	W.P. No. 4931/2018	M/s Bizxperts (Pvt) Ltd through its Director Vs. Federation of Pakistan, Islamabad, etc.
40.	W.P. No. 4976/2018	Muhammad Arif Kamal Vs. The Appellate Tribunal Inland Revenue, etc.
41.	W.P. No. 4977/2018	Muhammad Yousaf Vs. The Appellate Tribunal Inland Revenue, etc.
42.	W.P. No. 4978/2018	Muhammad Tanveer Arshad Vs. The Appellate Tribunal Inland Revenue, etc.
43.	W.P. No. 4979/2018	Malik Jaleel Ahmed Awan Vs. The Appellate Tribunal Inland Revenue, etc.
44.	W.P. No. 150/2019	M/s Ambrosia Pharmaceuticals Vs. FBR, etc.
45.	W.P. No. 205/2019	Jahanzab Nadeem Vs. FBR, etc.