

IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

Bench-V:

Mr. Justice Syed Mansoor Ali Shah
Mrs. Justice Ayesha A. Malik

Civil Review Petition No.275 of 2022
in Civil Petition No.4599 of 2021.

*(For review of judgment of this Court dated
12.5.2022, passed in C.P No.4599/2021)*

Commissioner Inland Revenue, Zone-III. RTO, Rawalpindi, etc.

..... Petitioner(s)

Versus

M/s Sarwaq Traders, Rawalpindi, etc.

....Respondent(s)

For the Petitioner(s): Malik Itaat Hussain Awan, ASC.
 Ms. Asma Idrees, Addl. Commissioner
 Yousaf Khan, Law Officer.

For the respondent(s): Respondent No.1, in person.

Date of hearing: 25.10.2022

ORDER

Syed Mansoor Ali Shah, J.- The judgment under review dated 12.5.2022 addresses the solitary question whether the first and second provisos to section 45B(2) of the Sales Tax Act, 1990 ("Act") are mandatory or directory provisions. The Court held that they were mandatory provisions and any order passed by the Commissioner (Appeals) under section 45B(2) beyond the maximum period of 180 days is an "invalid decision."

2. The department seeks review of the said judgment. It has been argued that the first and second provisos to section 45B(2) when considered as mandatory provisions, not only deprive the taxpayer of his right to appeal for no fault of the taxpayer, but are also adverse to the interest of the department because the consequence of the delay results in the acceptance of the appeal of the taxpayer, as held by the Appellate Tribunal Inland Revenue ("Tribunal"). It is argued that mandatory reading of the two provisos to section 45B(2) deprives both the parties to get their claims adjudicated on merits. He, therefore, argues that the statutory timeframe provided in the first and second provisos to section 45B(2) must be read as directory provisions. It is also pointed out that the

impugned judgement proceeds on an erroneous and a mistaken assumption that there is no difference between the appellate and the original adjudication under the Act. Original adjudication is on the basis of the show cause notice initiated by the tax department against a taxpayer, while the appellate adjudication is when the taxpayer challenges the order-in-original passed against him in an appeal. The scheme of appellate adjudication cannot be treated at par with the original adjudication under section 36(3)¹ of the Act or with a similar provision under section 179 of the Customs Act, 1969. He adds that reliance by this Court in the judgment under review on *Mujahid Soap*² and *Super Asia*³ in holding first and second provisos to section 45B(2) to be mandatory provisions is an error apparent on the record as these cases deal with the scheme of original adjudication under the respective laws and not with the concept of appellate adjudication. Learned counsel also relied on a recent judgment of a three member bench of this Court in *A.J. Traders*⁴, which has disagreed with the view expressed in the judgment under review considering similar provisions, as the first and second provisos to section 45B(2), under the Customs Act, 1969 to be a directory provision. It is noted for completion of record that the interest of the respondent taxpayer is no different than that of the petitioner as both stand equally aggrieved of the interpretation rendered by the judgment under review to section 45B(2) of the Act. Hence the arguments of the learned counsel for the petitioner have been considered to be on behalf of both the parties.

3. The background giving rise to the instant petition is that the taxpayer was issued a show cause notice for violation of section 25 of the Act on 18.1.2011 and thereafter an order-in-original was passed against the taxpayer on 22.2.2011. The taxpayer filed an appeal before the Commissioner (Appeals), which was dismissed on merits. Thereafter the taxpayer approached the Appellate Tribunal Inland Revenue, Islamabad and vide order dated 05.9.2012 the appeal of the respondent taxpayer was accepted on the ground that the Commissioner (Appeals) had to decide the matter within the statutory timeframe of a maximum of 180 days under section 45B(2)

¹ Omitted by Finance Act, 2012

² 2019 SCMR 1735

³ 2017 SCMR 1427

⁴ Civil Appeal Nos. 354 to 356 of 2020 dated 12.12.2022.

of the Act and as the same was decided beyond the said period, hence the order passed by the Commissioner (Appeals) was declared to be “void *ab initio* nullity in the eyes of law.” It further held that “it will be deemed that no order has been passed by the appellate authority and resultantly the appeal filed before that forum will stand accepted.” The said order was challenged in a tax reference by the tax department before the Lahore High Court and vide order dated 01.6.2021, the matter was decided against the tax department by holding that the first and second provisos to section 45B(2) of the Act were mandatory provisions, hence the order passed by the Commissioner (Appeals) was void. This Court upheld the view of the High Court in the impugned judgment under review and declared the first and second provisos to section 45B(2) of the Act to be mandatory provisions and thus the decision of the Commissioner (Appeals) to be “invalid.”

4. We have heard the learned counsel for the petitioner, examined the law and the afore-cited case law relied upon in the judgment under review. Following provisions of law under the Act and the Customs Act, 1969 are relevant for the purpose of understanding the distinction between original and appellate adjudication.

Original Adjudication:

Section 36 of the Act.

⁵36. Recovery of tax not levied or short-levied or erroneously refunded.—(1)...

(2) ...

(3) The officer of Inland Revenue empowered in this behalf shall, after considering the objections of the person served with a notice to show cause under sub-section (1) or sub-section (2), determine the amount of tax or charge payable by him and such person shall pay the amount so determined. Provided that order under this section shall be made within one and twenty hundred days of issuance of show cause notice or within such extended period as the Commissioner may, for reasons to be recorded in writing, fix, provided that such extended period shall in no case exceed sixty days:

Provided further that any period during which the proceedings are adjourned on account of a stay order or Alternative Dispute Resolution proceedings or the time taken through adjournment by the petitioner not exceeding thirty

⁵ Section 36 omitted by Finance Act, 2012. Earlier it was substituted by Finance Act, 1996. Before this it was substituted by the Finance Act, 1994.

days shall be excluded from the computation of the periods specified in the first proviso.

Section 179, Customs Act, 1969.

179. Power of adjudication.- (1) ...

(2) ...

(3) The cases shall be decided within one hundred and twenty days of the issuance of show cause notice or within such period extended by the Collector for which reasons shall be recorded in writing, but such extended period shall in no case exceed sixty days:

Provided that any period during which the proceedings are adjourned on account of a stay order or alternative dispute resolution proceedings or the time taken through adjournment by the petitioner not exceeding thirty days, shall be excluded for the computation of aforesaid periods.

Appellate Adjudication:

Section 45B(2) of the Act.

45B. Appeals.- (1) ...

(2) The Commissioner Inland Revenue (Appeals) may, after giving both parties to the appeal an opportunity of being heard, pass such order as he thinks fit, confirming, varying, altering, setting aside or annulling the decision or order appealed against:

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 Commissioner (Appeals) may, for reasons to be recorded in writing fix:

Provided further that such extended period shall, in no case, exceed sixty days:

Provided further that any period during which the proceedings are adjourned on account of a stay order or Alternative Dispute Resolution proceedings or the time taken through adjournment by the petitioner not exceeding thirty days shall be excluded from the computation of aforesaid periods.

Section 194-B, Customs Act, 1969

194-B. Orders of Appellate Tribunal.- (1) ...

Provided that the appeal shall be decided within sixty days of filing the appeal or within such extended period as the Tribunal may, for reasons to be recorded in writing, fix:

Review of the above provisions show that section 179 of the Customs Act, 1969 deals with original adjudication and is *in pari materia* with the erstwhile section 36(3) of the Sales Tax Act, 1990 and not with section 45B(2) as held by the judgement under review while discussing the importance of *Mujahid Soap* to the instant case in the following manner:

A similar view has already been taken in the case of Messers Mujahid Soap and Chemical Industries (Pvt) Limited v. Customs Appellate Tribunal, Bench-I, Islamabad and others (2019 SCMR 1735) where the provision under consideration was Section 179 of the Customs Act, 1969, which is *pari materia* to the provisions under consideration under the Act, which reads as follows:

"S.179(3) The cases shall be decided within one hundred and twenty days of the issuance of show cause notice or within such period extended by the Collector for which reasons shall be recorded in writing, but such extended period shall in no case exceed sixty days."

Second, the reliance placed by the judgment under review on *Mujahid Soap and Super Asia* is misplaced as both these case deal with original adjudication which has a different object, purpose and scheme as discussed later in the judgment.

5. Recently, a three member bench of this Court in *A.J.Traders*⁶ has held that the timeframe in section 194-B of the Customs Act, 1969 (which deals with appellate adjudication under Customs Act, 1969) is directory and disagreed with the view taken in the impugned judgement under review in the following manner:

8. If a taxpayer's appeal is not decided within the stipulated period his appeal cannot be negated and the taxpayer non-suited on this score. To hold otherwise would be eminently unfair and give the State a premium for its own functionary's non-compliance with the law. Article 4 of the Constitution of the Islamic Republic of Pakistan ('**the Constitution**') accords the *protection of law and to be treated in accordance with law to be the inalienable right of every citizen and also of every other person for the time being in Pakistan*. The right to be dealt with in accordance with the law is further fortified by Article 10A of the Constitution which stipulates *a fair trial and due process* as a Fundamental Right. These rights cannot be negated or diluted by statute, and if any law purports to do so it shall to such extent be void, as stipulated in Article 8(1) and (2) of the Constitution. Therefore, it cannot be stated that an order belatedly passed on a taxpayer's appeal is a void order and/or a nullity.

9. In the case of *Mujahid Soap and Chemical Industries (Pvt.) Ltd v Customs Appellate Tribunal*⁷ section 179 of the Customs Act, 1969, which attends to initial *adjudication*, and not an appeal, was considered and this Court concluded that since adjudication '*was beyond time as prescribed in section 179(3) of the Act*. Therefore, the said decision is

⁶ Ibid.

⁷ 2019 SCMR 1735.

invalid.⁸ The material distinguishing point in this case was that the initial *adjudication* with regard to the show cause notice was delayed. In other words the State's functionary, that is, the Deputy Collector (Adjudication), had delayed in deciding the show cause notice. Belatedly adjudicating a show cause notice is not the same as belatedly deciding an appeal preferred against a purported liability, because then the appellate authority's tardiness, whether intentional or otherwise, will frustrate the taxpayer's appeal, which is not the intention of the law, nor could it be as it would violate Articles 4 and 10A of the Constitution.

10. That as regards the view expressed in the *Sarwaq Traders* case by a two-member Bench we, with the greatest of respect, cannot bring ourselves to agree therewith to the extent that the said decision contradicts with what has been held in the cited precedents and by us. We also cannot, with profound respect, accept the stated *rationale for prescribing a time frame* which, to use the words of the learned judges is, '*that the taxpayer satisfies its liability and the Department is able to collect revenue*'. This *rationale* effectively presupposes that the taxpayer is liable which, in our humble opinion, is not what the statute says nor what can be implied therefrom. The Legislature in prescribing a period within which an appeal should, or must, be decided obligates the appellate authority. Therefore, if there are any consequences in deciding an appeal beyond the prescribed period the same may only be visited upon the State functionaries, and not on an appellant taxpayer.

6. It is important to underline that the test to ascertain whether a provision of a statute is directory or mandatory, the principle as laid down in *Super Asia*⁹ provides that "perhaps the clearest indicator is the object and purpose of the statute and the provision in question. It is the duty of the court to garner the real intent of the legislature as expressed in the law itself." The legislative intent can be drawn by consideration of the entire statute, its nature, its object and the consequences whether it will cause serious inconvenience or injustice to persons as a result of construing the provision in one way or the other. If by holding a provision mandatory serious general inconvenience will be created for innocent persons of the general public without furthering the object of the enactment, the same should be construed as directory.¹⁰

⁸ *Ibid*, para 7, p. 1738, decided by a three-member Bench of this Court comprising of Umar Ata Bandial, Ijaz ul Ahsan and Yahya Afridi, JJ.

⁹ *ibid*

¹⁰ See N.S Bindra's, *Interpretation of Statutes*. 12th Edition. p.437 & 438

Purposive interpretation of a statute further helps assess and understand the real intent of the legislation. Under this interpretative tool, every statute has a purpose, without which it is meaningless. This purpose, or *ratio legis*, is made up of the objectives, the goals, the interests, the values, the policy, and the function that the statute is designed to actualize. The Court must give the statute's language a meaning that best realizes its purpose.¹¹ With this understanding when we examine the relevant provisions of the Act. The object, policy and purpose of *original adjudication* under the erstwhile section 36(3) of the Act which requires that the order shall be made within a maximum statutory period of 180 days is to ensure that the show cause notice issued by the tax department is decided expeditiously so that tax recovery can be effected at the earliest and also the sword of alleged tax liability must not hang on the head of a taxpayer indefinitely. Therefore, if the tax department fails to decide the show cause notice within the maximum period provided under the law, the proceedings so initiated against a taxpayer come to an end. It is for this reason that section 36(3) of the Act has already be declared to be a mandatory provision by this Court in *Super Asia*¹².

7. The object, policy and purpose of the first and second provisos to section 45(B)(2) of the Act is totally different as it deals with the appellate adjudication. The said provision is invoked by a taxpayer by filing an appeal against the order-in-original. Appellate adjudication, as opposed to original adjudication, takes a different focus, as it deals with the right to appeal of a taxpayer. Right to appeal of a taxpayer is a right that flows from the constitutional rights of access to justice and fair trial guaranteed to a taxpayer under articles 9 and 10-A of the Constitution of the Islamic Republic of Pakistan, 1973. It is axiomatic that no statute can muffle fundamental rights and must at all times advance public interest and remain Constitution compliant. While the action of the tax department against a citizen can be regulated through a timeframe, it is not permissible to do so when the citizen has approached the tax department in an appeal. The fundamental rights of the citizen

¹¹ See Aharon Barak, *The Judge in Democracy*, chapter 5.

¹² *ibid*

stand invoked and come to his rescue which is not so in the case of a tax department. With these considerations in mind the statutory timeframe provided for the appellate adjudication under section 45(B)(2) can only be directory, and to conceive it otherwise, would cause injustice and irreparable harm to a taxpayer who is deprived of the right to appeal. We, therefore hold that the first and second provisos to section 45(B)(2) are directory provisions and lapse of the statutory timeframe will not affect the proceedings before the Commissioner (Appeals) who shall conclude the appeal in accordance with law by deciding the appeal on its merits. We also hold that inspite of the first and second provisos to section 45(B)(2) being directory provisions, the Commissioner (Appeals) must make reasonable effort to decide the appeal of the taxpayer within the maximum statutory timeframe, subject to the third proviso to section 45B(2). In case the taxpayer unduly delays the prosecution of the appeal without sufficient cause, the Commissioner (Appeals) is well within its power to proceed *ex-parte* against the taxpayer. Commissioner (Appeals) must also give reasons if the appeal is not decided within the statutory timeframe under the proviso to section 45(B)(2), so that the legislative aspiration to achieve effective and efficient tax governance is also realized even though such a timeframe is only directory in nature.

8. We also note that the argument that similar matters be marked to a larger bench in the light of *WAK Limited*¹³ has rightly been turned down by the judgment under review as the issue in the cited case is relating to original adjudication and therefore different and totally unrelated to the instant matter of appellate adjudication under the provision of law discussed in this case. Similar view has also been expressed in *A.J.Traders*¹⁴.

9. Having considered the recent view of the Court in in *A.J.Traders*¹⁵ and for the above reasons, the judgment under review, subject to para 7 above, is recalled and this review petition is partly allowed. It is declared that first and second provisos to section 45B(2) of the Act are directory provisions and do not deprive the

¹³ *WAK Limited v. Collector Central Excise and Sale Tax*, 2018 SCMR 1474

¹⁴ *ibid*

¹⁵ *ibid*

taxpayer of his right to appeal or deny the tax department the right to adjudicate the matter on merits by virtue of lapse of the maximum statutory timeframe. The case is, therefore, remanded to the Tribunal, where the appeal of the taxpayer shall be deemed to be pending, with the direction to the Tribunal to expeditiously decide the appeal on merits.

**Sd/-
Judge**

I have read the judgment but do not agree with it and have appended my opinion.

**Sd/-
Judge**

Announced.
Islamabad,
_____ 2022.

Judge

Approved for reporting
Sadaqat

AYESHA A. MALIK, J.- I have read the opinion of Syed Mansoor Ali Shah, J., however, I do not concur with the same.

2. The primary ground for filing the review is the argument that the adjournments taken by Respondent No.1, taxpayer during the proceedings before the Commissioner (Appeals) should have been considered in terms of Section 45-B(2), third proviso of the Sales Tax Act, 1990 (Act). The Petitioners' case is that the appeal was filed on 22.03.2011 by the Taxpayer. They sought adjournments on 19.07.2011, 16.08.2011, 13.09.2011 and 20.09.2011 and the case was finally decided on 21.09.2011. That if the time taken over adjournments is excluded as per the third proviso of Section 45-B(2) of the Act then the appeal was decided within the prescribed time, as the delay is of three days.

3. The record shows that the given dates of adjournment were not considered while calculating the time period under Section 45-B of the Act by the Appellate Tribunal Inland Revenue, Islamabad Bench (Tribunal) or the High Court. Given that this is a factual matter, it is necessary for the Tribunal to consider the dates of adjournments for the purposes of calculating the delay in terms of Section 45-B of the Act. Under the circumstances, this review is allowed, the judgment dated 12.05.2022 is recalled and accordingly, the orders of the Lahore High Court, Rawalpindi Bench and the Tribunal are set aside. The case is remanded to the Tribunal where the appeal of the Taxpayer shall be deemed to be pending with the direction that the Tribunal decides afresh the issue of the timeframe as prescribed in Section 45-B of the Act with reference to the adjournments sought. Order accordingly.

JUDGE

OPINION OF THE REFEREE JUDGE

SYED HASAN AZHAR RIZVI, J. :- The then Honorable Acting Chief Justice of Pakistan, vide order dated 21.05.2024, was pleased to direct that this matter be placed before me as a Referee Judge due to difference of opinion between a two-member bench of this Court. I have had the privilege of going through the scholarly opinions authored by my learned colleagues and have also heard the arguments of the learned counsel for the parties on 29.10.2024.

2. This review petition was heard by a two-member bench of this Court, comprising Justice Syed Mansoor Ali Shah and Justice Ayesha A. Malik. Justice Syed Mansoor Ali Shah partly allowed the petition and remanded the case to the Tribunal. However, Justice Ayesha A. Malik allowed the petition in its entirety and remanded the matter on the ground that the period of adjournments sought by the tax-payer was not considered by the Tribunal.

3. While partly accepting the review petition, the reasoning that prevailed with Justice Syed Mansoor Ali Shah was that the first and second provisos to Section 45-B(2) of the Sales Tax Act, 1990 ("the Act") are directory provisions. These provisos do not deprive the tax-payer of the right to appeal, nor do they prevent the tax department from adjudicating the matter on its merits due to the lapse of the maximum statutory timeframe. Whereas, Justice Ayesha A. Malik allowed the review petition and remanded the matter to the Tribunal on the ground that the adjournments sought by Respondent No. 1, the tax-payer, during the proceedings before the Commissioner (Appeals) should have been considered in accordance with Section 45-B(2) third *proviso* of the Act. These adjournments were not taken into account when calculating the time period under Section 45-B of the Act by the Tribunal.

4. I agree with understanding of Justice Mansoor Ali Shah qua the A.J. Traders case (**2019 SCMR 1735**), in which it was held that the timeframe specified in Section 194-B of the Customs Act, 1969, regarding appellate adjudication, is directory in nature. The rationale is that if a tax-payer's appeal is not resolved within the stipulated period, such a delay does not negate the appeal, nor can the tax-payer be non-suited on that basis. Thus, it cannot be asserted that an order passed belatedly on a tax-payer's appeal is void or a nullity.

5. I subscribe to the view taken by Justice Syed Mansoor Ali Shah that the first and second provisos to section 45(B)(2) of the Act should be treated as directory provisions. This interpretation effectively safeguards the tax-payer's constitutional rights while promoting efficient and fair tax governance. It serves the public interest by preventing procedural timelines from being used against tax-payers in a way that would compromise fairness and justice in the appellate system.

6. It is a settled legal principle that provisions should not be interpreted in a manner that imposes undue hardship on innocent members of the public or undermines the legislative intent. If holding a provision as mandatory would create significant inconvenience without furthering the objectives of the enactment, it should be construed as directory. Thus, provisions must not be interpreted in a way that limits or undermines fundamental rights. Strict enforcement of statutory timelines for tax-payer appeals could jeopardize these rights and potentially deny tax-payers a fair opportunity to seek redressal. Therefore, declaring these provisions as directory is crucial to maintain due process and uphold the constitutional principles of justice.

7. In view of the above legal position, I concur with the conclusion arrived at by my learned brother Justice Syed Mansoor Ali Shah and partly allow the Review petition.

JUDGE

ORDER OF THE BENCH:

By majority of two-to-one (Ayesha A. Malik, J. dissenting), this Civil Review Petition is partly allowed in terms of para-9 of the order authored by Syed Mansoor Ali Shah, J.

Judge

Judge

Announced.
Islamabad,
6th November, 2024.

Judge

Judge

Approved for reporting
Sadaqat