

IN THE HIGH COURT OF SINDH, KARACHI

PRESENT:

MR. JUSTICE MUHAMMAD JUNAID GHAFFAR

MR. JUSTICE AGHA FAISAL

1.	C.P.No.D-6831/2018	Summit Bank Ltd Vs. Sindh & others
2.	C.P.No.D-7016/2018	Citibank N.A Vs. Sindh and others
3.	C.P.No.D-7646/2018	Habib Metroplitan Bank Ltd Vs. Sindh and others
4.	C.P.No.D-395/2019	Karachi Intl. Container Terminal Vs. Sindh and others
5.	C.P.No.D-396/2019	Karachi Intl. Container Terminal Vs. Sindh and others
6.	C.P.No.D-686/2019	Qasim International Container Terminal Pak Ltd. Vs. Sindh and others
7.	C.P.No.D-804/2019	UIG (Pvt) Ltd. Vs. Province of Sindh & others
8.	C.P.No.D-1187/2019	Bank Islamic Pakistan Vs. Province of Sindh & others
9.	C.P.No.D-1188/2019	Bank Islamic Pakistan Vs. Province of Sindh & others
10.	C.P.No.D-1358/2019	Wall Street Exchange (Pvt) Ltd. Vs. Province of Sindh & others
11.	C.P.No.D-1359/2019	Wall Street Exchange (Pvt) Ltd. Vs. Province of Sindh & others
12.	C.P.No.D-1369/2019	Summit Bank Ltd. Vs. Fed. of Pakistan and others
13.	C.P.No.D-1524/2019	M/s. Pakistan International Container Terminal Vs. Province of Sindh & others
14.	C.P.No.D-1562/2019	Bank of Khyber Vs. Province of Sindh & others
15.	C.P.No.D-1586/2019	Karachi Intl. Container Terminal Vs. Sindh and others
16.	C.P.No.D-1842/2019	Habib Metropolitan Bank Ltd Vs. Sindh and others
17.	C.P.No.D-1960/2019	Bank Islami Pakistan Ltd Vs. Province of Sindh & others
18.	C.P.No.D-1995/2019	JS Bank Ltd. Vs. Pakistan and others
19.	C.P.No.D-1996/2019	JS Bank Ltd. Vs. Sindh and others
20.	C.P.No.D-2090/2019	MCB (Pvt) Ltd Vs. Sindh and others
21.	C.P.No.D-2339/2019	Bank Al Habib Ltd Vs. Sindh & others
22.	C.P.No.D-2340/2019	Bank Al Habib Ltd Vs. Sindh & others
23.	C.P.No.D-2610/2019	AC Neilsen Pakistan Vs. Province of Sindh & others
24.	C.P.No.D-2770/2019	Nafees ur Rehman Vs. Province of Sindh & others
25.	C.P.No.D-3010/2019	Qasim International Container Terminal Pak Ltd. Vs. Sindh and others
26.	C.P.No.D-3421/2019	Pakistan Stock Exchange Ltd. Vs. Sindh & others
27.	C.P.No.D-3722/2019	M/s. Aircraft Aviation Services Vs. Province of Sindh & others
28.	C.P.No.4091/2019	PK Logistics & Supply Chain Management Vs. Province of Sindh & others
29.	C.P.No.D-4741/2019	Pak Qatar Takaful Ltd. Vs. Province of Sindh & others
30.	C.P.No.D-4743/2019	Alpha Insurance Co. Ltd. Vs. Province of Sindh & others
31.	C.P.No.D-4769/2019	OICTL Vs. Sindh & others
32.	C.P.No.D-6117/2019	M/s. Adamjee Insurance Co. Ltd. Vs. Province of Sindh & others
33.	C.P.No.D-987/2020	M/s. Pak Qatar General Takaful Ltd. Vs. Province of Sindh & others
34.	C.P.No.D-988/2020	M/s. Pak Qatar Family Takaful Ltd. Vs. Province of Sindh & others
35.	C.P.No.D-1167/2020	IGI General Insurance Ltd. Vs. Sindh and Others

36.	C.P.No.D-1485/2020	National Insurance Company Ltd. Vs. Province of Sindh & others
37.	C.P.No.D-4443/2020	TPL Insurance Ltd. Vs. Province of Sindh & others
38.	C.P No.D-4774/2020	M/s. Habib Insurance Co. Ltd. Vs. Province of Sindh & others
39.	C.P No.D-4775/2020	M/s. Habib Insurance Co. Ltd. Vs. Province of Sindh & others
40.	C.P No.D-5805/2020	Southend Club (Pvt) Ltd. Vs. Province of Sindh & others
41.	C.P No.D-6089/2020	Bank Al Falah Ltd. Vs. Sindh and others
42.	CP No.D-1364/2021	BT Pakistan (Pvt) Limited Vs. Province of Sindh & others

ADVOCATES FOR THE PETITIONERS:

M/s. Hyder Ali Khan alongwith Ghulam Hussain Shah, Shaheer Roshan Shaikh, Ms. Nehl Chamdia and Mr. Sami-ur-Rehman, Qazi Umair Ali, Naeem Suleman, Arshad Hussain Shahzad, Nadir Khan Burdi, Mazharul Hassan, Jawaid Farooqui, Taha Samad, Muhammad Yousuf, Nazia Hanjrah, Mansoor Ali Ghanghro, Mohsin Ali, Ahmed Madani, Imran Ahmed.

ADVOCATES FOR THE RESPONDENTS

M/s. Ghulam Murtaza Korai, Shamshad Ali Narejo along with Zamir Khalid, Commissioner and Syed Zain-ul-Abidin, Depty Commissioner, SRB, Aamir Ali Shaikh.

Mr. Kafeel Ahmed Abbasi, DAG (For Federation)
Mr. Jawad Dero, Addl. A.G.

Dates of Hearing: 16.02.2021 & 02.03.2021.

Date of Judgment: 02.03.2021.

J U D G M E N T

Muhammad Junaid Ghaffar J.- The Petitioners hereinabove, have impugned respective Show Cause Notices only on the ground that these Show Cause Notices are time barred under Section 23(2) (un-amended) of the Sindh Sales Tax Act, 2011 (**2011 Act**).

2. Learned Counsel for the Petitioner¹ has contended that when Returns for respective periods were filed, the Petitioners were covered by limitation of five years, whereas, through Sindh Finance Act, 2016, effective from 01.07.2016, the limitation period has been extended to 8 years and admittedly all Show Cause Notices are time barred, being issued after expiry of 5 years. According to him vested right has accrued in favour of the Petitioners and it is settled law that limitation in tax matters is not procedural in nature; but is a substantive right and

¹ Mainly through Mr. Hyder Ali Khan Advocate and adopted by all others.

amendment itself has been made effective from 01.07.2016 by the Legislature; hence the extended period of limitation would not apply to the case of the Petitioners. Per learned Counsel it is a case of past and closed transaction and the Petitioners are to be governed by the law then prevailing at the relevant time, which provided a limitation of 5 years. According to him the law is settled² that the amendment would be prospectively applicable on returns filed on or after 1.7.2016; hence, the impugned show cause notices be declared as time barred.

3. On the other hand, Learned Counsel for Sindh Revenue Board has contended that Show Cause Notices are within time as the limitation period was amended on 01.07.2016 extending the same to eight (8) years, whereas, limitation is procedural in nature in view of the cases reported as³; hence can be given retrospective effect. He has prayed for dismissal of all listed petitions.

4. Learned Additional Advocate General appearing on behalf of the Province of Sindh, on Court notice, submits that through Finance Act 2016, Section 23(2) of the 2011 Act has been amended, which is a valid law, whereas, in this Petitions the vires of the said law have not been challenged; but only a show cause notice, therefore, the law, validly in field, would apply. According to him, the amendment was even otherwise introduced within the validity period of limitation governed prior to Sindh Finance Act, 2016; hence per settled law⁴ no case of a past and closed transaction is made out.

5. While making submissions in Rebuttal, learned Counsel for the Petitioners submits that Petitioners are not aggrieved by the validity of the law itself; hence have not impugned or challenged the vires of the

² 1970 (XXI) Taxation 62 (Income Tax Officer (Investigation) Circle,III, Dacca and another v. Daulatpur Jute Mills Limited), 2018 SCMR 1131 (The Taxation Officer/Deputy Commissioner of Income Tax, Lahore Vs. Messrs Rupafil Ltd. and others), 2018 PTD 1474 (Additional Commissioner Inland Revenue, Audit Range, Zone-I, and others v Eden Builders Limited), Unreported Order dated 03.09.2014 passed in Civil Petition No. 1306/2014, by the Hon'ble Supreme Court, 2019 SCMR 1111 (Messrs Super Engineering and another Vs. Commissioner Inland Revenue, Karachi), PLD 1969 Supreme Court 187 (Adnan Afzal Vs. Capt. Sher Afzal), 2016 SCMR 816 (Commissioner of Income Tax, Peshawar Vs. Messrs Islamic Investment Bank Ltd.)

³ 1998 PTD 2769 (Commissioner of Income Tax, Sukkur Zone, Sukkur through The Deputy Commissioner of Income-tax, Circle-I, Quetta), PLD 1964 Supreme Court 266 (Saeed Ahmad Vs. The State), 2009 SCMR 1279 (Commissioner of Income Tax Vs. Messrs Eli Lilly Pakistan (Pvt.) Ltd.), 2011 SCMR 1254 (Air League of PIAC Employees through President Vs. Federation of Pakistan M/O Labour and Manpower Division Islamabad and others).

⁴ 2018 SCMR 1131 (The Taxation Officer/Deputy Commissioner of Income Tax, Lahore, PLD 2016 Supreme Court 398 (Zila Council Jehlum through District Coordination Officer Vs. Messrs. Pakistan Tobacco Company Ltd. and others), 1993 SCMR 1905 (Molasses Trading & Export (Pvt.) Limited Vs. Federation of Pakistan and others), PLD 2013 Sindh 449 (Messrs Shahbaz Garments (Pvt.) Ltd. and others Vs. Pakistan through Secretary Ministry of Finance, Revenue Division, Islamabad and others).

same and further the power of the legislature is not in dispute here; but the only contention is that since vested rights have accrued, therefore, the Petitioners are to be governed by the law and period of limitation prevailing prior to the amendment made effective from 1.7.2016.

6. We have heard all the learned Counsel as well as learned Additional Advocate General and perused the record. Precisely in all these Petitions, show cause notices have been issued under Section 23 of the 2011 Act in respect of different transactions with allegations against individual petitioners, which are not a matter of dispute before us. These Petitions are confined only to one legal issue i.e. *Whether the Petitioners would be governed by the period of limitation as available on the Statute on 30.06.2016 or by the amended period of limitation made effective through Sindh Finance Act, 2016 w.e.f. 01.07.2016.* It would be convenient to refer to the relevant provisions of Section 23 and the amendment introduced through Sindh Finance Act, 2016, which reads as under:-

“23. Assessment of Tax.—(1) Where on the basis

(2) No order under [sub-sections (1) or (1A)] shall be made by an officer of the SRB unless a notice to show cause is given to the person in default within [eight years] from the end of the tax period to which the order relates specifying the grounds on which it is intended to proceed against him and the said officer shall take into consideration the representation made by such person and provide him with an opportunity of being heard if the person so desires.”

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“THE SINDH FINANCE ACT, 2016
SINDH ACT NO.XXIV OF 2016.

AN ACT

To rationalize, levy and enhance certain taxes and duties in the Province of Sindh and to amend certain laws in the Province of Sindh;

WHEREAS it is expedient to rationalize, levy and enhance Preamble, certain taxes and duties in the Province of Sindh and to amend certain laws in the Province of Sindh, in the manner hereinafter appearing.

It is hereby enacted as follows:-

1. (1) This Act may be called the Sindh Finance Act, 2016.
- (2) It shall come into force on and from 2st day of July, 2016.

(vi) in section 23—

- (i) In sub-section (2), for the words **“five years”**, the words **“eight years”** shall be substituted; and
- (ii) In sub-section (8), after the word “tax”, the words “and the Board shall also have the powers to regulate the system of assessment including the powers for transfer of cases and extension of time limit in exceptional circumstances” shall be inserted.”

7. Perusal of the aforesaid provisions of Section 23⁵ reflects that a show cause notice could have been issued within a period of 5 years from the relevant tax period⁶, whereas, through Sindh Finance Act, 2016 in sub-section (2) for the words “5 years”, the words “8 years” has been substituted. It is not in dispute that Sindh Finance Act 2016 came into effect from 01.07.2016. Precise case, as pleaded on behalf of the Petitioners is on the ground that some vested rights have accrued to the Petitioners inasmuch as they are to be governed by the limitation period of five (5) years applicable when the respective monthly Sales Tax Returns were filed. According to them subsequent amendment would only be applicable on Sales Tax Returns filed on or after 01.07.2016 and on this analogy, they have contended that the show cause notices are time barred; however, with respect we are unable to agree with these submissions. It is a matter of admitted position that the 2011 Act was promulgated w.e.f. 01.07.2011 and it provided a limitation period of 5 years under Section 23 and after its promulgation, the liability to get itself registered and filing of a tax return started from August, 2011, and keeping such date in mind, it appears that the limitation period had not expired on 30.06.2016 before which the Sindh Finance Act, 2016 was introduced and was passed by the Legislature giving it effect from 01.07.2016. It is not in dispute and is a matter of record, that when this amendment in Section 23 was introduced, the original limitation period as provided in the 2011 Act, in respect of all the Petitioners before us had not expired; hence in our view no vested right had accrued to the Petitioners on the date when this amendment and enhancement of limitation was introduced. This is so, because, had this change / enhancement in limitation not been brought in the Act, they could have been easily issued show cause notices by Sindh Revenue Board (“SRB”) on or before 30.06.2016, if so needed. In such a situation, it is neither a case of a past and closed transaction; nor of accrual of any vested right in favor of the Petitioners. The SRB was well within its right and could have issued show cause notices before expiry of the previous limitation period, if so desired, had the impugned amendment not been brought in the Act. The limitation period stands extended, and merely for the fact that the impugned show cause notices have been issued after introduction of Sindh Finance Act, 2016, it’s an incorrect approach to say that the limitation period had expired when the impugned show

⁵ Prior to Sindh Finance Act, 2016

⁶ Section 2(95) “tax period” means a period of one month or such other period as the Board may, by notification in the official Gazette, specify;

cause notices were issued. Here, in the given facts of the case, since no vested right had accrued as the original limitation period had not expired when Sindh Finance Act, 2016, was promulgated, the amendment, whereby, limitation has been extended, would be deemed to be procedural in nature. This is so, as no right had accrued to the Petitioners before introduction of the amendment through Sindh Finance Act, 2016. If it had been a case wherein the original limitation period had expired; and the amendment in the Act was brought thereafter, only then it was a past and closed transaction. We are of the considered view that once a matter becomes barred by time then the subsequent enhancement in the period of limitation shall not have the effect of reopening the past and closed transaction and resuscitating the matters which attained finality and had gone in the annals of history⁷. In the present case the original limitation had not lapsed; hence, no vested right had accrued as the enhancement in limitation was made before expiry of the limitation.

8. Learned Counsel arguing for the petitioners had placed reliance on the case of **Eden Builders** (Supra) and had contended that in that judgment the Hon'ble Supreme Court⁸ has held that limitation is not always procedural in nature; and cannot have its application retrospectively. However, the said judgment in the given facts is not applicable on all fours. The facts are of paramount importance when they are compared with the present set of petitions. It may be noted that **Eden Builders** (Supra) was a case under the Income Tax Ordinance, 2001, ("Ordinance") wherein, a tax return filed under the Ordinance is a deemed assessment order in terms of s.120(1)(b)⁹ *ibid*. This is not the case under the 2011 Act, which is primarily a case of sales tax on services, wherein, monthly returns are required to be filed. It has got nothing to do with the Income of a tax payer and it becoming a past and closed transaction or a deemed assessment order in terms of the Ordinance. Under the 2011 Act, pursuant to filing of a sales tax return on monthly basis before the due date, no right accrues to the Petitioners ("service providers") for a number of reasons. It is only a determination of input / out-put tax adjustment and its refund, if any. There is no finality of the same as against the concept of a deemed assessment order. Moreover, the service recipient is merely required to see that whether any sales tax has been charged to it

⁷ Ghandhara Nissan Diesel Ltd v Collector of Customs (2007 PTD 117)

⁸ 5-member bench

⁹ The return shall be taken for all purposes of this Ordinance to be an assessment order issued to the taxpayer by the Commissioner on the day the return was furnished.

by the service provider to it; and if so, then the service recipient is in most of the case entitled to adjust the same as its input tax. Secondly, it may be a case that the service recipient is to act as a withholding agent under the 2011 Act; and in all such circumstances it has nothing to do with any vested right being accrued to it. It is for this reason that the said judgment in the case of **Eden Builders (Supra)** is not relevant for the present purposes, as at least some right had accrued to the tax-payer in that case after filing of a tax return which was a deemed assessment order under s.120 of the Ordinance. Notwithstanding, it may also be pertinent to observe that **Eden Builders (Supra)** was not actually a case of enhancement of limitation period *stricto sensu* inasmuch as in that case the un-amended provision of section 122(2) of the Ordinance, was that "an assessment order shall only be amended under subsection (1) within five years after the Commissioner has issued or is treated as having issued the assessment order on the taxpayer" and was then amended in 2009 as "(2) No order under subsection (1) shall be amended by the Commissioner after the expiry of 5 years from the end of the financial year in which the Commissioner has issued or treated to have issued the assessment order to the taxpayer". This shows that the issue was quite distinct in that case as it was not only in respect of amending a deemed assessment order; but so also was a change in the words from the date of filing of a tax return (treated as deemed assessment order) to that of end of financial year. It was a case of an amendment in the Act, and its prospective or retrospective applicability. It was also not a case of issuance of show cause notice within the prescribed limitation period as it involved amendment of an assessment order within a certain period of limitation. In that very judgment it has been observed by the Hon'ble Supreme Court that it was not a case of enhancement of limitation period; rather it remained same i.e. 5 years¹⁰. These facts are pertinent to take note of as the period provided under s.122 of the Ordinance, is not *per-se* a period of limitation; but a period of amending the deemed assessment order. Section 122 of the Ordinance, only imposes a fetter upon the power of the Income Tax Officer to bring to tax an escaped income. It is in this context that we need to read the law enunciated by the Hon'ble Supreme Court in the case of **Eden Builders (Supra)**.

¹⁰ (Para-6) "...This means that the goal posts themselves were changed by the amendment. It was not that the period of limitation was enhanced to for example 6 years. On the contrary, post amendment too, the limitation period remained five years. Instead, the amended to section 122(2) of the I.T.O., 2001 changed the commencement date for when limitation would begin to run..."

9. On the contrary, in the case of *Rupafil Limited*¹¹ the Hon'ble Supreme Court, (though through a two member bench); however, subsequently, has been pleased to hold that law prescribing period of limitation was to be considered as procedural rather than substantive; though where right to commence a proceeding has already become time barred then a subsequent enlargement of time through an amendment can be of no avail, as with the lapse of time prescribed, the transaction becomes a past and closed transaction vesting a party with a right thus accrued which cannot be taken away by a subsequent amendment. This accrual of right is completely missing in the case of present petitioners.

10. Reference may also be made to the case of *Islamic Investment Bank*¹² wherein the Hon'ble Supreme Court was pleased to hold that the decision in the case of *Honda Shahrah-e-Faisal*¹³ considered to be an authoritative judgment as to limitation period in amending deemed assessment orders under the Ordinance and apparently approved in the case of *Eli Lilly*¹⁴ was erroneous as it had proceeded on the assumption that the right to revise an assessment made under the repealed law stands extinguished merely for the reason that the provisions of section 122(5A) of Income Tax Ordinance, 2001, were inserted with effect from 01.07.2003 and being prospective in nature, cannot be applied retrospectively. This resulted in destroying the department's right to revise, or amend or reopen an assessment order made under the repealed Income Tax Ordinance, 1979, irrespective of the fact that the time to revise such assessment under the repealed law had not even expired. The precise issue before the Hon'ble Supreme Court was whether the Commissioner Income Tax was justified in revising an assessment order relating to the period covered under the repealed Income Tax Ordinance, 1979, by invoking the provisions of Section 122 (5A) of the Income Tax Ordinance, 2001, that was inserted on 01.07.2003 i.e. one year after the Income Tax Ordinance, 2001, came into operation. As per *Honda Shahrah-e-Faisal*, the department could not have revised the assessment order in question by invoking section 122(5A) of Income Tax Ordinance, 2001, that was inserted on 01.07.2003 and being prospective in nature, cannot be given retrospective application; and provisions of section 66A of the repealed Income Tax Ordinance, 1979, were also not saved under the Saving Clause i.e. section 239 of

¹¹ 2018 SCMR 1134 (by Maqbool Baqar, J)

¹² 2016 SCMR 816

¹³ 2005 PTD 1316

¹⁴ 2009 SCMR 1279

the Income Tax Ordinance, 2001, the same also could not be applied to reopen the assessment order in question. The Hon'ble Supreme Court was dealing with the question whether section 239(1) as amended on 1.7.2003 on the basis of which notice under section 122(5A) was issued is prospective in its application or has retrospective application. The decision in *Honda Shahra-e-Faisal* was not approved in the case of *Islamic Investment Bank* by the Hon'ble Supreme Court. The facts of this case are more akin to the case in hand before us. The Hon'ble Supreme Court also attended to the argument that since *Honda Shahra-e-Faisal* was already approved in *Eli Lilly*; therefore, no further deliberation was warranted. It was dealt with in the following terms by the Hon'ble Supreme Court in the *Islamic Investment Bank* case.

13. In *Eli Lilly* case referred to above this Court held that the assessment order under the repealed Income Tax Ordinance, 1979, could have been reopened only under the provisions of section 239(1) which were originally incorporated but as the same were substituted through amendment on 01.07.2003, the amended provision being prospective in its application cannot be applied to income years ending on or before 30.06.2002 thus concurred with the decision of the Sindh High Court in the case of *Honda Shahra-e-Faisal*. In *Honda Shahra-e-Faisal* case, procedural provisions of Section 122(5A) of Income Tax Ordinance, 2001, were interpreted to be prospective in their application, such determination is contrary to the plethora of decisions of this Court wherein it has been held that where procedural provisions are incorporated through amendment then the same have retrospective application. We therefore treat such finding as per incuriam. In the case of Application by Abdul Rehman Farooq Pirzada and Begum Nusrat Ali Gonda v. Federation of Pakistan (PLD 2013 SC 829) the legal term per incuriam was extensively discussed in its paragraph 4 and applied to an earlier decision of this Court in the case of Accountant General Sindh v. Ahmed Ali U. Qureshi (PLD 2008 SC 522).

11. The Hon'ble Supreme Court in this case went further to hold that upon filing of a tax return a vested right is created in favor of the State at the end of each accounting year, though the exercise of making an assessment and revising it, takes place at a later stage and these procedural exercises are undertaken with the object of reaching to the correct calculations of yearly income.

12. In view of hereinabove facts and circumstances of this case, in our considered view the petitioners had no case of accrual of any vested right as the original limitation was very much alive when the said period was enhanced through Finance Act, 2016; hence, by means of a short order on 02.03.2021, we had dismissed all these Petitions and these are the reasons in support thereof.

JUDGE

JUDGE