

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-3945 of 2017

Date

Order with signature of Judge

1. For hearing on CMA No.17732/17.
2. For hearing of main case.

12.01.2022

Mr. Abdul Rahim Lakhani, Advocate for the petitioner.
Mr. Kafeel Ahmed Abbasi, DAG for the respondent No.1.
Mr. Shahid Ali Qureshi, Advocate for the respondents No.2 and 3.

The instant petition has been filed on the ground that the Show Cause Notice (SCN) issued on 08.05.2017 is illegal and uncalled for.

Mr. Abdul Rahim Lakhani Advocate has appeared on behalf of the petitioner and stated that SCN dated 06.10.2016 was issued to the petitioner and the department was required to finalize the said SCN, under the provisions of Section 11(5) of the Sales Tax Act, 1990 (**the Act 1990**), within a period of 120 days, however no Order-in-Original (ONO) was passed by the concerned sales tax authority on the said SCN and kept the matter pending and then issued a fresh SCN dated 08.05.2017, which on the face of it is time barred and thus, in his view, the department has no authority under the law to proceed against the petitioner by virtue of second SCN, which was issued beyond time limit. In support of his contentions, the learned counsel has placed reliance on the decision given by the Hon'ble Supreme Court of Pakistan in the case of *The Collector of Sales Tax, Gujranwala and others Vs. Messrs Super Asia Mohammad Din and Sons and others (2017 PTD 1756)*.

Mr. Shahid Ali Qureshi Advocate has appeared on behalf of the respondents No.2 & 3 and candidly conceded that no ONO was passed in respect of the first SCN issued on 06.10.2016. He further conceded that the second SCN dated 08.05.2017 was issued after 120 days of the issuance of the first SCN. He, however, submitted that due to the rampant transfers in the

department the matter could not be timely finalized in the first instance, hence a notice was repeated.

Mr. Kafeel Ahmed Abbasi, DAG has appeared on behalf of the respondent No.1 and adopted the arguments made by Mr. Shahid Ali Qureshi.

We have heard all the learned counsel at some length and have also perused the record.

There is no denial to the fact that the sales tax authorities, under the provisions of Section 11(5) of the Act-1990, are legally obliged to pass ONO within 120 days of the issuance of the SCN. The said Section is reproduced hereunder for the sake of brevity:

11. Assessment of Tax & Recovery of Tax not levied or short levied or erroneously refunded. – (1)

(2)

(3)

(4)

(5) *No order under this section shall be made by an officer of Inland Revenue unless a notice to show cause is given within five years, of the relevant date, to the person in default specifying the grounds on which it is intended to proceed against him and the officer of Sales Tax shall take into consideration the representation made by such person and provide him with an opportunity of being heard:*

Provided that order under this section shall be made within one hundred and twenty days of issuance of show cause notice or within such extended period as the Commissioner may, for reasons to be recorded in writing, fix provided that such extended period shall in no case exceed ninety days.

Provided further the any period during which the proceedings are adjourned on account of a stay order or Alternative Dispute Resolution proceedings or the time taken through adjournment by the petitioner not exceeding sixty days shall be excluded from the computation of the period specified in the first proviso.

It is also an undeniable position that the second SCN dated 08.05.2017 has been issued without there being an ONO in the field and after 120 days of the issuance of the first SCN, which on the face of it appears to be time barred. The decision given by the Hon'ble Supreme Court, quoted supra, squarely caters to this situation that the second SCN cannot be issued if no order in

respect of the first SCN has been passed within the mandatory period as specifically enshrined in Section 11(5) of the Act-1990. It would not be out of place to mention that proviso to Section 11(5) caters for the possibility of any unwarranted delays in adjudicating the matter within 120 days of issuance of SCN as it could be seen that it empowers the Commissioner to extend such period of 120 days to another term of 90 days for reasons to be recorded in writing. It is an established principle of law that where a law requires doing of something in a particular manner it has to be done in the same manner and not otherwise. Reliance in this respect may be made to the decisions given by the Hon'ble Supreme Court of Pakistan in the cases of *Ajmir Shah, Ex-Sepoy Vs. The Inspector-General, Frontier Corps Khyber Pakhtunkhwa and another (2020 SCMR 2129)*, *Muhammad Hanif Abbasi Vs. Imran Khan Niazi (PLD 2018 SC 189)* and *Shahida Bibi Vs. Habib Bank Limited (PLD 2016 SC 995)*. In the case in hand it appears that the second SCN was issued even after the expiry of further term of 90 days. The reason assigned for issuance of second SCN that due to rampant transfers in the department the matter could not be finalized hardly carries any weight, as it is a settled principle of law that no one should be made to suffer on account of an act or omission on the part of State functionaries. Reliance in this regard may be made to the decisions given by the Hon'ble Supreme Court in the cases of *Basar Vs. Zulfiqar Ali (2010 SCMR 1972)* and *Arshan Bi Vs. Maula Bakhsh (2003 SCMR 318)*. It is thus evident that the action of the department in not passing an ONO on the SCN and issuing second SCN after the mandatory period of 120 days is illegal which cannot be endorsed. We, therefore, vacate the SCN issued by the department and allow this petition accordingly. Listed application also stands disposed of.

JUDGE

JUDGE