IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench I:
Mr. Justice Umar Ata Bandial, CJ.
Mr. Justice Syed Mansoor Ali Shah

Civil Petition No.1417 of 2022.
(Against the judgment of Lahore High Court, Lahore dated 03.03.2022, passed in WP No.55044/2021)

Farrukhk Raza Sheikh

..... Petitioner

Versus

The Appellate Tribunal Inland Revenue, etc

.....Respondent(s)

For the petitioner: Mr. Ahsan Mehmood, ASC.
Syed Rifaqat Hussain Shah, AOR.

For the respondent(s): Ch. Muhammad Shakeel, ASC.

Date of hearing: 28.07.2022

JUDGMENT

Syed Mansoor Ali Shah, J.- The question before us is whether Rule 22(1) of the Appellate Tribunal Inland Revenue Rules, 2010 (**"Rules"**) is *ultra vires* Section 132(2) of the Income Tax Ordinance, 2001 (**"Ordinance"**) to the extent where the Rule allows that the tax appeal before the Appellate Tribunal Inland Revenue **("Tribunal")** can also be dismissed in default, whereas Section 132(2) of the Ordinance clearly provides that the Tribunal shall afford an opportunity of hearing 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 available record.

2. The facts giving rise to the above question are that the petitioner taxpayer challenged the amendment in the assessment order passed against him under Section 122(1) of the Ordinance before the CIR (Appeals), Lahore. Remaining unsuccessful he challenged the order passed by the CIR (Appeals) before the Tribunal. The appeal of the petitioner was dismissed for non-prosecution vide order dated 09.2.2021 and thereafter the

applications for restoration of the same were also dismissed for non-prosecution vide order dated 17.6.2021. The petitioner challenged both the orders through a constitutional petition challenging the vires of Rule 22(1) of the Rules before the High Court. The said petition was dismissed through the impugned order dated 03.03.2022.

3. The contention of the petitioner is that the appeal of the petitioner pending before the Tribunal could not have been dismissed for non-prosecution and could only have been decided on merits by proceeding *ex-parte* on the basis of the available record. He referred to Section 132(2) of the Ordinance in this respect and submits that dismissal of appeal on the ground of default provided in Rule 22(1) of the Rules is, therefore, *ultra vires* to the provisions of the Ordinance. Learned counsel for the respondent Department supported the judgment of the High Court and reiterated that the Rules are not *ultra vires* the Ordinance. He also pointed out that the petitioner instead of filing a Tax Reference under the Ordinance filed a constitutional petition. Learned counsel for the petitioner replying to the said objection contented that the order passed by the Tribunal is not envisaged under the Ordinance and therefore Reference could not be maintained against it. Besides the *vires* of the Rules was under question therefore the petitioner opted for a constitutional petition. He further contended that no such objection by the respondent Department was taken before the High Court.

4. We have heard the learned counsel for the parties and have examined the law on the subject and the record of the case. At the outset we do not wish to go into the question whether tax reference was maintainable before the High Court against the order of dismissal of appeal in default passed by the Tribunal. It is enough for us to note that this objection was not raised before the High Court by the respondent Department and remanding the matter at this stage will unnecessary delay the adjudication of an important issue involving the *vires* of the Rules which affect a large number of cases pending at various Tribunals in the country. Therefore, in the peculiar circumstances of this case, we find it

appropriate and in the interest of justice, to proceed with the merits of the case.

5. Section 132(2) of the Ordinance and Rule 22(1) of the Rules, are reproduced hereunder for convenience:-

Section 132(2) of the Ordinance:

> 132. **Disposal of appeals by the Appellate Tribunal**.— (1) ...
>
> (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**.

Rule 22(1) of the Rules:

> 22. **Exparte decision and recall of order**.— (1) Where on the date fixed for hearing or any day to which the hearing is adjourned, any or both the parties fail to appear when the appeal or application is called for hearing, **the Tribunal may if it deems fit, dismiss the appeal or application in default** or may proceed ex parte to decide the appeal or application on the basis of the available record.

The present Section 132(2) of the Ordinance was last amended through Finance Act, 2011 when the words *"may, if it deems fit, dismiss the appeal in default or..."* were omitted from the said sub-section. It appears that no corresponding amendment was made in the Rules, which were promulgated in 2010[1] and continue to retain the above words as reproduced above.

6. It is important to underline that the Appellate Tribunal Inland Revenue established under Section 130 of the Ordinance is one and the same under the Sales Tax Act, 1990[2] and the Federal Excise Act, 2005[3] and follows the same procedure[4] as laid down in Sections 131 and 132 of the Ordinance. Therefore the implication of Rule 22(1), under discussion in this case, is not only limited to the Ordinance but also extends to the appeals before the Tribunal arising under the Sales Tax Act, 1990 and Federal Excise Act, 2005.

7. These Rules were notified in exercise of powers available in section 130(12) of the Ordinance, prior to amendment vide Tax Laws (Amendment) Act, 2020 and are saved in terms of

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[1] Through SRO 948(I)/2010 dated 8.10.2010
[2] section 2(1A)
[3] section 2(2)
[4] section 46(2) of the Sales Tax Act, 1990 and section 34(3) of Federal Excise Act, 2005.

amended section 130(6) of the Ordinance. Section 130(12) of the Ordinance provided that "Subject to the Ordinance, the Appellate Tribunal shall have the power to regulate its own procedure...." In the year 2011 Section 132(2) was amended and the portion dealing with appeal being dismissed in default was deleted. These Rules are "subject to the Ordinance" under Section 130(12) and therefore cannot offend or contradict the substantive provisions of the Ordinance. Even otherwise, it is axiomatic that Rules being subordinate or delegated legislation, are framed under the authority of the parent statute, and are therefore subservient to the primary legislation. Rules cannot contradict or add to the clear provisions of the parent statute. Section 132(2) of the Ordinance provides that the Tribunal shall provide an opportunity of being heard to the parties to the appeal, however, in case any one of the parties is in default on the date of hearing, the Tribunal may proceed ex-parte and decide the appeal on the basis of available record. Section 132(2) no more provides for dismissal in default as was the case prior to the amendment brought about in Section 132(2) in the year 2011 (supra). Rule 22(1) of the Rules, *inter alia*, provides that if the parties fail to appear before the Tribunal on the date of hearing, the appeal can also be dismissed in default. This part of Rule 22(1) clearly contradicts the parent statute i.e., Section 132(2) of the Ordinance. It is trite law that Rules cannot override the specific provisions of the parent statute. The Rules are to carry out the purposes of the Ordinance and cannot offend, oppose or be inconsistent with the provisions of the parent statute (Ordinance in this case).[5] Any rule, to the extent of any inconsistency with the parent statute is, therefore, *ultra vires* of the parent statute.

8. It is important, as well as, interesting to record that the tax jurisprudence evolved over the years in the sub-continent, interpreting the powers and procedure of hearing an appeal by the Appellate Tax Tribunal under the Income Tax law has repeatedly held that the Tribunal is to decide the tax controversy before it in an appeal on merits and not to dismiss the appeal in default. This view was expressed by the courts when the language of the

[5] See. N S Bindra's - *Interpretation of Statutes*. 12th Edition, p.108. Also see Suo Motu Case No.11 of 2011, PLD 2014 SC 389; and, Suo Motu Case No.13 of 2009, PLD 2011 SC 619

corresponding Section 33(4) of the Income Tax Act, 1922 was not as explicit as that of Section 132(2) of the Ordinance. In *Walayat Flour Mills*[6] the Appellate Tribunal Rules, 1948[7] were examined on the touchstone of the then Income Tax Act, 1922.[8] Section 33(4) of the said Act provided as follows:

> The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such order thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner.

Relying on *Chenniappa,*[9] a decision of the Madras High Court (India) on the same provision, it was held that under Section 33(4) the Tribunal can only decide on merits and therefore cannot dismiss the appeal in default. In *Chenniappa* the High Court while discussing the scope of Section 33(4) of the Income Tax Act, 1922 (as reproduced above) held that the word 'thereon" in the said provision lays down that the power of the Tribunal is confined to dealing with the subject-matter of the appeal; that the order of the Tribunal is correlated to the actual subject-matter in the controversy and dismissal for default of appearance has nothing to do with the matter in controversy as it puts an end to the appeal; that Section 33(4) obliges the Tribunal to decide the appeal after giving an opportunity to the parties to put forward their case; the fact that the opportunity had not been availed by any party cannot obviously discharge the obligation cast on the Tribunal of passing orders on the merits of the appeal; that there can be no decision on its merits if the matter is to be dismissed for default of appearance of parties; that adjudication on the merits of the case is essential to enable the High Court to perform its statutory duty of hearing the tax reference on a question of law arising out the of decision of the Tribunal. *Chenniappa* was later on upheld by the Supreme Court of India[10] where the court held that 'thus looking at the substantive provisions of the Act there is no escape from the conclusion that under Section 33(4) the Appellate Tribunal has to dispose of the appeal on the merits and cannot short-circuit the same by dismissing it for default of appearance." There has been

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[6] Walayat Flour Mills Lyallpur v. Commissioner of Income-Tax Rawalpindi, 1973 PTD 530.
[7] Rule 24
[8] Section 33(4)
[9] Chenniappa Mudaliar v. Commr. of Inc.-Tax, (1964) 53 ITR 323.
[10] I.-T Commr., Madras v. S. Chenniappa, AIR 1969 SC 1068.

consistent jurisprudence over the years from our High Courts and from the constitutional courts in the subcontinent empowering the tax Tribunal to decide the appeal on merits.[11] The jurisprudence under the Income Tax Act, 1922, discussed above, highlights the judicial sagacity of the court in realizing the importance of good tax governance for the country. The Courts applied purposive interpretation of the taxing statute to curb protracted litigation and help disentangle the taxpayer from extended litigative process.

9. Section 132(2) of the Ordinance is far more detailed, explicit, direct and clear compared to Section 33(4) of the Income Tax Act, 1922. It is therefore underlined that the logic and rationale behind Section 132(2) of the Ordinance and the consistent jurisprudence evolved over the years around Section 33(4) of the erstwhile tax law is to promote and support an efficient tax administration and encourage smart tax governance in the country. Re-engineering the litigative process and procedure by removing dilatory steps in the dispute resolution mechanism is a welcome development. The order of dismissal of appeal on the ground of default, gives rise to a new set of litigation on a technical issue totally unrelated to the tax controversy in hand. Any further proceedings against the order of dismissal is a futile exercise for a tax collector, as well as, the tax payer, as the real tax dispute goes unattended till such time that the parties settle the issue of dismissal in default from the highest court in the land. The parties if successful have to start all over again before the Tribunal on merits. Section 132(2) avoids this double exercise and mandates that the appeal be decided on merits so that any further proceedings before a higher forum lead to a decision on merits. These unnecessary delays in tax dispute resolution seriously impair the overall tax governance in the country, which rests on efficient tax management and speedy tax collection. Section 132(2) of the Ordinance has no appetite for delays and penalizes the indolent party by empowering the Tribunal to proceed *ex-parte* on

[11] see Saleem Sallamt v. Special Officer of Wealth Tax, 2004 PTD 2839; M/s Adam Sugar Mills Limited v. Customs, Federal Excise and Sales Tax Appellate Tribunal, 2008 PTD 1958; Balaji Steel Re-Rolling Mills v. CCE and Customs, (2014) 16 SCC 360; Afloat Textile (India) Ltd v. Union of India, 2015 (325) ELT 719 (Bom.); Viral Laminates Pvt. Ltd v. Union of India, 1998 (79)ECR 533 (Gujrat); Amudhasurabi Fruit Industries P. Ltd v. The Commissioner of Central Excise, Chennai III Commissioner, 2019 (369) ELT 254 (Mad.); and, Golden Times Services Pvt. Limited v. DCIT, [2020] 422 ITR 102 (Delhi).

the basis of the available record. It is also to be noted that Section 132(2) does not encourage adjournments by the parties. The Tribunal can proceed *ex-parte* if any of the parties is in default on the date of hearing. "In default" means absence of a party without a sufficient cause on any date fixed for hearing.

10. For the reasons elaborated above, we hold and declare that Rule 22(1) of the Rules to the extent whereby it allows the Tribunal to dismiss an appeal in default is *ultra vires* Section 132(2) of the Ordinance and is, therefore, struck down to that extent. Consequently, the appeal of the petitioner shall be deemed to be pending before the Tribunal and shall be decided by the Tribunal within a period of three months from the receipt of this judgement.

11. This petition is converted into appeal and allowed in the above terms as a consequence the impugned judgement dated 03.03.2022 of the High Court is set aside.

12. Office shall dispatch copies of the judgment to the Federal Government through Secretary, Ministry of Finance, Revenue Division, Islamabad and to the Federal Board of Revenue, through its Chairman, for information and compliance.

Chief Justice

Judge

Islamabad,
28th July, 2022.
Approved for reporting
Sadaqat