**JUDGMENT SHEET**

# ISLAMABAD HIGH COURT, ISLAMABAD
# JUDICIAL DEPARTMENT

**1. Writ Petition No. 1702 of 2025**

**M/s. Fauji Fertilizer Company Limited**

**Versus**

**Federation of Pakistan, and another**

**2. Writ Petition No. 1703 of 2025**

**M/s. Fauji Fertilizer Company Limited**

**Versus**

**Federation of Pakistan, and another**

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| Petitioner by: | Mr. Sikandar Sukhera, Advocate. |
| Respondent No.1 by: | M/s. Saeed Raja and Mian Muhammad Faisal Irfan, DAGs. |
| Respondent No.2 by: | Mr. Ghulam Qasim Bhatti, Advocate |
| Research Assistance by: | Muhammad Fahad Khattak |
| **Date of Hearing:** | **11.07.2025** |

**INAAM AMEEN MINHAS, J:-** This judgment shall decide the afore-titled Writ Petitions, as they involve common questions of law and facts.

2. The petitioners has assailed the Show-Cause Notices issued under section 11E of the Sales Tax Act, 1990 **("STA, 1990")** dated 08.04.2025 for tax year, January-2020 to Decemebr-2020 in W.P No. 1702/2025, and tax year, January-2021 to Decemebr-2021 in W.P No. 1703/2025 respectively **("Impugned SCNs"),** by respondent No.02 i.e. Federal Board of Revenue **("FBR").**

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3. The brief facts in W.P No. 1702 of 2025 are that the petitioner company, engaged in the manufacturing and distribution of chemical fertilizers, was served with Impugned SCN for tax year Jan-2020 to Dec-2020. The genesis of the dispute lies in an earlier SCN (C. No. 302) issued on 14.12.2023 under Section 11(2) of the STA, 1990, whereby FBR observed discrepancies in input tax claimed by the petitioner company against local purchases and imports, which is not admissible under section 8 of STA, 1990, read with SRO 490(I)/2004. The petitioner company submitted its detailed reply dated 06.06.2024 in the earlier SCN, and learned DCIR passed an Order-in-Original No. 09 dated 31.08.2024, whereby the claim of petitioner company to the extent of local purchases was found unsatisfactory and disallowed the said input tax and imposed default surcharge and penalty. The petitioner company challenged the said order before the Appellate Tribunal Inland Revenue **("ATIR")**, which, vide order dated 20.03.2025, declared the order of DCIR barred by limitation without delving into the merits of the case. However, shortly thereafter, on 08.04.2025, FBR issued the Impugned SCN on same subject matter for the same year.

4. The brief facts in W.P No. 1703 of 2025 are that the petitioner company was served with Impugned SCN for tax year Jan-2021 to Dec-2021. The origin of the dispute lies in an earlier SCN (C. No. 304) issued on 18.12.2023 under Section 11(2) of the STA, 1990, whereby FBR observed discrepancies in input tax claimed by the petitioner company against local purchases and imports, which is not admissible under section 8 of STA, 1990, read with SRO 490(I)/2004. The petitioner company submitted its detailed reply dated 10.06.2024, and learned DCIR passed an Order-in-Original No. 10 dated 04.09.2024, whereby the claim of petitioner company to the extent of local purchases was found unsatisfactory and disallowed the said input tax claimed and imposed default surcharge and penalty. The petitioner company challenged the said order before the ATIR, which, vide order dated 20.03.2025, declared the order of DCIR barred by limitation without delving into the merits of the case. However, shortly thereafter, on

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08.04.2025, FBR issued the Impugned SCN on same subject matter for the same year.

5. The learned counsel for the petitioner company contended that the Impugned SCNs are without jurisdiction, barred by limitation, and a nullity in law, and ATIR had previously set-aside the orders of DCIR on the same subject matter as being barred under section 11(5) of the STA, 1990, and once the adjudication proceedings stood vitiated on account of limitation, the FBR could not issue a fresh notice for the same tax period and on the same subject matter as per the principles laid by Hon'ble Supreme Court which declared the time limit to pass order by Inland Revenue Officer under section 11(5) to be mandatory. It was further contended that the Impugned SCNs constitute an attempt to cure a jurisdictional defect through issuance of fresh notice and amounts to an abuse of process; that a fresh notice cannot revive proceedings that have already been adjudicated falls within the ambit of principle "what cannot be done directly cannot be done indirectly"; moreover, the issuance of the Impugned SCNs violates the petitioner's fundamental rights guaranteed under Articles 4, 10-A, 13, 18, 23, and 24 of the Constitution of Islamic Republic of Pakistan, 1973 **("the Constitution")**. Lastly, the learned counsel for the petitioner company contended that STA, 1990 provides no adequate remedy against proceedings that are inherently void and without lawful authority justifying the invocation of constitutional jurisdiction; therefore, the Impugned SCNs be declared illegal, without jurisdiction, and of no legal effect.

6. Conversely, the learned counsel for FBR contended that the issuance of the Impugned SCNs is lawful, within jurisdiction, and does not violate any constitutional right of the petitioner company, and the initial Orders-in-Original were set-aside by the learned ATIR solely on the ground of limitation under section 11(5) of the STA, 1990, without adjudication on merits; therefore, the principles of *res judicata* does not apply to the instant case. He further contended that the Impugned SCNs have been issued within the five-year limitation period prescribed under section 11G of the STA, 1990 and therefore cannot be considered time-barred. Moreover, no fundamental right of the petitioner company has been infringed merely by

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issuance of the Impugned SCNs; therefore, the petitions are misconceived, and aimed at obstructing the lawful process, and are liable to be dismissed with costs.

7. I have heard the contentions of the learned counsels for the parties and perused the record with their able assistance.

8. The facts stated in detail need not to be reiterated, it is common ground between the parties that the Impugned SCNs have been issued on the same allegations as were contained in the earlier show-cause notices, which in order of learned ATIR have been determined and culminated in favour of the petitioner company, by allowing the appeal filed by the petitioner company on the following basis:-

> *"**6.** After considering the arguments of both parties and reviewing the record, we note that the impugned orders were indeed passed after the expiration of the time period prescribed under Section 11(5) of the Sales Tax Act, 1990. As a result, and without delving into the merits of the case, we must vacate both impugned orders, following the judgment of the **Hon'ble Supreme Court in Collector of Sales Tax and Others vs. M/s Super Asia Muhammad Din Sons (Pvt) Ltd (2017 PTD 1756)**. However, the learned DR referred to the judgment of the Hon'ble High Court titled **M/s DH Travels vs. Commissioner Enforcement & Others, (2018 PTD 657)**, where it was held that the principle of res judicata does not apply in such like cases and that the department has the right to issue a fresh show cause notice. After reviewing this judgment, we recognize that it is at the discretion of the department whether to issue a new show cause notice, and this court cannot direct the department to do so."*

9. Thus it was held that the orders-in-original were passed after the expiration of time-period under section 11(5) of STA, 1990, which was a mandatory requirement and such orders have no legal effect and were thereby vacated in appeal by the ATIR and left it to the discretion of the department to issue a fresh show-cause notice, as such the learned counsel for FBR argued that FBR was well within its right to have issued a fresh

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show-cause notice and to pass an assessment order on the same facts and with regard to the same allegations on the ground that the order of ATIR was not passed on merits and was decided on a threshold question regarding the mandatory nature of the period prescribed by section 11(5) of the STA, 1990.

10. The question that engages this Court is *whether fresh show-cause notice can be issued by FBR (subject to 5 years limitation period) on the same allegations upon expiration of limitation of passing an order in prescribed period?*

11. For the purpose of determination of the present controversy, the newly inserted section 11G of the STA, 1990, by means of Finance Act, 2024, which continue on same terms as previously under omitted section 11(5) of the Act is reproduced hereunder:-

> *"**11G. Limitation for assessment.—** (1) The show cause notice under sections 11D to 11F shall be issued within five years, from the end of the financial year in which the relevant date falls.*
>
> *(2) An order under sections 11D, 11E and 11F 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 specify, provided that such extended period shall in no case exceed from ninety days:*
>
> *Provided that 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 registered person not exceeding sixty days shall be excluded from the computation of the period specified in this sub-section.*
>
> *(3) ...."*

12. The statutory framework of section 11G of STA, 1990 provides two separate limitations period, clause (1) of section 11G prescribes 5 years limitation for issuance of show cause notice under sections 11D to 11F, whereas clause (2) prescribes limitation for making an order under sections 11D, 11E and 11F in a certain time-frame within which an order-in-original shall be passed by the officer issuing the show-cause notice. It provides that

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an order shall be made within 120 days of the issuance of the notice to show cause or within such extended period as the Commissioner may for the reasons to be recorded in writing provided that such extended period shall not exceed from 90 days in any case. In the present matter, the ATIR has vacated the orders-in-original on the basis that it was passed beyond the prescribed period of limitation, and the adjudication made by the officer was rightly held to be without lawful authority and of no legal effect in light of the precendents laid down by the Honourable Supreme Court of Pakistan.

13. Before dilating upon the actual controversy surrounding the issuance of the fresh show cause notice, this Court would first examine whether the doctrine of *res judicata* is attracted to the present case. It is well-settled that the principle of *res judicata* apply when the matter in issue have been finally decided by a competent forum on merits, between the same parties and involving the same subject matter. 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 fresh action. In the instant case, the earlier adjudication by the ATIR was confined solely to the question of limitation under clause (2) of 11G of STA, 1990 and did not culminate in a decision on the merits of the tax liability; therefore, the essential pre-conditions for invoking the doctrine of *res judicata* are not satisfied. During the course of arguments, the learned counsel for both the parties were also in agreement that the principle of *res judicata* would not apply to the present controversy. The basic ground on which the appeal was allowed was that the time limit of passing the orders-in-original was mandatory 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 mandatory not directory has been accepted by the Supreme Court of Pakistan in ***Collector of Sales Tax vs. Super Asia Muhammad Din and Sons (2017 SCMR 1427)***. The mandatory nature to pass order under clause (2) of section 11G was reaffirmed by a larger bench of the Supreme Court in a reported case i.e. *C.A. 634 to 636/2018, etc*. decided on 14.05.2025. *(citation awaited)*

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14. There remains no cavil to the proposition that such a statutory mandate is compulsory mandate in nature and warrants strict compliance by the adjudicating officer. The holding by the Supreme Court leaves it in no manner of doubt that the time limit provided is not directory rather mandatory. However, the present petition stands on a different legal footing from the issue raised and adjudicated in *Super Asia* case *(supra)*. The matter before this Court revolves around the application of clause (1) of section 11G of the STA, 1990, where the issuance of a fresh show cause notices on same subject matter for the same tax year, which has been issued within the statutory limitation period of five years under clause (1) of section 11G is without jurisdiction on failure of passing orders-in-original and clause (2) of section 11G. It is evident from the record that the earlier orders were set aside solely on the ground that it was not passed within the mandatory time frame stipulated in clause (2) of Section 11G, and no adjudication on merits was made. This Court is of the view that if, in such circumstances, the hands of the tax authorities are tied and they are barred from initiating fresh proceedings despite five years statutory time has not yet lapsed, the very purpose and scheme of clause (1) section 11G would be defeated. Such an interpretation would defeat the legislative intent embedded in clause (1) of section 11G, which allows the issuance of a show cause notice within five years from the relevant date. The petitioner company cannot be permitted to benefit solely from the delay in passing the earlier orders-in-original, particularly when the statutory period for issuance of notice has not yet lapsed, nor has the matter been adjudicated finally on merits. Reliance is placed on ***M/s DH Travels vs. Commissioner Enforcement & Others , (2018 PTD 657).***

15. The effect of the order passed by the ATIR was that the orders-in-original were invalid orders 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 company is not in a position to deny the consequence referred to above which was the only consequence, which flowed from declaring the orders-in-original as void orders. Therefore, it cannot be argued that there was anything in law to lay a

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claim in respect of the tax liability, where input tax claimed by the petitioner company against local purchases and imports which is not admissible under section 8 of STA, 1990, as the petitioner remained liable to pay such liability. The only prohibition is with regard to the period of limitation of five years within which a show-cause notice can be issued and neither of the parties disputed the same during the course of arguments. Also the learned counsel for the petitioner company has not referred to any prohibition in the law, which restrains the department from issuing a fresh show-cause notice in such an eventuality.

16. In view of the above discussion, this Court is of the view that the Impugned SCNs issued by the FBR, on the same set of allegations, are not barred under the law, when the statutory limitation period of five years under clause (1) of section 11G of the STA, 1990 has not expired, and earlier proceedings stood vitiated solely due to non-compliance with the mandatory timeframe stipulated under clause (2) of section 11G to issue an order-in-original and not on merits. Consequently, the Impugned SCNs in afore-titled writ petitions have been issued in accordance with law. These petitions are without merits and are, therefore, ***dismissed.***

**(INAAM AMEEN MINHAS)**
**JUDGE**

**Announced in open Court on 18.07.2025.**

**JUDGE**

*R.Anjam.*

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