

OFFICE OF THE DIRECTOR LAW-II,
DIRECTORATE OF LAW LAHORE

Dated: 21/05/2019

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URGENT
COURT MATTER

Commissioners Inland Revenue,
TO: CITO and RTO-II Lahore,
Regional Tax Offices Gujranwala, Sialkot, Sargodha,
Faisalabad, Multan and Bahawalpur

Subject: HON'BLE LAHORE HIGH COURT LAHORE'S JUDGMENT DATED
10-04-2019 IN STR No.136 OF 2013 TITLED AS M/S STRONGMAN IDEAL
FURNITURE VS CIR & OTHERS

Kindly refer to the subject cited above.

The following question of law, arising out of the impugned orders
passed by learned ATIR, Lahore Benches, Lahore was pressed for the opinion of the
Hon'ble Court:

Whether the learned Tribunal misdirected itself to give finding:
*"compliance of Section 73 is mandatory as well as substantive
and cannot be termed as technical lapse"* while in fact the allegation
in the present case is that of procedure lapse, which is condonable?

The Hon'ble Court has answered the above question in para 11 as

*"11. In view of the above, since compliance of Section 73 to the
extent of making payment through banking channel is mandatory,
the answer to the proposed question is in negative i.e. against
applicant-taxpayer and in favour of respondent-department."*

In the light of above judgment, it is suggested that recovery
proceedings may please be initiated immediately in the above petitions. Moreover,
this issue is pending before the learned ATIR as well as Commissioner (Appeals) in
a large number of cases. In all those cases, application for early hearing may be filed
or a liaison in the light of judgment discussed above.
Encl: Copy of above judgment.

(SYED WALI MOD H. JAFRI)
Director Law-II

Chief(L-I)
S/Lit-SC)
SS/Lit-SC)
SS/T-I)
SS/T-II)
Chief(L-II)
S/Lit-III)
SS/L-A&A)
Chief(L-III)
S/Lit-IV)
SS/L-IV)
SS
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- ✓ The S.V.P. Chairman, Federal Board of Revenue, Islamabad
- ✓ The Member (Legal), Federal Board of Revenue, Islamabad
- ✓ The Member (Operation), Federal Board of Revenue, Islamabad
- ✓ Director, Directorate of Law, Lahore

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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT

STR No.136 of 2013

M/s Strongman Ideal Furniture
Versus
The Chief Commissioner Inland Revenue & others

J U D G M E N T

Date of hearing: 10.04.2019.
Applicants by: M/s Asif Ali, M.M. Akram, Usman Khalil,
H.M. Majid Siddiqui and Qamar-ud-Din
Ahmad, Advocates.
Respondent by: M/s Mian Yusuf Umar, Ch. Muhammad Zafar
Iqbal, Javed Akhtar, Shahzad Ahmad Cheema,
Fouziya Bakhsh, Shahid Sarwar Chahil and Ch.
Muhammad Yasin Zahid, Advocates / Legal
Advisors.

MUHAMMAD SAJID MEHMOOD SETHI, J.- This consolidated judgment shall decide instant Reference Application under Section 47 of the Sales Tax Act, 1990 ("the Act of 1990"), along with following connected cases, as common questions of law and facts are involved in these cases:-

1. STR No.122 of 2011 titled M/s Itehad Steel Industry v. Additional Collector-III (Adjudication), Collectorate of Customs, Lahore
2. STR No.291 of 2012 titled Commissioner Inland Revenue v. M/s Shahid Zaki & Co.
3. STR No.82 of 2013 titled The Commissioner Inland Revenue v. M/s Lucky Plastic Industries (Pvt.) Ltd.
4. STR No.268 of 2015 titled Commissioner Inland Revenue v. M/s Hasnain Cone Factory & another
5. STR No.17 of 2016 titled M/s Sher Bilal Impex (Private) Limited v. The Commissioner Inland Revenue
6. STR No.130 of 2016 titled Commissioner Inland Revenue v. M/s S.S. Metal House
7. STR No.23060 of 2017 titled Commissioner Inland Revenue v. Digital World (Pvt.) Ltd. & another

8. STR No.69636 of 2017 titled M/s H.M. United Centre v. The Commissioner Inland Revenue & others

9. STR No.74670 of 2017 titled Commissioner Inland Revenue v. M/s Badr-e-Munir Chemical Works (Pvt.) Ltd.

10. STR No.85888 of 2017 titled M/s Mian Abdul Sattar Sons Polypropylene Industries v. The Commissioner of Inland Revenue

2. The following question of law, asserted to have arisen out of the impugned order dated 12.09.2013, passed by learned Appellate Tribunal Inland Revenue, Lahore Bench, Lahore ("Appellate Tribunal"), has been pressed and argued for our opinion:-

"Whether the learned Tribunal misdirected itself to give finding: "compliance of Section 73 is mandatory as well as substantive and cannot be termed as technical lapse" while in fact the allegation in the present case is that of procedure lapse, which is condonable?"

3. Brief facts of the case are that a Show Cause Notice was issued to applicant-taxpayer confronting certain discrepancies, for the period from July 2007 to June 2008, which culminated in passing of order-in-original dated 08.10.2010. Feeling aggrieved, applicant-taxpayer filed appeal before CIR (Appeals), which was disposed of vide order dated 18.04.2011. Being dissatisfied, applicant-taxpayer filed second appeal before learned Appellate Tribunal, which was dismissed vide order dated 12.09.2013. The aforesaid orders have been assailed by applicant-taxpayer through instant Reference Application.

4. Learned counsel for applicant-taxpayer submit that learned Appellate Tribunal was not justified to uphold the order of CIR (Appeals) by holding that compliance of Section 73 of the Act of 1990 was mandatory as well as substantive in nature, which could not be termed as technical lapse. They further submit that learned Appellate Tribunal was required to adopt harmonious interpretation of Sections 3, 7 & 73 of the Act of 1990. In the end, they submit that impugned order has been passed while ignoring the earlier judgment of learned Income-Tax Appellate Tribunal reported as

[2010 PTD (Trib.) 1515], which renders the impugned order non-speaking within the contemplation of Section 24-A of the General Clauses Act, 1897, thus, the same is not sustainable in the eye of law. In support of their submissions, they have referred to Messrs Noon Sugar Mills Limited v. The Commissioner of Income-Tax, Rawalpindi (PLD 1990 Supreme Court 1156) and Commissioner of Income-Tax Company's II, Karachi v. Messrs National Food Laboratories (1992 PTD 570).

5. Conversely, learned Legal Advisors for respondent-department defend the impugned order and submit that no illegality or legal infirmity has been pointed out by applicant-taxpayer in the impugned order, passed by learned Appellate Tribunal, which is liable to be upheld under the law. In support of their contentions, they have placed reliance upon Allied Bank of Pakistan Ltd. v. Khalid Farooq (1991 SCMR 599), Messrs PFIZER Laboratories Limited v. Federation of Pakistan and others (PLD 1998 Supreme Court 64), Ghulam Hassan v. Jamshaid Ali and others (2001 SCMR 1001), Malik Muhammad Inam and others v. Federation of Pakistan and others (2006 SCMR 1670), Hashwani Hotels Limited v. Government of Pakistan through Secretary Ministry of Finance and others (2007 SCMR 1131), The Collector of Sales Tax, Gujranwala and others v. Messrs Super Asia Mohammad Din and Sons and others (2017 SCMR 1427), Messrs Kaloodi International (Pvt.) Ltd. and another v. Federation of Pakistan and others (PLD 2001 Karachi 311), M/s Mayfair Spinning Mills Ltd., Lahore v. Customs, Excise and Sales Tax Appellate Tribunal, Lahore and two others (PTCL 2002 CL. 115), Collector, Sales Tax and Center Excise (West), Karachi v. Messrs Al-Hadi Industries (Pvt.) Ltd. (2002 PTD 2457), Commissioner of Income Tax, Companies-I, Karachi v. Messrs ORIX Leasing Pakistan Ltd., Karachi (2007 PTD 1154), United Sugar Mills Ltd. through Executive Director Finance v. Federal Board of Revenue through Chairman and 5

others (2015 PTD 152) and M/s Mahalaxmi Cotton Ginning v. The State of Maharashtra & Ors. [(2012) 51 VST 1 (Bom.)].

6. Arguments heard. Available record perused.

7. The precise question pressed for our opinion is whether compliance of Section 73 of the Act of 1990 in making payment through banking channel, is mandatory or directory. For facility of reference, Section 73 of the Act of 1990 is reproduced hereunder:-

73. Certain transactions not admissible.-- (1) Notwithstanding anything contained in this Act or any other law for the time being in force, payment of the amount for a transaction exceeding value of fifty thousand rupees, excluding payment against a utility bill, shall be made by a crossed cheque drawn on a bank or by crossed bank draft or crossed pay order or any other crossed banking instrument showing transfer of the amount of the sales tax invoice in favour of the supplier from the business bank account of the buyer

Provided that online transfer of payment from the business account of buyer to the business account of supplier as well as payments through credit card shall be treated as transactions through the banking channel, subject to the condition that such transactions are verifiable from the bank statements of the respective buyer and the supplier.

(2) The buyer shall not be entitled to claim input tax credit, adjustment or deduction, or refund, repayment or draw-back or zero-rating of tax under this Act if payment for the amount is made otherwise than in the manner prescribed in sub-section (1), provided that payment in case of a transaction on credit is so transferred within one hundred and eighty days of issuance of the tax invoice.

(3) The amount transferred in terms of this section shall be deposited in the business bank account of the supplier, otherwise the supplier shall not be entitled to claim input tax credit, adjustment or deduction, or refund, repayment or draw-back or zero-rating of tax under this Act.

Explanation.-- For the purpose of this section, the term "business bank account" shall mean a bank account utilized by the registered person for business transactions, declared to the Commissioner in whose jurisdiction he is registered through Form STR1 or change of particulars in registration database "

8. Perusal of above provisions shows that consequence of non-compliance of payment through banking channel has been clearly given if such a person is not entitled to claim input tax credit, adjustment or deduction, or refund etc. In order to determine whether a provision of statute can be termed mandatory or

directory, the real intention of the Legislature is to be seen together with the scheme of the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceedings. Crawford opined that as a general rule, those provisions that relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than of substance, are directory.

9. Section 33 of the Act of 1990 deals with offences and penalties and its clause 16 provides penalty for a person who fails to make payment in the manner prescribed under Section 73, as follows:-

Offences.	Penalties.	Section of the Act to which offence has reference.
(1)	(2)	(3)
...
16. Any person who fails to make payment in the manner prescribed under section 73 of this Act.	such person shall pay a penalty of five thousand rupees or three per cent of the amount of tax involved, whichever is higher.	73

Reference can be made to the cases reported as The State through Regional Director ANF v. Imam Bakhtish and others (2018 3CMR 2039), Ansar Abbas v. Judge Family Court and others (2018 CLC 1761) and Messrs Ainmaz (Pvt.) Limited v. Federation of Pakistan, through the Secretary, Ministry of Law, Federal Secretariat, Islamabad and 2 others (2018 PTD 1966).

In the case of Ghulam Hassan supra, the Hon'ble Apex Court has held that where the Legislature has provided penalty consequences for the non-compliance of a provision, such provision

is "mandatory" in nature and where no such consequences are provided, the provision is "directory". The relevant observations are as under:-

"13. It is an established principle of law that where the Legislature has provided a penalty / consequences for the non-compliance, the said provision would be mandatory in nature and where such consequences are not provided it would be termed as directory. Reference in this behalf is made to the case of Maulana Nur-ur-Haq v. Ibrahim Khalil (2009 SCMR 1305) where it was held as under:-

"There is yet another aspect of the matter to which it is necessary to refer to section 32 of the Act appears to be mandatory, in view of the expression 'shall' used therein, but in fact is directory for want of a penal clause. No doubt there exists no faultless acid test or a universal rule for determining whether a provision of law is mandatory or directory and such determination by and large depends upon the intention of Legislature and the language in which the provision is couched but it is by now firmly settled 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. It was held in Niaz Muhammad Khan v. Mian Fazal Razaq (PLD 1974 SC 134) that as a general rule a statute is understood to be directory when it contains matters merely of direction but it is mandatory when those directions are followed by an express provision that in default of following them the facts shall be null and void. In Major Shujat Ali v. Mst. Surrya Begum (PLD 1973 SC (AJ&K) 118) it was held that in the absence of a penalty for failure to follow the prescribed procedure the provisions are to be taken to be directory and not mandatory. The provisions of section 32 of the Act being directory cannot in manner override or dilute the provisions of section 31 of the Act which are mandatory by all standards."

Reference is also made to the case of Mafzullah v. Monal Ullah and others (PLD 1963 Dacca 318) wherein it was observed as under:-

"9. When a statute is passed for the purpose of enabling something to be done, it may be either a mandatory enactment, or a directory one, the difference being that a mandatory enactment must be obeyed or fulfilled exactly, but is sufficient, if a directory enactment be obeyed or fulfilled substantially. If a mandatory enactment is not strictly complied with, the thing done shall be invalid. On the other hand, if an enactment is merely directory, it is immaterial, so far as relates to the validity of the thing done, whether the provisions of that enactment are strictly complied with or not. (See Craies on Statute Law, Fifth Edition, pages 240-241). There is no general rule as to when an enactment is to be considered mandatory and

when merely directory and it is the duty of the Court to ascertain the real intention of the Legislature having regard to the whole scope and purposes of the enactment to be construed."

10. It is settled law that when the word "shall" is used in a provision of law, it is to be construed in its ordinary grammatical meaning and normally the use of word "shall" by the legislature brands a provision as mandatory, especially when an authority is required to do something in a particular manner. Reference is made to Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited (PLD 2012 Supreme Court 247), wherein while interpreting Order VII Rule 11 CPC, the Hon'ble Apex Court held that the Courts were bound by the word "shall" used therein which made it mandatory to reject a plaint if it appeared from the statement in the plaint that it was barred by any law. Needless to say that the word "shall" or presence of penal consequences in case of non-compliance is not the sole factor rather the legislative intent, object and purpose of a provision are yardsticks to determine its mandatory or directory nature.

11. In view of the above, since compliance of Section 73 to the extent of making payment through banking channel is mandatory, our answer to the proposed question is in negative i.e. against applicant-taxpayer and in favour of respondent-department.

This Reference Application, along with connected applications, is decided against applicant-taxpayer.

12. Office shall send a copy of this order under seal of the Court to learned Appellate Tribunal as per Section 47 (5) of the Act of 1990.

(Muzamil Akhtar Shabir)
Judge

(Muhammad Sajid Mehmood Sethi)
Judge

Approved for reporting.

Judge

Judge