JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Income Tax Reference No. 51 of 2016
Commissioner of Inland Revenue Zone-III, Islamabad
Versus
M/s Pearl Security Pvt. Limited

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Applicant by: Mr. Manzoor Hussain, Advocate
Respondent by: Mr. Amraiz Khan, Advocate
Date of Hearing: **20.06.2022**

Sardar Ejaz Ishaq Khan, J:- By this judgment we answer the following questions of law (infelicitously) framed in the instant reference applications by the Commissioner Inland Revenue (CIR) under section 133 of the Income Tax Ordinance, 2001 (ITO):

> "Whether limitation runs against not passing a refund order, where the refund was inadmissible due to unsubstantiated or unverifiable claim or illegality especially considering the provisions of subsection (5)(b) of section 170 the ITO;
>
> "Whether or not passing a refund order within 60 days would transform an inadmissible claim of refund into admissible refund which is patently against the law or unverifiable."

After hearing the submissions at the bar and perusing the record, the question of law for us to answer is a narrower one extracted out of the aforesaid two questions framed by the CIR, and is stated in paragraph 5 of this judgment preceded by the reasons for its formulation.

2 The order-in-original that led to these references was passed well after the 60 days stipulated in section 170(4) of the ITO as follows:

> "The Commissioner shall, within sixty days of receipt of a refund application under sub-section (1), serve on the person applying for the refund an order in writing of the decision after providing the taxpayer an opportunity of being heard."

3 The taxpayer, Pearl Security (Pvt.) Limited, filed tax refund applications under section 170(1) of the ITO on 28.07.2011. The 60 day time limit under section 170(4) of the ITO for the tax department to serve the refund order (favourable or otherwise) in writing to the taxpayer expired on 27.09.2011. The order-in-original was passed on 03.12.2012. The order-in-original reveals that the department did not agree with the basis on which the taxpayer's refund claim was filed. The disagreement lay in the correct classification of the taxpayer – services or contractual[1] – to see whether the tax deductions by the taxpayer[2] were, or should have been, under the normal tax regime or the minimum tax regime. This latter question of mixed law and fact was never decided in the two appeals before the Commissioner (Appeals) and the Appellate Tribunal. The Commissioner allowed the taxpayer's appeal confining himself to the ground of the order-in-original coming into existence well beyond the statutory prescription of 60 days. The CIR's appeal before the Appellate Tribunal failed with the Tribunal agreeing with the Commissioner (Appeals) that the order-in-original could not have been passed beyond the statutory period.

4 The questions of law set for us to answer ask us to accept as correct for the mere assertion of the department's view on the question of mixed law and fact referred above on which no appellate adjudication has been carried out and only an order-in-original is placed before us with the department's interpretation. Resultantly, this reference application under section 133 of the ITO is no occasion for this Court to attempt to answer the question of mixed law and fact as to which tax classification would govern the taxpayer for the purposes of deductions made by it under section 153 of the ITO. This task was for the Commissioner (Appeals) and the Appellate Tribunal, neither of whom thought it necessary to visit the merits where the order-in-original for them was a nullity on the ground

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[1] Or any other classification.
[2] And their calculations as over, under or fully paid.

of limitation. We therefore extract out of the two questions of law framed by the CIR the question '*whether the Appellate Tribunal (and the learned Commissioner (Appeals)) were correct in law on the ground of limitation*'.

5 The CIR's submission before us in substance is that the statutory period for the income tax officer to pass the refund order is directory, where to hold it mandatory would 'transform an inadmissible claim of refund into admissible refund'. This, however, is yet another invitation in disguise for this Court to answer the aforesaid question of mixed law and fact or, as the learned counsel for CIR would prefer, accept at face value his statement that his client's stance on the taxpayer's classification for the purposes of section 153 of the ITO is the correct one. We steer clear of any temptation to do so for the first time in a reference application before us, and proceed to reformulate the question of law that can be extracted out of the two questions of law framed by CIR that can be decided in these reference applications by us as follows:

> "The 60 day timeframe under section 170(4) was not mandatory, as the taxpayer had, per section 170(5)(b) of the ITO, a remedy of filing an appeal before the Commissioner (Appeals) under Part III of Chapter X of the ITO, if the taxpayer was aggrieved by the Commissioner's failure to pass an order under section 170(4) within 60 days specified in that subsection."

6 The concept of an appeal against a failure to pass an order sits uneasily with the scheme of Part III of Chapter X, section 127(5) whereof stipulates the limitation period of 30 days to file an appeal that are to be counted from *'the date on which the order to be appealed against is served'*. Apart from being at a loss to see how, in practical terms, an appeal might be filed in the absence of an order, the limitation period for such an appeal would also be at large given that section 170(5)(b) does not have its own limitation period – the 30 day limitation period under section 127(5) can obviously not apply as there is no order with a date to start counting 30 days. We did not receive any assistance on these

questions, and are left with the impression that the CIR itself is not clear as to how an appeal under section 170(5)(b) will be filed and processed.

7 However, the CIR's stance is that the machinery by which the appellate process under section 170(5)(b) will be triggered and processed is not the question before us. In question before us is whether the Legislative intent of escalating the failure of refund proceedings to translate into a refund order (favourable or otherwise) within 60 days to an officer superior in hierarchy vested with the appellate powers is a clear indication that the Legislature never intended the resolution of a contested refund claim in favour of the taxpayer by default for the sole reason of the refund order not being passed within 60 days.

8 The cornerstone of the taxpayer's submissions was the Hon'ble Supreme Court of Pakistan's recent decision titled Commissioner Inland Revenue, Zone-II and another *versus* M/s Sarwaq Traders and another [3] (***Sarwaq Traders***). Her Ladyship, Hon'ble Justice Ayesha A. Malik, authored the judgment of the two-member bench. *Sarwaq Traders* scanned recent precedents of the Supreme Court and found that the 180 days' timeframe for the Commissioner (Appeals) to decide appeals under section 45-B(2) of the Sales Tax Act was mandatory and not directory, rendering the decision made therein beyond the prescribed period invalid, by observing that "[*T]his is because the statute requires the appeal to be decided within 180 days, hence, it has to be decided in the prescribed period*". The Supreme Court applied the test laid down in The Collector of Sales Tax, Gujranwala and others *versus* Messrs Super Asia Mohammad Din and Sons and others (2017 SCMR 1427) (**Super Asia**), that "*…the ultimate test to determine whether a provision is mandatory or directory is that of ascertaining the legislative intent … while the use of the word 'shall' is not the sole factor which determines mandatory or directory nature of a provision, it is certainly one of the indicators of legislative intent. Other factors include presence of penal consequences in*

[3] Civil petition no. 4599 of 2021, decided on 12.05.2022 and approved for reporting.

case of non-compliance, but perhaps the clearest indicator is the object and purpose of the statute and the provision in question"[4].

9 With this reiteration of the principles governing the test whether a statutory provision is directory or mandatory, the Supreme Court in *Sarwaq Traders* found that the words '*in no case [exceed]*'[5] appearing in the second proviso to section 45-B(2) were an express indicator of the Legislative intent of prohibition against exceeding the timeframe for passing the order in question. The language of the provisos which dominated the conclusion in *Sarwaq Traders* is reproduced below:

> Provided that such order shall be passed not later than one hundred and twenty days from the date of filing of appeal or within such extended period as the Collector (Appeals) may, for reasons to be recorded in writing fix:
>
> Provided further that such extended period shall, in no case, exceed sixty days.
>
> (emphasis supplied)

The Supreme Court elaborated that "…*the Second Proviso clarifies that such extended period shall, in no case, exceed 60 days … by using the words in no case the legislature has limited or restricted the discretion of the Commissioner (Appeals) rendering its compliance mandatory … the legislature has prescribed a clear time frame of 180 days for deciding the appeal, by using negative and restrictive language*"[6]. (emphasis per the original)

10 *Sarwaq Traders* also relied on Mujahid Soap and Chemical Industries (Pvt.) Limited versus Customs Appellate Tribunal, Bench-I, Islamabad and others (2019 SCMR 1735). The Mujahid Soap case turned on the *pari materia*[7] section 179(3) of the Customs Act 1969, which also had the same 'negative and restrictive language' whereby the extended timeframe for a decision by the officer concerned was 'in no case [to] exceed' 60 days.

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[4] Per the latter part of para 6 of the Sarwaq Traders judgment.
[5] With reference to the timeframe for making the decision
[6] Paragraph number 4
[7] To the second proviso to section 45-B(2) of the Sales Tax Act

11 *Sarwaq Traders* followed the Super Asia judgment for the broader legal test of the mandatory versus directory question, and also for the narrower point of use of negative and restrictive language. In Super Asia too, the phrase 'in no case exceed' appeared in the provisos to sections 11 and 36 of the Sales Tax Act under consideration therein to explicitly restrict the timeframe for passing the orders in question therein.

12 However, and this is the distinguishing feature, none of the Hon'ble Benches in the judgments discussed above had before them a provision in *pari materia* with section 170(5)(b) of the ITO. In all the judgments cited above, the subtext is clear that the use of the word 'shall' is not the sole determinant of the directory or mandatory nature of the statutory time period.

13 A right of appeal against the inaction of an income tax officer, before his superior exercising appellate power, is certainly not inconsistent with the inference of the Legislative intent being that, though section 170(4) required the decision to be made within 60 days, a failure to do so would not *ipso facto* result in the contested refund claim being deemed decided in favour of the taxpayer, for the taxpayer could very well appeal against the inaction, and on the principle that an appeal is a continuation of the original proceedings, the Commissioner (Appeals) could decide the contested refund claim instead of the Commissioner Inland Revenue. Ignoring section 170(5)(b) altogether in the circumstances of this case is tantamount to making section 170(5)(b) redundant. It is a hallowed canon of statutory construction that each provision in a statute is to be given effect and a statute is not to be interpreted so as to result in redundancy ascribed to another provision. Why would the taxpayer rush to file an appeal against the failure to pass the refund order, when he can bask in the knowledge that on the 61st day his tax refund would be deemed approved if no refund order rejecting the claim was passed, while by filing an appeal he would be taking the risk of an adverse order by the Commissioner (Appeals)? The alternative interpretation, that the Legislative intent was in favour of an appellate escalatory process instead of the refund being admitted by default rescues section 170(5)(b) from redundancy. This is not a case of two alternative

interpretations being possible with the one favouring the taxpayer to be preferred; rather, we find there is only one interpretation possible if section 170(5)(b) is to be saved from redundancy. The statutory prescription of appeal under section 170(5)(b) cannot be said to matter any the less than section 170(4), notwithstanding the mechanics of the appeal not (yet) being clear. Reconciling sub-sections (4) and (5)(b) of section 170, we come to the conclusion that the timeframe under section 170(4) is directory and not mandatory.

14 We do not read in all the judgements cited above an unqualified and absolute rule that each and every statutory period for passing an order by income tax officers is mandatory *per se*. On the contrary, the Supreme Court in all those cases embarked on a minute analysis of the underlying statutory provisions in concluding that the relevant provisions were mandatory, and none of those judgments can be read to lay down the broad proposition, which the taxpayer urges at the bar, that the use of the word 'shall' alone makes the order passed beyond the statutory time period void. As noted earlier, no provision in *pari materia* to section 170(5)(b) was before the Hon'ble Judges, whose judicial opinions read in their entirety do not spell out the broad proposition learned counsel for the taxpayer urges this Court to accept by referring only to selected paragraphs and sentences of those judgements out of context of the discussions that precede and succeed those paragraphs.

15 The taxpayer is estopped from asserting a favourable refund order *by default* where it had statutory recourse against the department's inaction, which it opted not to pursue. The rationale for this can be understood to be that a taxpayer not filing an appeal under section 170(5)(b) is apparently not pushed for an early resolution of its refund claim, and the taxpayer cannot turn around to hold the tax officer to his duty to pass the refund order within 60 days, while absolving itself altogether of any responsibility for proactive action for the refund claim to be decided as early as possible after the expiry of 60 days.

16 The upshot of the above discussion is that the question of law formulated in paragraph 5 above **is answered for the Revenue and**

against the Taxpayer, in that the 60 day timeframe under section 170(4) to pass the refund order is directory for as long as the right of appeal under section 170(5)(b) subsists.

(Mohsin Akhtar Kayani)
Judge

(Sardar Ejaz Ishaq Khan)
Judge

Imran

Announced in open Court on _____.

Judge **Judge**

Approved for reporting.