

(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-68/2018

M/s Assistant Commissioner, SRB, Karachi.....Appellant

Versus

M/s Gul Traders, Karachi.....Respondent

Mr. Bakht Ali, AC SRB for Appellant

Mr. Hamid Ali Memon, Advocate for Respondent

Date of Filing of Appeal: 25.09.2018

Date of hearing: 15.01.2019 and 24.04.2019

Date of Order: 25.04.2019

ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been initially filed by the Appellant (SRB) challenging the Order-in-Appeal No.141/2018 dated 0.08.2018 passed by the Commissioner (Appeals) in Appeal No. 64/2018 filed by the respondent (service provider) against the Order-in-Original No. 80/2018 dated 28.02.2018 passed by the Assistant Commissioner (Mr. Bakhat Ali Dahio), Unit-3, SRB, Karachi.



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01. The facts as stated in the order-in-original are that the respondent is registered with SRB in the category of services provided or rendered by persons engaged in contractual execution of work or furnishing supplies services falling under tariff heading 9809.0000 of the Second Schedule of Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) subject to tax @ 14%.

02. It was alleged in the order-in-original that on scrutiny of record available with SRB reveals that during the tax periods from July, 2015 to June, 2016 respondent has provided taxable services to M/s Pakistan Petroleum Limited amounting to Rs.176,325,614/= involving sales tax of Rs.24,685,586/= @ 14%, which the respondent has failed to pay to SRB. It was further alleged that respondent also failed to e-file sales tax returns for the period from July, 2015 to December, 2015.

03. A show cause notice dated 06.04.2017 was issued to the respondent for recovery of tax amounting to Rs.24,685,586/= along with default surcharge and penalty under S. No. 2 and 3 of the Table of Section 43 of the Act. On 07.05.2017 the respondent submitted a letter wherein it was stated that the appellant is engaged in construction works of universities in Sindh and is exempt from Sindh sales tax. In the letter it was also stated that the respondent received payment from Pakistan Petroleum Limited.

04. Finally the Assessing Officer passed assessment order dated 28.02.2018 determining the sales tax of Rs.24,685,586/= along with default surcharge and penalty of Rs.60,000/= under serial No.2 of the Table of Section 43 and Rs.1,234,279/= under serial No. 3 of the Table of Section 43 of the Act.

05. The respondent challenged the Order-in-Original by way of filing appeal before the Commissioner (Appeals) who allowed the appeal and set aside the order in original being barred by limitation, hence this appeal by the department.



06. On 08.10.2018 Mr. Bakht Ali the learned AC submitted that the show cause notice was issued on 06.04.2017 and order was passed on 28.02.2018 on 172nd day. He then submitted that during the proceedings the respondent has obtained adjournments of 156 days which were excluded and the order was passed within time allowed by law then existed. He then submitted that as per amendment dated 14.07.2017 vide Sindh Finance Act, 2017 sub-section (3) of Section 23 of the Act was amended extending the time for passing an assessment order from 120 days to 180 days from the date of issuance of show cause notice.

07. On 22.10.2018 Mr. Bakht Ali AC submitted that if during pendency of proceedings law is changed or altered the new provision of law will apply and not the old law which existed at the time of issuance of show cause notice. He relied upon on un reported Judgment of Single Bench of Lahore High Court in the case of Commissioner Inland Revenue vs. Ms. Ambreen Fawad T.R. No.51/2011. He then submitted that the amendment made in section 23(3) through Sindh Finance Act, 2017 was procedural in nature and apply retrospectively on all pending proceedings. He also submitted that by the amendment no vested right of the appellant was affected. He relied upon un reported judgment of Supreme Court in the case of Commissioner Income Tax Peshawar vs. M/s Islamic Investment Bank, CA No.1086/2009 (2016 SCMR 816) on the point that if the amendment is procedural then the retrospective rule of construction is to be applied.

08. On 27.11.2018 Mr. Hamid A. Memon the learned advocate for respondent submitted that in case the amendment is beneficial to the tax payer it can be applied retrospectively and not otherwise. He then submitted that the amendment in question is neither procedural nor beneficial to the tax payers. He then submitted that at the date of issuance of show cause notice the time for passing order in original was 120+60 days and the proceeding should be terminated within that time

M. A. Memon



as the appellant has a vested right created in its favor which cannot be taken away. He then submitted that order in original was passed after lapse of 328 days without extending the time and without assigning any reason and is clearly barred by time and supported the order of Commissioner (Appeals). He then submitted that show-cause notice was issued on 06.04.2017 and order in original was passed on 28.02.2018 after the statutory period of 120+60 days.

09. As per Mr. Bakht Ali the total time consumed in finalizing the assessment proceedings was 328 days out of which 156 days were excluded on account of adjournments. He then submitted that the words not exceeding 30 days appearing in sub section (4) of section 23 were omitted vide Sindh Finance Act, 2014 effective from 07.07.2014. He then submitted that sub section (3) of Section 23 was also amended vide Sindh Finance Act, 2017 effective from 14th July, 2017 and the words "180 days" were substituted for "120 days". He then submitted that order in original was passed on 172nd day from the date of issuance of show cause notice i.e. 06.04.2017. He then submitted that the amendment in both the sections are procedural in nature and applies retrospectively. He then submitted that no vested interest of the respondent was violated as by the amendments neither any new liability was created nor any existing liability was enhanced. He then submitted that amendment of 2017 came into operation on 14.07.2017 when the show cause notice proceedings were still pending and it was not a past and closed transaction.

10. Mr. Hamid Ali Memon Advocate submitted that it should not be the intention of the legislature to grant unlimited time/free hand to the department to pass order in original without any limitation and the adjournments which were not sought or obtained by the respondent were also excluded, which is not the intention of the legislature. He then submitted that if the time for passing order in original was extended it should be with a specific order with reasons and communication with the respondent which is lacking in the case. He then submitted that the amendment of 2017 has no application on the present case.

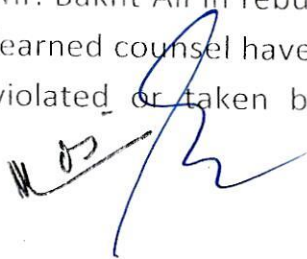


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11. Mr. Bakht Ali under the direction of the Tribunal filed calculation for consumption of time in finalizing show cause proceedings. According to this statement the order was passed on 172nd day from the date of issuance of show-cause notice dated 06.04.2017. Mr. Bakht Ali submitted that the amendment in sub section (3) of section 23 of the act dated 14.07.2017 provides 180 days for passing the order in original and in view of this provision extension of time by the Assessing officer is not required. He adopted his arguments advanced on 17.12.2018. He relied upon 1993 SCMR 1276 (Com. I.T. vs. Asbestos Cement).

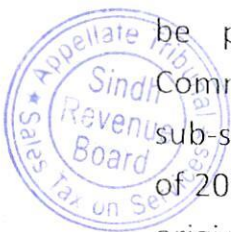
12. In reply Mr. Hamid Ali Memon advocate adopted his earlier arguments made on 17.12.2018 and in addition submitted that all laws are prospective unless by express enactment or necessary intendment retrospective operation has been given to it and relied upon (1) PLD 2018 SC 97 (Sardar Sher Bahadur Khan vs. Election Commission), and (2) 2016 PTD 1072 (Sindh H.C.) Com of I.T. vs. M/s Café Student, Karachi, the relevant citation is "B & C" page 1076 & 1077, 1078. He then submitted that the limitation prescribed for availing remedies are not to be lightly disturbed and relied upon (3) 2018 SCMR 991 (Additional Commissioner IR vs. M/s Eden Builders). He then submitted that the amendment though procedural in nature, but affects the vested rights operates prospectively and not retrospectively, and relied upon (4) 2018 PTD 977 (Best way Cement vs. Add. Com. IR). He then submitted that a thing requires by law was to be done in a manner prescribed by law, if not done so the entire structure build there on will fall and relied upon (5) 2017 PTD 1725 (Appellate Tribunal SRB (E&F) (Assistant Commissioner versus Optimus Capital), (6) 2016 PTD Tribunal 189 M/s Arrows Advertising versus C.I.R. Zone II, Lahore. Mr. Memon also relied upon PLD 2016 SC page 872, 2017 PTD 1053, 2016 PTD 358, 2015 PTD Tribunal 319, 2015 PTD Tribunal 1422, 2017 PTD Tribunal 2108, 2018 PTD Tribunal 527 and 2017 PTD Tribunal 1911.

13. Mr. Bakht Ali in rebuttal submitted that the arguments advanced by the learned counsel have no basis as no vested right of respondent has been violated or taken back and all the judgments cited by the learned



counsel relates to limitation when substantial rights were affected and all the cases have distinguished facts. .

14. We have heard the learned representatives of the parties and perused the record made available before us and statement filed by the AC showing total days consumed in finalizing the order in original including the adjournments excluded there from the total time consumed in finalizing the order in original.
15. The Commissioner Appeal allowed the appeal filed by the respondent on the ground that the order in original is barred by limitation and cannot sustain in law and setaside the order in original.
16. The contention of the appellant is that number of days involved in the proceedings are 328 days out of which 156 days on account of adjournments obtained by respondent was excluded and the order was passed on 172nd day. He then referred to Sindh Finance Act, 2017 dated 14.07.2017 by which sub-section (3) of Section 23 of the Act was amended extending the time for passing an assessment order (order in original) from 120 days to 180 days from the date of issuance of show cause notice.
17. The contention of the Respondent is that the show cause notice was issued on 06.04.2017 whereas the order in original was passed on 28.02.2018 after lapse of 328 days without extending time, which is in violation of the time prescribed in sub-section (3) of section 23 of the Act as before passing the order the time was not extended.
18. The controversy between the parties is whether the order in original can be passed within 120 days or within 180 days. The learned Commissioner (Appeals) has not considered the amendment made in sub-section (3) of section 23 of the Act by Sindh Finance Act, 2017 (XXIV of 2017) dated 14.07.2017 by which the period for passing of an order in original was enhanced from 120 days to 180 days.
19. The learned representative for the appellant is of the view that the amendment is procedural in nature and can be applied to pending proceedings. Whereas the learned advocate for the respondent is of the



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view that the amendment is not procedural but relating to substantive right of the respondent for determination of tax liability within a specified period and vide amendment the vested right of the respondent was affected and the amendment is prospective in nature.

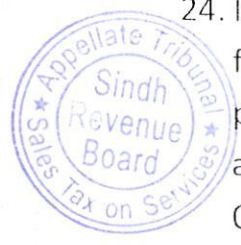
20. It is not disputed that on the date of amendment dated 14.07.2017 the proceeding under show-cause notice dated 06.04.2017 was pending before the Assessing Officer (AC). It is also not disputed that the order in original was passed on 172nd day from the date of show cause notice.

21. Now the question before us is whether the amendment is procedural or relating to substantive right and its application to pending proceedings is amount to retrospective operation or not.

22. The substantive law is that, which defines the right of the parties, while procedural law determines the remedies. The law of procedure may be defined as that branch of law which governs the process of litigation. The limitation of passing of order in original comes within the ambit of procedural law.

23. The general principle is that when the law is changed/alterd during the pendency of a proceeding the substantive right of the parties are to be decided according to the law as it existed at the time when the action was initiated unless the legislature has made its intention clear that the amendment will apply retrospectively. However exception to this rule is that the law beneficial to the subject and the procedural law can be applied retrospectively.

24. In this case the limitation of passing of order in original was altered from 120 days to 180 days. The limitation is generally known as procedural law and the amendment relating to the limitation can be applied to the pending proceedings. In the reported case of The Commissioner of Income Tax, Central Zone B, Karachi versus M/s Asbestos Cement Industries Limited, Karachi 1993 SCMR 1276 it has been held that "4. The first legal proposition not open to question is that the law of limitation is by and large and substantially a procedural law. (Emphasis supplied) It was so held in S.M. Junaid v. President of Pakistan PLD 1981 SC 12. The other principle equally well established is that a procedural law has a



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retrospective application and is attracted forthwith to the pending proceedings....." (Emphasis supplied) It was further held that "5. Section 136, clauses (1) and (2) of the Ordinance had the effect of enlarging the period of limitation both for applying to the Tribunal for making a reference as well as for making a reference thereafter to the High Court. The provision being beneficial and relating to procedure should have been given effect to forthwith and in matters decided after coming into force of the Ordinance. Of course such as application could not revive the period of limitation or extend t where at the time when the Ordinance came into force the period of limitation under the Act had already expired".

25. In the reported case of S.M. Junaid versus President of Pakistan PLD 1981 Supreme Court 12 in para 7 while dealing with section 3 of the Limitation Act it has been held that "7.In our opinion the law of procedure may be defined as that branch of law which governs the process of litigation. It is the law of actions-jus quod et actious pertent-using the term action in a wide sense include all legal proceedings civil and criminal. All the residue is substantive law and relates not to the process of litigation but to its purpose and subject matter. Substantive law is concerned with the ends but procedural law with the mean and instruments by which those ends are to be attained. Whether a person has a right to recover certain property is a question of substantive law, for the determination and protection of such right are among the ends of administration of justice, but in what courts and within what time he should institute proceedings are questions of procedural law, (emphasis supplied) for they relate, merely, to the modes in which the courts fulfill their functions.....".

26. In this matter by way of amendment in sub section (3) of section 23 of the Act time prescribed for passing the order in original was enlarged from 120 days to 180 days. By this amendment no vested right of the respondent was affected. The respondent has no vested right to have a decision in a particular time frame. In the reported case of The Taxation Officer, Deputy Commissioner, Income Tax, Lahore versus Rupafil Limited 2018 SCMR 1131 it has been held that "Law prescribing of limitation was to be considered as procedural rather than substantive. (Emphasis supplied) It was also held that "It is now well settled that procedural amendments apply to all cases which have not become past and closed transactions therefore the provisions of section 22 of Income Tax Ordinance has been rightly invoked in this case".

27. In the reported case of Commissioner of Income Tax Versus Ms. Cafe Student Karachi and others 2016 PTD 1072 (Sindh High Court) it has



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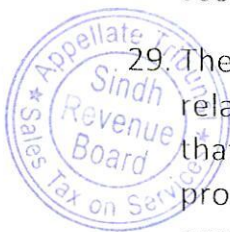
been held that "5. The legal issue relating to application of amendment introduced in Fiscal Laws, through Finance Act, 1994, either prospectively or retrospectively, stands settled by various decisions of this Court as well as of the Honorable Supreme Court, according to which, an amendment introduced in law through Finance Act shall apply prospectively in the year in which it has been inserted unless such retrospective effect has been given by the legislature. Similarly, it has also been settled through various pronouncements of this Court as well as of the Honorable Supreme Court that unless and until any amendment introduced by Finance Act creating any charge or additional burden upon a taxpayer is given retrospective effect by express words by the legislature, it cannot be applied retrospectively to the disadvantage of the taxpayer. In a recent decision in the case of Kurdistan Trading Company v. Commissioner Inland Revenue 2014 PTD 339, this Court while examining the application of an amendment introduced through Finance Act, prospectively or retrospectively, has held as under:-

"8.On the other hand, in cases where the amendment introduced is remedial and beneficial in nature, it has to be given retrospective effect and also to apply to all pending cases on the date of amendment / enactment as well, unless some prospective effect is given by the legislature or it is made prospective by its implication. It is trite principle of construction of a fiscal statute that unless and until any amendment introduced by Finance Act, creating any charge or additional burden upon a taxpayer, is given retrospective effect by express words by the legislature, it cannot be applied retrospectively to the disadvantage of the taxpayer."

28. In the reported case of Commissioner of Income Tax, Peshawar versus Ms. Islamic Investment Bank Limited, 2016 SCMR 816 It has been held that "When a provision is incorporated in any statute through an amendment that is procedural in nature then the retrospective rule of construction is to be applied to such provision. Such a provision has to be construed as if it was incorporated on the date when the main enactment reached the statute book".

29. The learned AC also cited a judgment from the Indian jurisdiction which relates to the change of forum during pendency of proceedings and in that context it was held that amendments changing forum of trial was procedural in nature and it was settled position that procedural amendments take retrospective effect.

30. In this case at the time of passing of amendment the proceedings were pending before the Assessment Officer and the amendment is applicable to pending proceedings and the time for passing the order in original

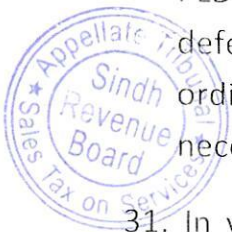


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was 180 days and not 120 days. The Order in original passed on 172nd day was properly passed.

30. The judgments cited by the learned advocate for the respondent have distinguishable facts and law point involved are not applicable to the present case. The case of M/s Eden Builders Limited 2018 SCMR 991 relates to amendment in the deemed assessment order and in that context it has been held that "*Law of limitation in so far as it regulated the period in which one party could avail a remedy against another was not to be lightly disturbed as the certainty created by limitation was necessary for the success of trade and business, more so when such limitation governed tax matters*". The the reported judgment of Khushi Muhammad V Fazal Bibi (PLD 2016 SC 872) relates to condonation of delay of time spent in pursuing an appeal before a wrong forum and in that context it has been held that "*The law of limitation is a statute of repose, designed to quieten title and to bar stale and water logged disputes and is to be strictly complied with*". In the reported case of M/s Bestway cement Limited versus Additional Commissioner Inland Revenue 2018 PTD 977 (SB Islamabad High Court has observed that any amendment even though procedural in nature which could affect vested rights of any person was to operate prospectively and not retrospectively. In the reported case of M/s M. Z. International versus The Assistant Commissioner Inland Revenue Audit 5, a case related to section .11 (4) and 36 (3) of the Sales Tax Act, 1990 in para 7 it was observed that period prescribed for completion of adjudication proceedings is mandatory and not directory. The reported case of Sardar Sher Bhadur Khan Versus Election Commission of Pakistan PLD 2018 SC 97 a matter relating to disqualification on the ground of defection it has been held that a statute or any amendment thereto ordinarily operates prospectively unless, by express enactment or necessary intendment, retrospective operation has been given to it..

31. In view of the above we are satisfied that the order in appeal is not proper and consequently setaside the same and the case is remanded to the Commissioner (Appeals) to decide the same on merits expeditiously after adequately hearing both the parties.



32. The copy of this order may be provided to the learned representatives of the parties.

(Agha Kafeel Barik)
TECHNICAL MEMBER

(Justice [®] M. Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 25.04.2019

Certified to be True Copy

Copies supplied for compliance:-

1. The Appellant through authorized Representative.
2. The Assistant Commissioner (Unit-), SRB, Karachi.

Copy for information to:-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office copy
- 5) Guard file

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

25/4/19

Registrar

Order Dispatched on

25/4/19

Registrar