Form No.HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT.

W.P. No.19101 of 2016.

Malik Faisal Imran **VERSUS** Federation of Pakistan etc

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties of counsel, where necessary
	25.05.2017	Mr. Muhammad Mohsin Virk Advocate for the petitioner. Mrs. Kausar Parveen Advocate for respondents.

This order shall decide the present writ petition as well as writ petition No.14125 of 2016 as common question of law arising for consideration in both the writ petitions is the interpretation of the expressions “set aside” and “annulled" as used in section 45B (2) of the Sales Tax Act, 1990 (the **Act**).

2. Facts of the case in brief are that respondent No.4 had earlier passed assessment order No.29 of 2014 dated 21.05.2014 against the petitioner, which order was challenged before the Commissioner Inland Revenue (Appeals). The Commissioner Inland Revenue (Appeals) by his order dated 11.01.2016 annulled the assessment order dated 08.04.2014. Respondent N.4 once again issued hearing notice dated 07.05.2016 to the petitioner for proceeding afresh with the assessment proceedings, which notice has been assailed in this writ petition.

3. The learned counsel for the petitioner submitted that the Commissioner Inland Revenue (Appeals) “annulled” the assessment order against which the respondent department did not file any further appeal and as such the said order attained finality. It was, therefore, contended that no further proceedings

could be initiated by respondent No.4 in regard to the assessment proceedings. It was further stated that the types of orders the Commissioner Inland Revenue (Appeals) can pass on hearing an appeal are mentioned in section 45B(2) of Act which include confirming, varying, altering, setting aside or annulling the decision appealed against. It was accordingly argued that where a decision is annulled, the same cannot be re-opened by the assessing officer and the only remedy available to the aggrieved party is to approach the Appellate Tribunal Inland Revenue. Reference in this regard is made by two judgments reported as Glaxo Smith Kline Pakistan Limited, Karachi v. Collector of Customs, Sales Tax and General Excise (adjudication) Karachi III **2004 PTD 3020** and Saeed-ur-Rehman v. Assistant Commissioner of Income Tax, Circle 16 Abbotabad etc. **2002 PTD2379**.

4. Learned counsel appearing on behalf of respondents, on the other hand, submitted that the writ petition against the hearing notice is not maintainable and any objection the petitioner has with regard to the notice must be raised before respondent No.4.

5. Arguments heard and record perused.

6. In order to decide the controversy, it will be expedient to set out the relevant provision of the Act which is in issue in this petition.

> **45B. Appeals.—** (1) Any person, other than the Sales Tax Department, aggrieved by any decision or order passed under sections 10, 11, 25, 36, or 66, by an officer of Inland Revenue may, within thirty days of the date of receipt of such decision or order, prefer appeal to the Commissioner Inland Revenue (Appeals):
> Provided that an appeal preferred after the expiry of thirty days may be admitted by the

> Commissioner Inland Revenue (Appeals) if he is satisfied that the appellant has sufficient cause for not preferring the appeal within the specified period: Provided further that the appeal shall be accompanied by a fee of one thousand rupees to be paid in such manner as the Board may prescribe.
> (2) The Commissioner Inland Revenue (Appeals) may, after giving both parties to the appeal an opportunity of being heard, pass such order as he thinks fit, confirming, varying, altering, setting aside or annulling the decision or order appealed against: (emphasis supplied)

According to the petitioner's counsel there is a material distinction between *setting aside* an assessment and *annulment* of assessment and that in the former case it shall be open to the assessing officer to make a fresh assessment in accordance with law whereas in the latter case, the assessment order becomes *non-est.* In another words, the argument of the petitioner's counsel proceeds on the assumption that the expressions "set aside" and "annul" are mentioned as alternative to each other in section 45B(2) of the Act. It was argued that where the assessing officer had no jurisdiction in the first place to assess an order for annulment of an assessment is liable to be passed. Barring this eventuality, the learned counsel went on to contend, where an error has been committed in the assessment process which require some further steps to be taken by the assessing officer or where there was some procedural lapse on the part of the assessing officer in passing the assessment order, it can be set aside with a further direction to the assessing officer to make assessment afresh.

It was also contended that the appellate authority must annul the assessment order where the assessment proceedings are a nullity which is to say

that the assessing officer had no jurisdiction under the law to enter upon the proceeding and/or to make a final order of assessment. The logical consequence for annulment of an assessment order, according to the learned counsel, is that it ceases to exist. In case of a procedural lapse in the proceedings, which is capable of being cured, or if the assessment was made without holding a proper inquiry, however, the assessment is liable to be set aside. In the latter case, according to the learned counsel, the issue of lack of jurisdiction is not present and as such the appellate authority ought to and in fact would be bound to remand the matter and direct the assessing officer to make a fresh assessment.

8. This Court is in agreement with the argument that where the assessment order or proceedings in which it was passed was tainted on account of some jurisdictional defect and the resultant order proceedings has been so declared by the appellate authority, the assessment proceedings cannot be revived. Section 45B(2) of the Act is, however, silent in regard to the consequences if the appellate authority annuls or sets aside the order challenged in appeal. To put it in another way, section 45B(2) of the Act, by its terms, does not cast any duty on the appellate authority to give directions to the adjudication officer for passing a fresh order in case the order appealed against is set aside. Any interpretation that in case of setting aside of an assessment order, the assessment proceedings get revived and not otherwise would not be in consonance with the text of section 45B(2) of the Act. What would happen if the appellate authority while overturning the decision of the assessing

authority on the ground of procedural lapse declares the assessment order to have been annulled? Will the assessment order, in such an eventuality, be construed to have been wiped out and be treated as void *ab initio*? The answer, in considered the opinion of this Court, is in negative as the text of section 45B(2) does not say so. It is the grounds of the appeal and reasons for which the assessment order was overturned on the basis of which the appellate order will have to be interpreted for ascertaining if assessment proceedings are to be recommenced. Upon this view of the matter, the expression "annulled" and "set aside" used in section 45B(2) of Act appears to be interchangeable.

9. If section 45B(2) of the Act does not command the appellate authority to give a clear direction to the adjudication authority for restoration of the assessment proceedings in consequence of overturning of the order-in-original, it should of necessity fall on the assessing officer to make a determination from the tenor of the order of the appellate authority as to whether the assessment proceedings get revived or not. In case, the assessing officer comes to the conclusion that the assessment order was not set aside by the appellate authority on account of a jurisdictional defect, he shall have to put the taxpayer to notice regarding re-initiation of assessment proceedings notwithstanding the type of expression employed by the appellate authority from the text of section 45B(2) of the Act and in such eventuality the taxpayer shall have the opportunity to take all the objections before him regarding the validity of the proceedings.

10. In the present case, the petitioner has approached this Court against the issuance of notice issued by the assessing authority by claiming that the order was annulled which did not have the effect of reviving the assessment proceedings. It is, therefore, the duty of this Court to examine what is the tenor and scope of the order of Commissioner Inland Revenue (Appeals) and that can only be done by reading the order as a whole with reference to the grounds taken in appeal. Assessment order dated 08.04.2014 was an *ex-parte* order against which an appeal was preferred by the petitioner before the Commissioner Inland Revenue (Appeals). From the perusal of order dated 11.01.2016 passed by the Commissioner Inland Revenue (Appeals), it is apparent that the ground of appeal before the first appellate authority was that the petitioner was not served with notice of the hearing before respondent No.4/Deputy Commissioner Inland Revenue. This was the ground which had to be adjudicated upon by the first appellate authority. It is further apparent that the Commissioner Inland Revenue (Appeals) accepted the stance of the petitioner and observed that "…..*neither any service of notice was made nor proper hearing opportunity was accorded.*" In conclusion, it was held by the Commissioner Inland Revenue (Appeals) that "……*the impugned order is not maintainable which is accordingly annulled.*" There is no way that the decision based on the said ground could be termed as "annulment" of the decision of respondent No.4 for declaring it as *non-est*. It is apparent that the assessment order passed by respondent No.4 was the result of an irregular

exercise of power with no allegation that he lacked the jurisdiction to pass the order.

11. The unfortunate use of expression by the Commissioner Inland Revenue (Appeals) by describing the order as having been annulled does not mean that the decision appealed against has been declared void *ab initio*. This construction is consistent with the facts of the present case where the allegation before the Commissioner Inland Revenue was that the petitioner was not served with a notice of the proceedings pending before respondent No.4. It is manifest from the perusal of order dated 11.01.2016 that assessment order dated 08.04.2014 was not declared as void. As such, the logical result of the order passed by the appellate authority was that the assessment proceedings got revived and respondent No.4 was well within his right to have sent the notice in question to the petitioner. It is the conclusion of this Court that the petitioner's contention that the order passed by respondent No.4 was declared by the Commissioner Inland Revenue (Appeals) to be *ab initio void* is not correct. The assessment order did not suffer from any legal infirmity of jurisdiction and thus respondent No.4 was justified in sending the fresh notice of hearing to the petitioner.

12. In the result, this writ petition being devoid of any merit is **dismissed**.

(Shams Mehmood Mirza)
Judge.

Announced in open Court on 30.06.2017.

Judge.

Approved for reporting.

Judge.

*Ihsan**