

**23rd KTBA CASE LAW UPDATE
(November 01, 2023)**

Committee Members

Shams Ansari (Convener)

0333-2298701

shamsansari01@gmail.com

Hameer Arshad Siraj

0333-2251555

hameer.siraj@gmail.com

Shabbar Muraj

0321-8920972

shabbar.muraj@pk.ey.com

Razi Ahsan

0300-0446892

razi.lawconsultancy@gmail.com

Noman Amin Khan

0310-2271271

noman.amin@mooreshekhamufti.com

Shiraz Khan

0333-2108546

shiraz@taxmanco.com

Faiq Raza Rizvi

0302-2744737

federalcorporation@hotmail.com

Imran Ahmed Khan

0300-9273852

iakjci@yahoo.com

Ehtisham Qadir

0334-2210909

ehtisham@aqadirncompany.com

Dear Members,

A brief update on a recent judgment by the Supreme Court of Pakistan on **“CIRA can pass order after 120 Days: 120 Days Limit is Directory”**, is being shared with you for your knowledge. The order has been attached herewith the update.

This update is in line with the efforts undertaken by our **“CASE LAW UPDATE COMMITTEE”** apprise our Bar members with important court decisions.

You are equally encouraged to share any important case law, which you feel that should be disseminated for the good of all members.

You may contact the Committee Convener Mr. Shams Ansari or at the Bar’s numbers 021-99212222, 99211792 or email at info@karachitaxbar.com & ktba01@gmail.com

(Zafar Ahmed)

President

November 01, 2023

(M. Mehmood Bikiya)

Hon. General Secretary

November 01, 2023

23rd KTBA CASE LAW UPDATE
(November 01, 2023)

**CIRA CAN PASS ORDER AFTER 120 DAYS:
120 DAYS LIMIT IS DIRECTORY.**

Appellate Authority: Supreme Court
Appellant: A.J. Traders
Section: 194-B of the Customs Act, 1969

Detailed judgment was issued on October 11, 2022 [Civil Appeal 354 of 2020]

Background: Argument was raised by the appellant taxpayer that the appeal filed by the appellant was not decided within the period of limitation given in section 194B of the Customs Act, 1969 [the Customs Act], hence the judgment of the Tribunal is void.

The argument was based on ratio laid down in the *M/s Sarwaq Traders* case (reported as 2022 PTD 1128), which was passed by a two-member bench. The argument was rejected by the three-member bench in the present case.

Decision of the Court:

First Ruling of the Court: If a taxpayer's appeal is not decided within the specified time period, it should not be disregarded or dismissed. This is because it would be unfair to penalize the taxpayer for the delay caused by the state or its officials. Article 4 of the Constitution guarantees the right to be treated in accordance with the law and under Article 10A, which ensures a fair trial and due process to all citizens. These constitutional rights cannot be undermined by any law, and if a law attempts to do so, it would be considered void. Therefore, an order passed late on a taxpayer's appeal should not be considered void or invalid.

Second Ruling of the Court: In the case of *Mujahid Soap and Chemical Industries (Pvt.) Ltd v Customs Appellate Tribunal*, reported as 2019 SCMR 1735, the court found that if initial adjudication exceeds the prescribed time limit, the decision becomes invalid. This case distinguished between belatedly adjudicating a show cause notice (which was deemed invalid) and belatedly deciding an appeal, as the latter would violate the taxpayer's rights.

Third Ruling of the Court: *M/s Sarwaq Traders* case contradicted established precedents. The rationale behind prescribing a time frame based on the taxpayer's liability and revenue collection, as laid down in *Sarwaq Traders* case cannot be accepted. The legislature imposes an obligation on the appellate authority to decide appeals within a prescribed period. If there are consequences for delaying an appeal, they should be imposed on the state functionaries and not on the appellant taxpayer.

Conclusion: This judgment and the earlier one on the subject are from the Supreme Court of Pakistan and apparently contradicts each other. In order to understand the implication of such contradiction, recourse shall be made to the rules of interpretation for law of precedence.

Accordingly, where there are judgments of the Supreme Court at variance, the judgment of the Larger Bench is to be followed. However, where judgments of Benches of the same number are at variance, then the judgment latest in time is to be followed, ref: PLD 2009 Lahore 415.

Hence, the judgment, being from a three-member bench, holds the field in terms of binding precedence as compared to the judgment in the *M/s Sarwaq Traders* case, which was from a two-member bench. Further, in case of conflicting findings, the ratio of the larger bench prevails, resulting in overruling of ratio laid down in the *M/s Sarwaq Traders* case.

DISCLAIMER:

This update has been prepared for KTBA members and carries a brief narrative on a detailed Judgment and does not contain an opinion of the Bar, in any manner or sort. It is therefore, suggested that the judgment alone should be relied upon. Any reliance on the summary in any proceedings or project would not be binding on KTBA.

Dear Members,

A brief update on a recent judgment by the Supreme Court of Pakistan on “**CIRA can pass order after 120 Days: 120 Days Limit is Directory**”, is being shared with you for your knowledge. The order has been attached herewith the update.

This update is in line with the efforts undertaken by our “CASE LAW UPDATE COMMITTEE” apprise our Bar members with important court decisions.

You are equally encouraged to share any important case law, which you feel that should be disseminated for the good of all members.

You may contact the Committee Convener Mr. Shams Ansari or at the Bar’s numbers 021-99212222, 99211792 or email at info@karachitaxbar.com & ktba01@gmail.com and the following members;



Shams Ansari (Convener)
0333-2298701
shamsansari01@gmail.com



Hameer Arshad Siraj
0333-2251555
hameer.siraj@gmail.com



Shabbar Muraj
0321-8920972
shabbar.muraj@pk.ey.com



Razi Ahsan
0300-0446892
razi.lawconsultancy@gmail.com



Noman Amin Khan
0310-2271271
noman.amin@mooreshekhamufti.com



Shiraz Khan
0333-2108546
shiraz@taxmanco.com



Faiq Raza Rizvi
0302-2744737
federalcorporation@hotmail.com



Imran Ahmed Khan
0300-9273852
iakjci@yahoo.com



Ehtisham Qadir
0334-2210909
ehtisham@aqadirncompany.com

Best regards

(Zafar Ahmed)
President

(M. Mehmood Bikiya)
Hon. General Secretary

(Shams M. Ansari)
Convener: Case Law Update Committee

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi
Mr. Justice Jamal Khan Mandokhail

Civil Appeal Nos. 354 to 356 of 2020

*(On appeal from the judgments of the Peshawar High Court,
Peshawar dated 08.10.2019 passed in Customs Reference
Nos.56-P, 57-P and 58-P of 2019)*

M/s A.J. Traders through its proprietor

Muhammad Ilyas

(in all appeals)

... *Appellants*

Versus

The Collector of Customs (Adjudication)

Islamabad & others

(in all appeals)

... *Respondent*

For the Appellants:

Syed Hamid Ali Shah Bukhari, ASC
Raja Abdul Ghafoor, AOR
(in all appeals)

For the Respondent:

Mr. Abdul Rauf Rohaila, ASC
(Through video link from Peshawar)

Date of Hearing:

12.10.2022

ORDER

Qazi Faez Isa, J. The learned counsel representing the appellants states that these three appeals involve the same question of law. The relevant facts are that the appellants had availed the benefit of SRO No. 266(I)/2001 dated 7 May 2001 ('**SRO 266**') and had imported silver and gold which was required to be used in the manufacture of jewellery and the jewellery manufactured therefrom was to be exported within one hundred and eighty days, but no export took place. Therefore, orders-in-original dated 25 January 2016 were passed by the Collector of Customs, which were unsuccessfully appealed before the Customs Appellate Tribunal ('**the Tribunal**'). Thereafter, the appellants filed customs references before the Peshawar High Court, Peshawar but these too were dismissed.

2. The learned counsel representing the appellants submits that SRO 266 was replaced by SRO No. 760(I)/2013 dated 2 September 2013 ('**SRO 760**'), therefore, the obligations incurred under SRO 266, of exporting jewellery manufactured by using the imported silver and gold, was no longer required to be complied with. This question has been properly considered and attended to by the learned Judges of the High Court (in paragraph 8) and held that since the benefit of SRO 266 was availed of it had to be complied with. No reason has been put forward to persuade us to take a different view from the one taken in the impugned judgments. Therefore, the appeals fail on merit.

3. The learned Mr. Bukhari, representing the appellants, then submitted that the Tribunal did not decide the appeals within sixty days nor extended the period for decision in terms of the first proviso to section 194-B of the Customs Act, 1969, reproduced hereunder:

'Provided that the appeal shall be decided within sixty days of filing the appeal or within such extended period as the Tribunal may, for reasons to be recorded in writing, fix:'

Therefore, the learned counsel submits, that since the Tribunal did not decide the appeals within the prescribed period nor extended the period, therefore, the judgments passed by the Tribunal are void and a nullity in law.

4. Our attention has been drawn to a recent decision by a two-member Bench of this Court¹ which had interpreted a similar provision of the Sales Tax Act, 1990² and held that the same was '*mandatory and if [the appeal is] decided beyond the given time ... makes the order void.*' It would be appropriate to reproduce the reasoning which had prevailed with the learned judges in coming to this conclusion:

'The rationale, as we understand, for prescribing a time frame is to ensure that tax matters be resolved at

¹ dated 12 May 2022 in the case of *Commissioner Inland Revenue v M/s Sarwaq Traders* (CPLA No. 4599 of 2021), decided by Umar Ata Bandial, CJ and Ayesha Malik, J.

² Section 45-B(2) of the Sales Tax Act, 1990.

the earliest, within the relevant tax year, so that the taxpayer satisfies its liability and the Department is able to collect revenue, within the relevant tax year. This is important because taxes pay for public goods and services and is one of the main sources of revenue for the State. Consequently, the intent of the legislature is to obligate the Commissioner (Appeals) to decide the appeal within 180 days. The question is whether this obligation is mandatory or is it directory. We find that its mandatory as the first time frame given under section 45-B(2) is 120 days, which is extendable, meaning that, the Commissioner can exercise discretion and extend the time where required. The only caveat is that reasons have to be given in writing, so that the discretion is not misused and is not exercised arbitrarily. The second time frame under Section 45-B(2) is for extending 120 days by 60 days and nothing beyond 60 days. With the help of negative language, the legislature has created an obligation on the Commissioner (Appeals) to decide the appeal in a total of 180 days where the appeal is not decided within 120 days. This obligation renders the section mandatory as the Commissioner (Appeals) cannot go beyond 180 days, as the Commissioner's discretion is curtailed if the time needs to be extended beyond 120 days. Consequently, the obligation fixed on the Commissioner (Appeals) to decide the matter within 180 days is mandatory and not directory.³

5. If we, for the sake of argument, accept the contention advanced by the learned Mr. Bukhari, and consequently proceed to declare that the judgments of the Tribunal are void and/or a nullity then the orders-in-original, which are against the appellants, would come to occupy the field. Therefore, it is not understandable what would be gained by the appellants in contending that the judgments of the Tribunal were passed belatedly.

³ Para 5 of the decision in the case of *Commissioner Inland Revenue v M/s Sarwaq Traders* (CPLA No. 4599 of 2021).

However, we need to consider, and determine, whether the order passed in an appeal belatedly decided is void and/or a nullity since leave in this case was granted on this ground. The leave granting order dated 17 March 2020 is reproduced hereunder:

'Learned counsel submits that the precise question that the learned High Court was required to decide in the Reference before it was, as to whether was the Tribunal in terms of Section 194-B of the Customs Act, 1969 essentially required to decide the appeal within sixty days or within such extended time as the Tribunal would have, for the reasons recorded, extended and further that such extended time also ought to not have exceeded 90 days, as in the present case neither was the appeal decided within the prescribed period sixty days nor was any extension granted. Learned counsel submits that the question goes to the very root of the matter and ought to have been decided by the learned High Court, however, such has not been done and thus the judgment does not conform to the requirements of the law.

2. Contentions require consideration. Leave is accordingly granted. Since a short point is involved, the office is directed to re-list the matter for hearing after notice to the respondents within six weeks from today.'

6. The questions requiring consideration are whether the statutory requirement to decide an appeal, and to do so within a particular time frame, is a mandatory obligation cast on a State functionary and whether non-compliance therewith adversely affects the rights of the taxpayer. In the case of *Collector of Sales Tax v Super Asia Mohammad Din & Sons*⁴ the following test, with which we are in agreement with, was prescribed:⁵

'6. The ultimate test to determine whether a provision is mandatory or directory is that of

⁴ 2017 SCMR 1427, decided by Mian Saqib Nisar, CJ, Maqbool Baqar and Faisal Arab, JJ.

⁵ *Ibid*, para 6, p. 1437.

ascertaining the legislative intent. While the use of the word 'shall' is not the sole factor which determines the mandatory or directory nature of a provision, it is certainly one of the indicators of legislative intent. Other factors include the presence of penal consequences in case of non-compliance, but perhaps the clearest indicator is the object and purpose of the statute and the provision in question. It is the duty of the Court to garner the real intent of the legislature as expressed in the law itself.'

Significantly, the consequences for not deciding the appeal within the prescribed time is not provided in the Customs Act, 1969.

7. In the case of *WAK Limited v Collector Central Excise and Sales Tax*⁶ this Court was of the opinion that the proviso to section 36(3) of the Sales Tax Act, 1990 '*cannot be construed as mandatory on any account and by any attribute*'. However, since their lordships had taken issue with the determination arrived at in the *Super Asia* case the constitution of a *larger bench* was sought. It transpires that though a larger Bench was constituted but due to the retirement of three Hon'ble Judges of this Court the matter could not be decided. However, for our purposes it is immaterial what the larger Bench, if and when it is reconstituted, decides since the time tested and repeatedly applied test (reproduced above) prescribed in the case of *Super Asia*, was not disagreed with by their lordships in the case of *WAK Limited*.

8. If a taxpayer's appeal is not decided within the stipulated period his appeal cannot be negated and the taxpayer non-suited on this score. To hold otherwise would be eminently unfair and give the State a premium for its own functionary's non-compliance with the law. Article 4 of the Constitution of the Islamic Republic of Pakistan ('**the Constitution**') accords the *protection of law and to be treated in accordance with law to be the inalienable right of every citizen and also of every other person for the time being in Pakistan*. The right to be dealt with in accordance with the law is further fortified by Article 10A of the Constitution which stipulates *a fair*

⁶ 2018 SCMR 1474, decided by a three-member Bench of this Court comprising of Ejaz Afzal Khan, Maqbool Baqar and Faisal Arab, JJ.

trial and due process as a Fundamental Right. These rights cannot be negated or diluted by statute, and if any law purports to do so it shall to such extent be void, as stipulated in Article 8(1) and (2) of the Constitution. Therefore, it cannot be stated that an order belatedly passed on a taxpayer's appeal is a void order and/or a nullity.

9. In the case of *Mujahid Soap and Chemical Industries (Pvt.) Ltd v Customs Appellate Tribunal*⁷ section 179 of the Customs Act, 1969, which attends to initial *adjudication*, and not an appeal, was considered and this Court concluded that since adjudication '*was beyond time as prescribed in section 179(3) of the Act. Therefore, the said decision is invalid.*'⁸ The material distinguishing point in this case was that the initial *adjudication* with regard to the show cause notice was delayed. In other words the State's functionary, that is, the Deputy Collector (Adjudication), had delayed in deciding the show cause notice. Belatedly adjudicating a show cause notice is not the same as belatedly deciding an appeal preferred against a purported liability, because then the appellate authority's tardiness, whether intentional or otherwise, will frustrate the taxpayer's appeal, which is not the intention of the law, nor could it be as it would violate Articles 4 and 10A of the Constitution.

10. That as regards the view expressed in the *Sarwaq Traders* case by a two-member Bench we, with the greatest of respect, cannot bring ourselves to agree therewith to the extent that the said decision contradicts with what has been held in the cited precedents and by us. We also cannot, with profound respect, accept the stated *rationale for prescribing a time frame* which, to use the words of the learned judges is, '*that the taxpayer satisfies its liability and the Department is able to collect revenue*'. This *rationale* effectively presupposes that the taxpayer is liable which, in our humble opinion, is not what the statute says nor what can be implied therefrom. The Legislature in prescribing a period within which an appeal should, or must, be decided obligates the appellate authority. Therefore, if there are any consequences in deciding an appeal beyond the prescribed period the same may only be visited upon the State functionaries, and not on an appellant taxpayer.

⁷ 2019 SCMR 1735.

⁸ *Ibid*, para 7, p. 1738, decided by a three-member Bench of this Court comprising of Umar Ata Bandial, Ijaz ul Ahsan and Yahya Afridi, JJ.

11. As determined above (in paragraph 2) the appeals fail on merit and the ground on which leave was granted has also been decided. Therefore, the appeals are dismissed, however, there shall be no order as to costs since leave was granted to determine the said novel proposition.

Judge

Judge

Judge

Islamabad
12.10.2022
K. Anees

Approved for Reporting