

**BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT KARACHI**

**APPEAL NO. AT-77/2023**

M/s Shanghai Electric Engineering  
Consulting Company Limited,  
(SNTN: S5219581-4), 14<sup>th</sup> Floor,  
The Harbour Front Building,  
HC # 3, Marine Drive, Block-04, Clifton,  
Karachi..... Appellant

**Versus**

Assistant Commissioner (Unit-3A),  
Sindh Revenue Board (SRB),  
2<sup>nd</sup> Floor, Shaheen Complex,  
M.R. Kayani Road, Karachi.....Respondent

Date of filing of appeal: 08.06.2023

Date of hearing: 27.07.2023

Date of Order: 31.07.2023

Ameer Azam, Advocate and Mr. Muhammad, ACA for the appellant.

None is present on behalf of respondent.

**ORDER**

**Justice Nadeem Azhar Siddiqi.** This appeal has been filed by the appellant challenging the Order dated 06.06.2023 passed by the Commissioner (Appeals) in Appeal No. /2023 under section 58 (4) of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) refusing to extend the stay beyond one twenty days.

01. The brief facts of the case are that Assessing Officer (AO) passed Order-in-Original (OIO) No. 2224/2022 dated 17.10.2022 against the appellant determining the Sindh Sales Tax (SST) at Rs.352,839,347/- alongwith penalty and default surcharge. The said OIO was challenged by the appellant before Commissioner

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(Appeals) by way of filing Appeal No. ..../2018 alongwith an application for grant of stay of recovery of tax dues. The stay was granted which remained effective for one hundred twenty days and after expiry of statutory period of one hundred twenty days the stay was vacated on 06.06.2023.

02. The appellant challenged the said order of vacating the stay before this forum. The appeal was taken up for hearing on 14.06.2023 on which date the stay was granted subject to deposit of Rs.50 million. The appellant challenged the said Order of the Tribunal before the High Court in CP No. D-3065/2023. However after filing the petition the appellant has not pressed the said petition subject to extension of time for payment of Rs.50 million. The High Court extended the time till 12.07.2023 and disposed of the petition.

03. The respondent issued Notice under section 66 (1) of the Act and attached the bank account of the appellant and on deposit of Rs.50 Million the notice for attachment of bank account was withdrawn by the respondent vide letter dated 11.07.2023.

04. The learned advocate for the appellant submitted as under:-

- i. The major portion of input tax claimed by the appellant was in respect of fuel which was consumed in providing taxable services of contractual execution of work or furnishings supplies under Tariff Heading 9809.000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (The Act) The core activity of the appellant was coal mining and transportation of coal and in this regard the fuel was consumed in operating trucks, machineries, dumpers, tractors and generators and in absence of the same the taxable activity could not be provided.
- iii. The department has erroneously just to extract more SST from the appellant has disallowed the input tax lawfully claimed by the appellant.
- iv. The time of 120 days provided under sub-section (4) of section 58 of the Act is not mandatory and to safeguard the interest of the tax payer the same can be extended beyond statutory period.

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- v. The appeal could not be decided for want of reconciliation to be prepared by the respondent.
- vi. The coercive recovery of tax during the pendency of appeal and without determination of the matter by an independent forum has always deprecated by the superior courts of Pakistan.

05. The learned AC submitted as under:-

- i. The appellant do not own any type of Trucks, Dumpers and Generators and all these type of machinery in which the fuel was used are property of recipient M/s Sino Sindh Resources Pvt. Ltd.
- ii. The input claimed by the appellant was not directly used in providing the taxable services.

The Commissioner (Appeals) has no power to extend stay beyond 120 days as the provision is mandatory.

The advocate for appellant failed to point out any error in the order.



06. We have heard the learned representative of the parties and perused the record made available before us.

07. The appellant is providing or rendering taxable services covered under tariff heading 9839.0000 (Erection, Commission and Installation Services) of the Second Schedule to the Act.

08. This case appears to be a case of hardship. The appeal is still pending before Commissioner (Appeals) for want of preparation of reconciliation statement by the concerned AC. The matter required further inquiry to ascertain whether the input tax claimed by the appellant was used in providing taxable services or not. The Commissioner (Appeals), SRB during pendency of appeal vacated the stay on the ground that statutory period was lapsed and stay could not be extended beyond 120 days. The appellant was not at fault if the appeal was not decided within a reasonable time and is entitled to protect its right. The

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Commissioner (Appeals), SRB should decide appeals within a reasonable time in which the stay was granted by him to avoid such situation. Coercive action against the tax payer during pendency of appeal is highly objectionable and Department should avoid such coercive action in the interest of justice and fair play even if the stay is vacated. Since the appellant was not at fault it should not be deprived from its usual right to approach an independent forum for redresses of its grievances.

09. In a recent Order in Appeal No. 71/2023 (Order-In-Appeal No. 27/2023) the Commissioner (Appeals), SRB relying upon the judgment of Islamabad High Court reported as Dowell Schlumberger (Western) SA versus Federation of Pakistan and others, 2016 PTD 1702 grant Stay beyond 120 days. The relevant portion of the judgment of the Islamabad High Court is reproduced as under:-

*"4. When confronted with the above, the learned counsel for the department has also not opposed the suggestion made by the learned counsel for the petitioner. Moreover, from a plain reading of Section 131(5) of the Ordinance of 2001 it obviously appears that the time specified for the validity of an order passed in relation to the stay of recovery of the tax is directory in nature (emphasis supplied). It would give rise to an anomaly if the provision is interpreted in a manner that on the one hand the learned Tribunal has been empowered to grant the stay after forming an opinion to the effect that the recovery shall cause hardship and on the other hand for the legislature to have intended that the taxpayer is exposed to the rigours of hardship merely because the appeal was not decided within a specified period and that too without any fault on part of the appellant. It is settled principle of interpretation of a statutory provision that absurdity cannot be attributed to the legislature. It has been consistently held by the august Supreme Court that the determination, whether a provision is mandatory or directory, largely depends upon the intention and language in which the provision is couched. It is, however, settled law that where the consequence of failure to comply with the provision is not mentioned the provision is directory and where the consequence is expressly mentioned the provision is mandatory (emphasis supplied). Reliance is placed on Malik Umar Aslam v.*

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*Mrs. Sumaira Malik and others 2014 SCMR 45, Maulana Nur-ul-Haq v. Ibrahim Khalil 2000 SCMR 1305, Ghulam Hassan v. Jamshaid Ali and others 2001 SCMR 1001, Human Rights Cases Nos. 4668 of 2006, 1111 of 2007 and 15283-G of 2010, PLD 2010 SC 759. In the instant case, the provision is couched in such language which renders the provision as directory and not mandatory. As already noted above, the legislature could not have intended to cause undue hardship to a taxpayer. A reasonable interpretation of Section 131(5) obviously would be that the time specified therein is directory and, therefore, if the appeal is not decided within the said period, the stay would continue till the disposal or decision of the appeal unless expressly recalled by the learned Tribunal. Any other interpretation would defeat the legislative intent of protecting a taxpayer against undue hardship.*



10. The above provision relates to section 131 (5) of the Income Tax Ordinance, 2001: However, the ratio decided in the above case is fully applicable to this case. The Commissioner (Appeals) also relied upon the judgments in the reported cases of Pak Saudi Fertilizers Ltd. versus Federation of Pakistan, 2002 PTD 679 (a judgment of DB of High Court of Sindh and Syed Imran Raza Zaidi Superintend Engineer versus Government of Punjab, 1996 SCMR 645.

11. The earlier orders of the then Commissioner (Appeals) are not strictly binding on the present Commissioner (Appeals), SRB but the earlier orders could not be easily ignored with an intention to recover SST during the pendency of appeal. The department should follow the rule of consistency which is a good practice and display transparency. In the case law reported as Manager, Jammu & Kashmir State Properties versus Khuda Yar and another, PLD 1975 SC 678 it was held as under:-

*"The proposition could hardly be disputed that the principal object behind all legal formalities is to safeguard paramount interest of justice. In fact while considering the importance of legal technicalities and rules of procedure in the administration of justice it is inevitable to recall the various evolutionary stages in the transition from justice without law of primitive society to justice in*

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*accordance with law of modern society and the conflict between equity in law in judicial history. It cannot be denied that legal precepts were devised with a view to impart certainty, consistency, and uniformity to administration of justice and to secure it against arbitrariness, errors of individual judgment and malafides" emphasis supplied).*

12. The Commissioner (Appeals) should not vacate the stay during the pendency of appeal before him mechanically and should apply his mind and consider who was guilty of delaying the proceedings.

13. The Appellate Tribunal Inland Revenue in an recent Order dated 20.07.2023 passed in ITA No. 15711/KB/2022 relying upon the Judgment of Islamabad High Court in WP No. 2608/2018, M/s Holmore Power Generation Company Limited versus Deputy Commissioner, grant stay beyond statutory period. The relevant portion of the Judgment of High Court is reproduced as under:-

*"Indeed, the ATIR is empowered to grant interim relief for a period of 180 days. However, the presuppose that appeals would be decided by the ATIR within the said period. Failure on the part of the ATIR to decide the appeal within the said period cannot operate to the prejudice of the petitioner/appellant who is not responsible for causing of delay in adjudication of the appeal".*

14. In the case law reported as Imtiaz Ahmed versus Ghulam Ali, PLD 1963 SC 382 it was held as under:-

*".....the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy.... Any system which by giving effect to the form and not the substance defeats substantive rights is defective to that extent".*

15. The coercive recovery of tax by the department during pendency of appeal and without determination of the matter by an independent forum was always deprecated by the Superior Courts. In the judgment reported as Pearl Continental

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Hotel versus Customs, Excise and Sales Tax Appellate Tribunal 2005 PTD 1368 it was held as under:-

*"6. Under the circumstances of the present case, it would be travesty of justice to allow the respondents to adopt coercive measures for recovery of the amount which is the subject-matter of a pending appeal. The right of appeal; compete and unbridged, is a right vesting in an affected person. To seek an interim relief is also a right recognized by the Courts and the law to vest in such person as a necessary concomitant of the right of appeal. In my opinion, denial of the relief of an interim protection in an appropriate case, during the pendency of appeal, will be an abridgment of the effective and complete appeal right. Furthermore, the petitioners are also entitled to at least one extra departmental appeal. During pendency of such an appeal and for effectiveness of the right to maintain the appeal, the petitioners under the circumstances are entitled to the protection against coercive measures for effective dispensation of the justice and law in absence of any other efficacious remedy.*

16. In another judgment reported as Z. N. Exports Pvt. Ltd. versus Collector Sales Tax, 2003 PTD 1368 it was held as under:-

*"2. Learned counsel for the petitioner contends and I will agree that before a recovery created by an impugned order by a Departmental Authority can be effected, an assessee, appellant must be heard by a forum outside the departmental hierarchy. The Tribunal as a forum of first appeal having not disposed of the appeal, the petitioner cannot be blamed on that account. In all fairness, equity and justice, an assessee should not be forced to pay a demand created by a Revenue Authority unless the order creating such demand has undergone the scrutiny of at least one independent forum".*

17. In another judgment reported as Sun Rise Bottling Co. Pvt. Ltd Versus Federation of Pakistan, 2006 PTD 1368 it was held as under:-

*"2. The Hon'ble Supreme Court has laid down that access to justice is a fundamental right. In the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445), it has been held that an essential feature of such right is the determination of any grievance or dispute by an*

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*independent Tribunal. Based on that principle and adopting the view of this Court expressed in the Z.N. Export case, it is directed that the respondent No.5 shall not press for recovery of the impugned dues from the petitioner who shall appear before the learned Appellate Tribunal through an appropriate application seeking final adjudication of this pending appeal. The learned Appellate Tribunal shall endeavour to decide the petitioner's appeal within a period of three months from the date of receipt of certified copy of this order. During such period coercive recovery of the impugned dues by the respondents shall not be resorted”.*

18. The perusal of the above case laws clearly established that the vacation of stay and coercive recovery of tax dues during the pendency of appeal is not a good practice and the same should be avoided in the interest of justice and fair play.

19. The learned representative of the appellant apprehends coercive action on the part of the department and requested to grant stay even after disposal of this appeal and at least seven day stay after the disposal of appeal by Commissioner (Appeals). The apprehension of the appellant has force. In case the Department during pendency of appeal attached the bank accounts of the appellant it will cause loss of business and reputation.

20. Keeping in view that the appeal of appellant is still pending before the Commissioner (Appeals) and the appellant has also deposited Rs. fifty million with SRB and the appeal is fixed for hearing it appears appropriate to provide a fair chance to the appellant to get its appeal decided on merits.

21. In view of above, this appeal is allowed and stay against recovery of tax dues is granted for a period of forty five days from today. The Commissioner (Appeals) will decide the appeal within that period and in case the appeal is decided against the appellant further seven days-time is allowed to the appellant to avail remedy available to it under law. In case the Commissioner (Appeals) fails to decide the appeal within forty five days the Department will not take any coercive measure against the appellant. The time will start from the date of receipt of this order.

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22. The appeal and stay application is disposed of in the above terms. The copy of this order may be provided to the learned representatives of the parties.

Karachi.

Dated: 31.07.2023

  
(Justice<sup>®</sup> Nadeem Azhar Siddiqi)  
CHAIRMAN


Copies supplied for compliance:-

1. The Appellant through authorized Representative.
2. The Assistant Commissioner (Unit-30-A), SRB, Karachi.
3. The Commissioner (Appeals-III), SRB, Karachi.

Copy for information to:-

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

Certified to be True Copy  
  
04-08-2023  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

04-08-2023  
Order issued on  
  
Registrar

04-08-2023  
Order Dispatched on  
  
Registrar