

Form No: HCJD/C-121
ORDER SHEET

**IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT**

Case No. Writ Petition No. 7636 of 2017.

Shahnawaz Proprietor Tooba
Traders.

Versus

Appellate Tribunal Inland Revenue,
etc.

S. No of order /proceedings	Date of order of proceeding	Order with signature of Judge, and that of Parties or counsel, where necessary
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15.03.2017

Mr. Mudassar Shujaiddin, Advocate for the petitioner.
Mr. Sarfraz Ahmad Cheema, Advocate for the respondents.
Mian Tariq Ahmed, Deputy Attorney General for Pakistan,
on Court's call.

Petitioner has challenged order dated 28.02.2017 passed by Appellate Tribunal Inland Revenue ("**Appellate Tribunal**") whereby application for grant of stay was refused.

2. Brief facts are that an appeal was filed by petitioner before Appellate Tribunal challenging competence of Commissioner (Appeals) to remand the case to Taxation Officer for re-adjudication. An application, for restraining the Taxation Officer from re-assessment meanwhile, was also moved. The application was dismissed, through impugned order, with the observation that Appellate Tribunal is not vested with the power to stay re-adjudication proceedings.

3. Learned counsel for the petitioner placed reliance on an unreported judgment by Hon'ble Supreme Court in C.P. No.53 of 2007 and 83 of 2012 wherein earlier judgment in *Imran Raza Zaidi v. Government of Punjab (1996 SCMR 645)* was followed. He argued that order to decline interim relief is against the law laid down.

4. Learned DAG and Mr. Sarfraz Ahmad Cheema, Advocate, on Court's call, after going through file opposed the arguments, submitting that jurisdiction of Appellate Tribunal under Section 131(5) of the Income Tax Ordinance, 2001 ("**Ordinance**") is limited. Further submitted that this petition against order of Appellate Tribunal is not maintainable, because the impugned order could only be challenged through Reference Application under Section 133 of the Ordinance.

5. Heard. Record perused.

6. Second objection, raised by respondent side, on maintainability of petition, is examined first. An order on application for interim relief is required to be passed, by Appellate Tribunal, under the Section 131(5) of the Ordinance. Whereas, reference application, before Division Bench of this Court is filed under Section 133(1) of the Ordinance, which is reproduced hereunder for facility:-

"133. Reference to High Court.- (1) Where the Appellate Tribunal has made an order on an appeal under section 132, the taxpayer or Commissioner may, by application in such form and accompanied by such documents as may be prescribed, require the Appellate Tribunal to refer any question of law arising out of such order to the High Court."

Perusal of the subsection shows that Reference Application can be filed against an order by Appellate Tribunal communicated under Section 132(7) of the Ordinance. The subsection (7) envisages communication of Appellate Tribunal's order passed under the Section 132, to the taxpayer and the Commissioner. The Section 131 provides procedure for filing appeal, whereas, the Section 132 deals with the power of Appellate Tribunal for disposing of the appeal filed before it. Appeals are decided through final order under the latter section and under

subsection (5) of the former section, application for interim relief is decided during proceeding of main appeal. Both the orders, being distinct in nature and character, cannot be treated alike for the purpose of reference application, under the Section 133, before this Court.

These provisions were examined, earlier, by Division Bench of this Court in The Commissioner Inland Revenue v Tariq Mahmood etc. (2015 PTD 120) and The Commissioner Inland Revenue v M/s Macca CNG Gas Enterprises etc. (2015 PCTLR 851). It was held that Reference Application was not maintainable against an order passed under Section 221 of the Ordinance for refusal to rectify an earlier order. Ratio of the judgment, to this extent, is applicable to this case as well. Reference application can only be filed against an order under the Section 132, deciding appeal finally. No remedy is provided under the statute against an order, under Section 131(5), for refusing to grant stay or interim relief, hence petition under Article 199(1)(a)(ii) of Constitution of the Islamic Republic of Pakistan, 1973 is maintainable. This Court is satisfied that no other adequate remedy is provided by law against the impugned order.

7. Before looking into the extent of Appellate Tribunal's jurisdiction under subsection (5) of the Section 131, its examination is necessary, therefore, is reproduced for ease of reference:

“131. Appeal to the Appellate Tribunal.-

(5) Notwithstanding that an appeal has been filed under this section, tax shall, unless recovery thereof has been stayed by the appellate Tribunal, be payable in accordance with the assessment made in the case.

Provided that if on filing of application in a particular case, the Appellate Tribunal is of the opinion that the recovery of tax levied under this Ordinance and upheld by the Commissioner (Appeals), shall cause undue hardship to the taxpayer, the Tribunal, after

affording opportunity of being heard to the Commissioner, may stay the recovery of such tax for a period not exceeding one hundred and eighty days in aggregate.

Provided further that in computing the aforesaid period of one hundred and eighty days, the period, if any, for which the recovery of tax was stayed by a High Court, shall be excluded.

Section 131(5) of the Ordinance of 2001 provides jurisdiction to grant stay against recovery of tax up to 180 days, after providing opportunity of being heard to the Commissioner. It is silent regarding other ancillary or incidental interim reliefs.

Similar situation has already been examined by Hon'ble Supreme Court in some cases. In Imran Raza Zaidi's case, supra, the Apex Court examined the provision of Section 5 of Punjab Service Tribunal Act, 1974 wherein powers to grant stay were not provided; After observing that provisions of Civil Procedure Code could be invoked it was held;

"Apart from this, law is fairly well settled that even in the absence of an express provision for the grant of interim relief, the appellate Court/Tribunal having the power to grant the main relief can also grant the interim relief by suspending wholly or partially, the operation of the order under appeal before it as such a power is reasonably incidental or ancillary to the main appellate jurisdiction."

[emphasis supplied]

For these findings an earlier judgment in Sindh Employee's Social Security Institution and others Vs. Adamjee Cotton Mills Ltd (PLD 1975 SC 32) was relied upon. Jurisdiction of Social Security Court to stay execution of impugned order in absence of express provision, while hearing appeal, was the subject of this judgment. The August Court held; when there is no limitation on jurisdiction to grant partial relief, under express provision

conferring appellate jurisdiction, then grant of stay against execution of impugned order is an ancillary and incidental jurisdiction. The right of appeal was held to be of substance and not procedure. For better comprehension of the ratio, relevant excerpt from the judgment are reproduced:-

“The above is a general provision, which is not qualified by any limitation. It was observed in the ***Colonial Sugar Refining Co. v. Irving*** 1905 AC 369, that *a right of appeal where it exists, is a matter of substance and not mere procedure.* It is not disputed that the Social Security Court, on an appeal brought before it under the above section can set aside the order appealed against in its entirety or may grant even partial relief depending upon the facts of a particular case. *The question therefore, would really be, whether there is any limitation on the power or jurisdiction of the Social Security Court to grant partial redress. This partial redress may be as respects the quantum of liability or may be in point of time, when the liability under order made be the Institution may have to be discharged.* In other words, whether the Social Security Court can reverse the order appealed against, in its entirety and thus grant complete redress to the appellant before it, which ordinarily would happen at the final stage in the appeal, the Court will have no power to suspend the operation of the order during the pendency of the appeal, even if the circumstances of the case would eminently justify it?

To accept any such proposition, would indeed be to whittle down the substance of the Courts' appellate jurisdiction, which would be scarcely just or reasonable. *Strictly speaking, the matter does not fall to be governed by Order XXXIX, rule 1, C. P. C. In our opinion, the power to grant interim relief by suspending wholly or partially, the operation of the order appealed against is reasonably incidental or ancillary to the main appellate jurisdiction.* It would be wrong to regard the exercise of this incidental or ancillary power as enlargement of the appellate jurisdiction of the Court. Mr. Sarwana's argument, that in the absence of any provision in the Ordinance, corresponding to Order XXI, rule 26, or Order XXXIX rules 1 and 2, C. P. C. the Social Security Court will have no power to suspend the recovery of the amount of contribution either wholly or partly also overlooks the true nature of the 1965 Ordinance which is essentially a substantive law and is not designed to lay down the procedure in detail to be followed by the Institution or the Social Security Court. If the argument of the appellants' learned counsel was to

stretched to its logical conclusion then it would lead to a number of absurdities. For instance, there is no provision corresponding to Order XVII, rule 1, C. P. C. or section 344, Cr. P. C. to enable the Social Security Court to adjourn the case to a future date. It would indeed, be absurd to suggest that in the absence of any such provision, the Social Security Court will have no power to adjourn a case. This is sufficient to demonstrate the futility of the argument.

However, that may be, this Court's recent judgment in Commissioner of *Khairpur Division v. Ali Sher Sarki* **P L D 1971 S C 243**, is directly in point. That case arose out of an appeal against the order of a Tribunal constituted under West Pakistan Control of Goondas Ordinance, 1959, to the Commissioner under section 18 *ibid*. The question that arose for decision was, whether the Commissioner, in the absence of an express provision in that behalf, could suspend the operation of the impugned order during the pendency of the appeal before him. The Commissioner had declined to suspend the order in that case on the ground that section 18 of the Ordinance, apart from empowering the Commissioner to entertain and decide the appeal, did not expressly empower him to suspend the operation of the impugned order during the pendency of the appeal. The matter was then agitated in the High Court in certiorari and ultimately brought to this Court in appeal, and it was **held** that the power of the Divisional Commissioner to grant interim relief during the pendency of the main appeal before him was "ancillary" to the main appellate jurisdiction expressly conferred under section 18. This judgment in our opinion concludes the matter."

[emphasis supplied]

8. Appellate Tribunal, in exercise of appellate jurisdiction under the Section 132, can affirm, modify or annul an assessment or an order appealed against, in addition to remanding the case to Appellate Commissioner. To exercise this jurisdiction effectively, power to suspend the impugned order or to restrain Taxation Officer from passing assessment order, pursuant to the order impugned before it, falls within incidental and ancillary jurisdiction. Particularly when no restriction or limitation, on exercise of such ancillary or incidental power, is available in the subsection (5) of Section 131. Needless to observe that

allowing the Taxation Officer to complete re-assessment would not only lead to multiplicity of litigation but would frustrate the right of appeal before Appellate Tribunal if subsequent order is passed.

9. Under the circumstances, the impugned order is set aside. Application for grant of stay shall be deemed pending before the Appellate Tribunal, which shall be decided on merits.

Till decision, as directed, proceedings before the Taxation Officer shall remain suspended.

Disposed of.

(Shahid Jamil Khan)
Judge

Approved for Reporting.

Judge

Tahir Noor *