

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, ATKARACHI

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APPEAL NO. AT-91/2023

M/s Telenor LDI Communication,  
(Pvt.) Ltd. (SNTN: S2046004-3)  
Plot No.55, River View Avenue Bock-B,  
Gulberg Greens Islamabad..... Appellant

**Versus**

The Assistant Commissioner (Unit-01),  
Sindh Revenue Board, (SRB)  
2<sup>nd</sup> Floor, Shaheen Complex,  
M.R. Kayani Road, Karachi..... Respondent

Date of filing of appeal: 27.06.2023

Date of hearing: 31.07.2023

Date of Order: 31.07.2023

Mr. Arsalan Siddiqui, ACMA and Mr. Junaid Siddiqui, CIMA for the appellant.

Mr. Shareef Malik, DC-DR, SRB and Mr. Yousuf Bukhari, DC-SRB for the respondent.

**ORDER**

**Nadeem Azhar Siddiqi:** This appeal has been filed by the appellant challenging the Order dated 05.06.2023 passed by the Commissioner (Appeals) in Appeal No. 03/2023 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 hundred twenty days.



02. The brief facts of the case are that the Assessing Officer (AO) passed Order-in-Original (OIO) No. 2739/2022 dated 22.11.2022 against the appellant determining the Sindh Sales Tax (SST) at Rs.18,919,187/- along-with penalty and default surcharge. The said OIO was challenged by the appellant before Commissioner (Appeals) by way of filing Appeal No. 03/2023 along-with an application for grant of stay of recovery of tax dues. The stay was granted on 13.01.2023 which remained effective for one hundred and twenty days and after expiry of statutory period of one hundred twenty days the stay was vacated on 05.06.2023.

03. The appellant challenged the said order of vacating the stay before this forum. The appeal was taken up for hearing on 14.07.2023 on which date the stay was granted.

04. The learned representative of the appellant submitted as under:-

- i. The SCN issued by the respondent was time barred. The provision under which the time for issuance of SCN was extended from five years to eight years was challenged before the High Court of Sindh which has dismissed the petitions and the order of the High Court of Sindh was challenged before the Supreme Court of Pakistan and the SCB was directed to maintain status quo and during the status quo no tax liability could be created. The coercive recovery of tax dues during pendency of the appeal before the Commissioner (Appeals) and without determination of the dispute by an independent forum is not warranted in law and the same has always deprecated by Superior Courts.
- iii. The time frame provided under sub-section (4) of section 58 of the Sindh Sales Tax on Services Act, 2011 (The Act) is not mandatory but directory and where the taxpayer is not guilty of delaying the appeal proceedings the stay could be extended beyond one hundred and twenty days.
- iv. The appeal is pending for want of preparation of reconciliation statement by the respondent and the appellant was not instrumental in delaying the disposal of the appeal.

04. The learned DC-SRB in reply submitted as under:-



- i. The time frame provided under sub-section (4) of section 58 of the Act is mandatory and the stay could not be extended beyond one hundred twenty days.
- ii. The reconciliation statement was delayed for want of documents from the appellant.
- iii. The protection under proviso to sub-section (1) of section 66 of the Act is available to the appellant and on deposit of 25% of tax dues the appellant will get stay order against coercive recovery of tax dues.

05. The learned representative of the appellant in rebuttal submitted that all required evidence and material with supporting documents were provided to the DC-SRB and Commissioner (Appeals), and the delay in preparation of reconciliation statement was on the part of the department.

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

07. This appeal has been filed by the appellant against the order dated 05.06.2023 passed by the Commissioner (Appeals) refusing to grant further stay on expiry of one hundred and twenty days. While, refusing to grant further stay the Commissioner (Appeals) has referred to the proviso to sub-section (1) of section 66 of the Act, 2011.

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 DC. The Commissioner (Appeals), SRB during pendency of appeal vacated the stay on the ground that statutory period has 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 their right. The 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 redressal of their 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 granted 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. 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*



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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 Superintending 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 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).*



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12. The Commissioner (Appeals) should not vacate the stay during the pendency of appeal before him mechanically merely for the reason that the time frame provided in law was lapsed and should apply his mind and consider who was guilty of delaying the proceedings.

13. The Appellate Tribunal Inland Revenue in a 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" (emphasis supplied).*

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 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*



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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 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*

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copy of this order. During such period coercive recovery of the impugned dues by the respondents shall not be resorted”.

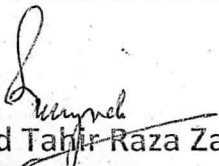
18. The perusal of the above case laws clearly established that the vacation of stay and coercive recovery of tax dues during the pendency of appeal is not a good practice and the same should be avoided in the interest of justice and fair play.

19. The learned representative of the appellant apprehends coercive action on the part of the department and requested that in case the appeal is granted against it a stay of seven days after disposal of this appeal may be granted. 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) we in the interest of justice grant stay to the appellant from coercive recovery subject to deposit of rupees 2 million with SRB within 14 days from today. In case the amount is not deposited within above statutory period the stay stands vacated without any further order.

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.

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

  
(Syed Tahir Raza Zaidi)  
Member Technical

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

Order Dispatched on 04-08-2023  
  
Registrar

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



Karachi

Dated: 31.07.2023

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.
4. The Commissioner (Legal), SRB.

Copy for information to:-

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

