JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.33566 of 2017

M/s DH Travels

Versus

Commissioner Enforcement & others

J U D G M E N T

Date of Hearing.	30-01-2018
PETITIONERS BY:	Mr. Hamza H. Rashid, Advocate.
RESPONDENTS BY:	Mr. Asfand Yar Khan Tareen, Advocate.

Shahid Karim, J:- This petition challenges the order dated 21.03.2017 (**"the second order"**) passed under Section 52(1) read with section 60 of the Punjab Sales Tax on Services Act, 2012 (**"the Act, 2012"**). One of the defences set up by the petitioner to the adjudication undertaken by the respondent No.2 vide the impugned adjudication order was that the contents of the show cause notice were caught by the principle of *res judicata* as the show cause notice envisaged the allegations which had already been determined on a previous occasion and had culminated in the favour of the petitioner. It is pertinent to mention that an order in original was passed on 15.09.2016 (**"the first order"**) by the same officer i.e. respondent No.2. An appeal was filed which was dealt with by the Commissioner Appeals through an order dated 21.12.2016 and the appeal filed by the petitioner was allowed on the following basis:-

> *"12. Without going into the details of the facts and merits of the case and other legal grounds raised, the appeal is decided only on point of violation of prescribed limitation. In view of the above discussion and the case-laws cited supra the time limit of 120 days as envisaged in section 52(4) has patently lapsed therefore the appeal is accepted and the impugned order is declared to have been made without lawful authority, of no legal effect and is hereby annulled."*

2. Thus it was held that the period of 120 days mentioned in section 52(4) was a mandatory requirement and since the said period had lapsed when the adjudication order dated 15.09.2016 was passed, that order had no legal effect and was thereby annulled in appeal by the Commissioner (Appeals). No further appeal was filed by the department against the said order passed in appeal and this is admitted on all hands. The learned counsel for the Punjab Revenue Authority (PRA) contends that it was not necessary to have filed an appeal against the order passed by the Commissioner (Appeals) as PRA was well within its right to have issued a fresh show cause notice and to pass an assessment order on the same facts and with regard to the same allegations. This contention has been put forth on the ground that the appellate order dated 21.12.2016 was not passed on merits and was decided on a threshold question regarding the mandatory nature of the period prescribed by section 52(4) of the Act, 2012.

3. To reiterate, it is common ground between the parties that the second order passed under Section 52 and impugned herein has been passed on the same

allegations as were contained in the earlier show cause notice which culminated in the first order dated 15.09.2016. The question that engages this Court is whether the subsequent show cause notice and the ensuing second order could have been issued on the same allegations.

4. For the purpose of determination of the present controversy, section 52 will have to be referred to and for facility it is reproduced as under:-

> *"**52. Recovery of tax not levied or short-levied**.– (1) Where by reason of inadvertence, error, misconstruction or for any other reason, any tax or charge has not been levied or has been short levied, the person liable to pay such amount of the tax or charge shall be served with a notice, within five years of the relevant tax period requiring him to show cause for payment of the amount specified in the notice.*
>
> *(2) Where by reason of some collusion, abetment, deliberate attempt, misstatement, fraud, forgery, false or fake documents–*
>
> *(a) any tax or charge has not been paid or is, short paid, the person liable to pay such tax shall be served with a notice within five years of relevant tax period, requiring him to show cause for non-payment of such tax; and*
>
> *(b) any amount of the tax is refunded which is not due, the person obtaining such refund shall be served with a notice within five years of the receipt of such refund to show cause for recovery of such refund.*
>
> *(3) The officer shall, after considering the objections of the person served with a notice under sub-sections (1) or (2) or if the objections are not received within the stipulated period, determine the amount of the tax or charge payable by him and such person shall pay the amount so determined.*
>
> *(4) Any order under sub-section (3) shall be made within one hundred and twenty days of issuance of the notice to show cause or within such extended period as the officer may, for reasons to be recorded in writing, fix provided that such extended period shall not ordinarily exceed sixty days.*

> *(5) In computing the period specified in sub-section (4), any period during which the proceedings are adjourned on account of a stay order or proceedings under section 69 or the time taken through adjournments by the petitioner not exceeding thirty days shall be excluded."*

5. The statutory structure of section 52 provides for issuance of a show cause notice where a tax or charge has not been levied or has been short levied on the person liable to pay such amount of tax. Sub-section (4) will have a gravitational pull on the resolution of the controversy. It provides for a certain time frame within which an order under sub-section (3) shall be passed by the officer issuing the show cause notice. It provides that an order shall be made within 120 days of the issuance of the notice to show cause or within such extended period as the officer may for reasons to be recorded in writing fix provided that such extended period shall not exceed sixty days. This provision was interpreted by the Commissioner (Appeals) while deciding the appeal on 21.12.2016 to have a mandatory effect and according to the Commissioner (Appeals) the order of the officer passed under Section 52 was outwith his authority since it had been passed beyond the period specified under sub-section (4). By the order dated 21.12.2016, the adjudication made by the officer was held to be without lawful authority and of no legal effect and was thereby annulled. Plainly, the purpose of the order passed by the Commissioner (Appeals) was that it erased the first order and thereby annulled it. It would

be a travesty of justice according to the petitioner and a contradiction in terms if the respondent department was permitted to issue a fresh show cause notice on the same facts and to require the petitioner to go through the rigours of adjudication although in a previous round of litigation the issues in the show cause notice already stand decided in favour of the petitioner and the decision of the officer passed under Section 52 has been annulled.

6. At the heart of the petitioner's arguments is the doctrine of *res judicata.* It has been argued that the impugned show cause notice is caught by the mischief of *res judicata* as the matter has finally been determined by the appellate tribunal and the claim against the petitioner cannot be re-opened which would impinge upon the rights of the petitioner as in the estimation of the petitioner the matter has attained finality and cannot be determined afresh.

7. PRA seriously disputes the proposition that the doctrine can be invoked to aid by the petitioner in the peculiar circumstances of the case. The principles of *res judicata* are enshrined in section 11 of the Code of Civil Procedure, 1908. However, by virtue of section 141, CPC the procedure provided for the civil court in regard to suits shall be followed in all proceedings in any court of civil jurisdiction. This provision in my opinion extends the principles of *res judicata* to all proceedings of civil jurisdiction. Doubtless, the

proceedings in the order in original and the appeal before the Commissioner Appeals were before tribunals exercising civil jurisdiction. However, even if section 11 is not applicable in the strict sense to the proceedings under the Act, 2012, the general principles of *res judicata* will be applicable as the rule is based on the doctrine of public policy. That doctrine simply is that where there is a judgment *inter parties*, it will prevent a fresh suit between them regarding the same matter (**PLD 1987 SC 145**). It has been settled by respectable authority that the doctrine is of universal application and in fact a fundamental concept in the organization of every civilized society and requires that every case should be fairly tried and public policy demands that having been tried once all litigation about that cause should be concluded between those parties. For, if it were not for the conclusive effect of such determinations, there will be no end of litigation and the rights of persons will be embroiled in endless litigation. The doctrine is also based on the considerations that it would result in utmost hardship to an individual if he were to be vexed twice for the same cause. It is also in the interest of the state as a provider of justice and the protector of the people's right that there should be an end to litigation. However, for the rule to be made applicable, certain pre-conditions must be urged to exist and for the doctrine of *res judicata* to be invoked. These rules

have once again been settled by the courts over the years and can be summarized as follows:-

> *"(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually, or constructively, in the former suit.*
> *(2) The former suit must have been a suit between the same parties or between parties under whom they or any one of them claim.*
> *(3) The parties as afore-said must have litigated under the same title in the former suit.*
> *(4) The court which decided the former suit must have been a court competent to try the subsequent suit in which such issue is subsequently raised.*
> *(5) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit."*
>
> *The enumerations made in section 11 CPC, also embody the above principles.*

8. It is a fallacy to argue that the doctrine of *res judicata* does not apply to these proceedings. It must be borne in mind that that doctrine is based on public policy and it is indeed a matter of public policy that dispute and controversies should have finality attached to them. Litigants should have the assurance that their rights and liabilities, one determined, will not be relitigated and will bind the parties in a future claim. The rendering of a final judgment on the merits of the claim in a previous action involving the same litigants will act as a preclusion of a subsequent action. At the heart of the doctrine is the twin goal: stability and certainty. In *The Law of Judicial Precedent* by Bryan A. Garner et al. the idea underlying the doctrine has been captured in the following words:-

> *"Despite these differences, both stare decisis and res judicata promote a similar goal: stability in the*

> *law. Res judicata stands for the idea that once an issue has been decided for particular litigants, it should not be undone by a later lawsuit. This doctrine lets parties rest assured that they need not relitigate issues in the future: they can live without a cloud of uncertain future litigation perpetually hovering. Similarly, stare decisis promotes the fundamental notion emphasized throughout this book: that like cases will be decided alike."*

9. The generality of the doctrine and its various nuances referred to in the above treaties are being reproduced hereunder in order to understand the concept more fully:

> *"A judgment is binding and conclusive as res judicata only on the parties to the particular lawsuit and those in privity with them: it creates estopple for disputed matters of fact and law. By contrast, state decisis is conclusive on questions of law, not of fact, and a judicial precedent is applied to a similar state of facts later arising, no matter who the parties are."*

> *"At its highest level of generalization, res judicata takes in two concepts that modern courts call claim preclusion and issue preclusion. Claim preclusion prevents a litigant from bringing a claim if a court that had jurisdiction has already rendered a final judgment on the merits of that claim in a previous action involving the same litigants or their privies. Issue preclusion prevents the same parties from relitigating issues of ultimate fact that they had already litigated in earlier suits. A nonparty to the first action can use issue preclusion offensively against the party who lost the issue decided in the first case, within certain limits. Stare decisis may determine which of these two concepts of res judicata applies in a particular jurisdiction."*

> *"The doctrine of res judicata applies to disputed facts as well as to disputed mixed questions of fact and law, such as whether the defendant drove the car negligently or whether the plaintiff received adequate notice of the rejection of a claim so as to start the running of the statute of limitations."*

10. It has been said by Lord Mansfield (father of English Commercial Law) that:-

> *"The successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. In all mercantile transactions, the*

> *great object should be certainty; and therefore it is of more consequence that a rule should be certain."*

11. The argument of PRA in alleging that the doctrine does not apply to these proceedings cuts both ways and is counter-productive. In a converse case, the PRA might face the same set of argumentation in a claim which has been decided in its favour previously. Moreover, no one can really harbour any doubt regarding proceedings under section 52 of the Act, 2012 (and appeals arising therefrom) and their true nature. These may be termed as quasi-judicial proceedings while being dealt with by the departmental adjudicators but the fact remains that these officers are obliged to act judicially and so the doctrine of *res judicata* remains applicable to these proceedings. But the question which engages this Court is whether the doctrine can be invoked by the petitioner in the present case or not.

12. The primary facts in the instant matter have been narrated above. To reiterate, an appeal was filed before the Commissioner (Appeals) which was decided on 21.12.2016 and was allowed. The basic ground on which the appeal was allowed was that the time limit of 120 days mentioned in section 52(4) of the Act, 2012 was a mandatory time limit and any order passed beyond the said time limit was *void ab initio*. Therefore, admittedly there was no finding on the merits of the claim. The rule that such a time limit provided in a provision of law is a mandatory

connotation has been accepted by the Supreme Court of Pakistan in *Collector of Sales Tax v. Super Asia Muhammad Din and Sons* (**2017 SCMR 1427**) in the following words:-

> *"7. From the plain language of the first proviso, it is clear that the officer was bound to pass an order within the stipulated time period of forty-five days, and any extension of time by the Collector could not in any case exceed ninety days. The Collector could not extend the time according to his own choice and whim, as a matter of course, routine or right, without any limit or constraint; he could only do so by applying his mind and after recording reasons for such extension in writing. Thus the language of the first proviso was meant to restrict the officer from passing an order under section 36(3) supra whenever he wanted. It also restricted the Collector from granting unlimited extension. The curtailing of the powers of the officer and the Collector and the negative character of the language employed in the first proviso point towards its mandatory nature. This is further supported by the fact that the first proviso was inserted into section 36(3) supra through an amendment (note:- the current section 11 of the Act, on the other hand, was enacted with the proviso from its very inception in 2012). Prior to such insertion, undoubtedly there was no time limit within which the officer was required to pass orders under the said section. The insertion of the first proviso reflects the clear intention of the legislature to curb this earlier latitude conferred on the officer for passing an order under the section supra. When the legislature makes an amendment in an existing law by providing a specific procedure or time frame for performing a certain act, such provision cannot be interpreted in a way which would render it redundant or nugatory. Thus, we hold that the first proviso to section 36(3) of the Act [and the first proviso to the erstwhile section 11(4) and the current section 11(5) of the Act] is/was mandatory in nature."*

13. There is no question that such a mandate in the law is a compulsory mandate and ought to be complied with by the officer making the adjudication. The holding by the Supreme Court of Pakistan leaves it in no manner of doubt that the time limit provided is not directory. However, the consequences of rendering a decision beyond that time limit have not been spelt out in *Super Asia Muhammad Din and Sons*. This remains a vexed question of law and according to the learned counsel for the petitioner the order having been set aside on this basis operates as *res judicata* and the claim cannot be reopened.

14. The contention of the learned counsel for the petitioner, if accepted, would lead to anomalous results. The entire gemut of arguments on this basis is in contravention of public policy as also the rule that public interest must outweigh private interest. This means that if an officer has not complied with the mandatory requirements of the law in determining an adjudication within a certain period of time, then the taxpayer is relieved of all obligations under the law from payment with regard to the evaded amount of tax in question. This also means that public exchequer shall suffer grievously on this ground and the ultimate sufferer would be the general public for whom the tax is collected which get accumulated in the provincial consolidated fund to be expended on the welfare of the people and citizens of the Province of Punjab. Such a course of action cannot be countenanced.

15. Regard for public good is always implicit in the retention of rights by individuals. They are circumscribed by political authority to pursue the general welfare. The right of the petitioner to the determination of disputes is also subject to restrictions under laws that promote public good. It has been said that:-

> *"The principal end of every legislature is the public good".*
> *(Thomas Hayter, An essay on the liberty of the press chiefly as it respect personal stander 18 (London, J. Raymond).*

16. It is necessary and expedient for the general advantage of the public and for its collective interest that loss to the public revenue should not be occasioned on account of failure of an officer of the department to understand the mandatory nature of the determinate limits provided by law.

17. As explicated, the entire proceedings in the earlier show cause were a nullity, as if they did not take place at all. And therefore, the question of *res judicata* does not present itself. The petitioner might have a case if the first order in original was a subsisting order capable of being acted upon. On the contrary, that order in original will be deemed to be non-existent as an action *extra jus*.

18. As Crawford said, *"an enactment designed to prevent fraud upon the Revenue, is more properly a statute against fraud rather than a taxing statute, and it should receive a liberal construction in the Government's favour".*

(*Crawford Statutory Constitution, p.508*)

19. It is also a rule of interpretation that any construction leading to a large-scale evasion of tax is to be avoided. *(SP Jain v Director of Enforcement), AIR 1962 SC 1764.*

20. Cases from the courts of England have gone to the extent of holding that a mandatory provision may simply be vitiated by the dictates of public policy. *(See Nagle v Fielden [1966] 2 Q. B 633; Edwards v*

SOGAT [1971] Ch. 354. Such a result is founded upon the interpretation of statutory purpose, rather than upon any strained distinction between statutory provisions.

21. In De Smith's Judicial Review (seventh edition), the following passage will illustrate the point in issue:-

> *"A related question to that of administrative inconvenience is the extent to which public policy might be employed to rebut the presumption that a statutory provision is mandatory. Public policy is employed here as the public law equivalent of private law equitable principles, such as that which states that no person may benefit from his own wrong. Thus the courts will presume that Parliament did not intend to imperil the welfare of the state or its inhabitants."*

22. From the ingredients of the doctrine of *res judicata* referred to above, it can plainly be seen that the doctrine of *res judicata* is not applicable to the present facts. Clearly and admittedly no adjudication on merits was made by the Commissioner (Appeals) and, therefore, the matter was not heard and finally decided by the Commissioner in the first round of litigation. However, the matter was directly and substantially in issue before the officer who adjudicated it in the first instance but by the order passed by the Commissioner (Appeals) that order and the findings rendered therein was erased and became *non est*. The effect of the order passed by the Commissioner was that the order in original dated 15.09.2016 was an invalid order and would be deemed to have been erased as if it did not exist at any time. Doubtless this is the effect of the order of the appellate

forum and the learned counsel for the petitioner is not in a position to deny the consequence referred to above which was the only consequence which flowed from declaring the order in original as a nullity. Therefore, it cannot be argued that there was anything in law to lay a claim in respect of the tax or surcharge which has not been levied or short levied by the petitioner as the petitioner remained liable to pay such amount or charge. The only prohibition is with regard to the period of limitation of five years within which the show cause notice can be issued and no one disputes the fact that the period of five years has not run out in the present case. Also the learned counsel for the petitioner has not referred to any prohibition in the law which restrains the department from issuing a fresh show cause notice in such an eventuality. There is an old legal proverb that what is not prohibited shall be deemed permitted in law.

23. A reference may also be made to the provisions of Order VII, Rule 11 CPC which relate to rejection of plaint. However, Rule 13 of Order VII provides that the rejection of plaint does not preclude the presentation of a fresh plaint. Once again, while reading this provision with section 141 CPC it cannot be doubted that rejection of the earlier show cause notice would preclude in any manner the department from filing a fresh show cause notice.

24. Above all, this case will have to be analysed on the touchstone of public interest and the rule that private interest must give way to public interest and it is certainly in the public interest that the prosecution be held against the petitioner in respect of a charge or tax for which the petitioner is liable and on the basis of a mere technicality the petitioner should not be allowed to circumvent that liability and that too on account of indolence shown by an officer of the department. Moreover, the law relating to the mandatory nature of such a time limit had not been crystallized until the judgment of the Supreme Court of Pakistan referred to above and thus the officer was not aware of the implication of passing an order beyond the time limit.

25. In view of the above, this petition is without merit and is, therefore, ***dismissed***. The Chairman of PRA is directed to issue instructions to all officers adjudicating claims under Section 52 of the Act, 2012 to comply with the time limit and its mandatory nature. They should also be made aware of serious consequences which will visit those officers in case the time limit is not adhered to.

(SHAHID KARIM)
JUDGE

Announced in open Court on 21.02.2018.

Approved for reporting.

JUDGE

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Rafaqat Ali