JUDGEMENT SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 2622/2022

M/s Pakistan LNG Limited through its duly Authorized Representative.
Vs.
Federation of Pakistan through the Secretary Revenue Division, Ministry of Finance, Islamabad & others.

PETITIONER BY:	Mr. Uzair Shafie, Advocate.
RESPONDENTS BY:	Sheikh Anwar ul Haq, Advocate for FBR. Mr. Farrukh Shahzad Dall, Assistant Attorney General.
DATE OF HEARING:	15.08.2022.

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BABAR SATTAR, J.-The petitioner has impugned a notice issued by respondent No.3 dated 09.03.2022 under Section 140 of the Income Tax Ordinance, 2001 ***("Ordinance")***, pursuant to which the accounts of the petitioner were attached and the demand generated in the amount of Rs.2,928,517,260/- for the tax year 2020 against the petitioner by the Commissioner, Inland Revenue, Islamabad ***("Commissioner")*** was recovered from the bank accounts of the petitioner.

2. The learned counsel for the petitioner submitted that against the Assessment Order issued by the Commissioner under Section 122(5A) of the Ordinance an appeal was filed before the Commissioner (Appeals), Inland Revenue, Islamabad ***("Commissioner Appeals")***. That the Commissioner Appeals denied grant of interim injunction against the recovery and that the petitioner then approached the learned Appellate Tribunal,

Inland Revenue, Islamabad ***("Tribunal")*** seeking an injunction against the recovery, which was granted by order dated 31.05.2021. On 09.03.2022, the Commissioner Appeals upheld the Assessment Order for the tax year 2020. On 10.03.2022, the day after the date on which the Commissioner Appeals upheld the Assessment Order, the petitioner filed an appeal against such order and obtained injunctive relief against coercive recovery by the respondents. The learned counsel for the petitioner submitted that while the appellate order passed by the Commissioner Appeals was uploaded on the web portal of Federal Board of Revenue (FBR) (i.e. IRIS) at 03:28 p.m on 09.03.2022, respondent No.3 issued a Section 140 notice to the banks at 04:00 p.m on the same day, and the petitioner's accounts were attached and the amount in dispute was recovered instantly from the banks under the threat of penal action against the banks in case they demurred. He further submitted that the petitioner had written to Chairman FBR seeking refund of the amount recovered by respondent No.3 under Section 140 of the Ordinance, as the learned Tribunal had already barred tax authorities from coercively affecting the recovery from the petitioner pending adjudication of its appeal. But Chairman FBR has not responded to the representation filed by the petitioner. He contended that while a notice under Section 137 of the Ordinance was issued to the petitioner at the time when the demand was generated by the Commissioner pursuant to the Assessment Order, no notice was issued subsequently under Section 137 or Section 138 of the Ordinance once the Commissioner Appeals upheld the Assessment Order. And that

the issuance of Section 140 notice to enforce coercive recovery from the banks on behalf of the petitioner, without first notifying the petitioner and providing it with a reasonable time to discharge the demand and/or exercise its right to file an appeal before the learned Tribunal was a fraud on the statute. He submitted that the scheme of the Ordinance required that the State must seek to recover any liability directly from the taxpayer before taking coercive action for seeking to affect recovery from a third party in exercise of authority under Section 140 of the Ordinance. He further submitted that coercive recovery under Section 140 of the Ordinance could not be affected until the notice of demand had been served under Section 138 of the Ordinance. He submitted that it had been held by this Court in ***Messrs Huawei Technologies Pakistan Private Limited vs. Commissioner Inland Revenue and others*** ***(2016 PTD Islamabad 1799)*** and by the learned Lahore High Court in ***Mst. Fouzia Razzak vs. Federal Board of Revenue and others*** ***(2021 PTD Lahore 162)*** and ***Romex International vs. Federation of Pakistan and others*** ***(2022 PTD Lahore 760)*** that the issuance of a notice under Section 138 of the Ordinance was a mandatory requirement of law prior to invocation of Section 140 of the Ordinance.

3. The learned counsel for FBR submitted that there was no infirmity in the manner in which recovery had been affected by the respondents. He submitted that rule 210-B of the Income Tax Rules, 2002, clearly stated that any recovery under Section 140 of the Ordinance was independent of Section 137 and 138 of the Ordinance and as no injunctive order was in field on

09.03.2022 when the recovery was affected pursuant to the Assessment Order passed by the Commissioner (as upheld by the Commissioner Appeals), there was no illegality made out.

4. The learned Assistant Attorney General representing the Federation submitted that FBR and its employees were under an obligation to follow due process as prescribed under Sections 137, 138 and 140 of the Ordinance. He submitted that it had been held by this Court in ***Huawei Technologies Pakistan Private Limited*** that the requirement of issuing a notice under Section 138 of the Ordinance could not be bypassed. He further submitted that the question before this Court related to the just, fair and reasonable exercise of statutory authority by State officials as required under Section 24-A of the General Clauses Act, 1897 ***("Act")*** read together with Article 10-A of the Constitution.

5. The question before this Court as whether there is any obligation under provisions of the Ordinance to issue a notice under Section 138 of the Ordinance before affecting recovery in exercise of authority under Section 140 of the Ordinance. Let us first look at the nature of duties that the State owes to the citizen taxpayers. At least three sets of duties can be identified as follows:-

1. The duty to act in a just, fair and reasonable manner while upholding the right of a citizen under Article 4 of the Constitution to be afforded the protection of law, and to not take action detrimental to the property of a citizen under Article 4(2)(a) of the

Constitution except in accordance with law read together with Article 24 of the Constitution that prohibits the State from depriving a person of his property save in accordance with law.

2. The duty of the State to give fair notice to a citizen of any demand that the State has against the citizen to enable the citizen to discharge such demand without the need for the State to resort to use of its coercive powers, or to exercise the right to due process for determination of civil rights and obligations as guaranteed under Article 10-A of the Constitution.
3. The duty to uphold the right of a citizen to access justice before an independent Tribunal and seek the adjudication of civil rights and obligations before such Tribunal prior to the State exercising its coercive authority to realize a claim against the citizen.

6. It is now well settled that the obligations of the State and all its functionaries to act in a just, fair and reasonable manner as required under Section 24-A of the Act is to be read into every statute. All State functionaries exercise state authority under provisions of the Ordinance and are therefore required to act in a just, fair and reasonable manner. Article 4 of the Constitution declares that *"to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen"*. The dictate of the Constitution is clear enough. The Constitution and the body of statutory laws under it aims to protect the citizen and prohibit the State from treating the

citizen in a manner that is not backed by law. This requirement has to be understood in a context wherein a citizen is at liberty to do what he/she is not prohibited by law from doing and the functionaries of the State can only interfere with his/her life, liberty, body, reputation or property where they are authorized by law to interfere in such manner as prescribed by law.

7. The principles of natural justice are also well settled. It was held by superior Courts even prior to the introduction of Article 10-A within the Constitution that to be treaded in accordance with principles of natural justice is to be regarded as a fundamental right of a citizen. The principles of natural justice are understood to include the right of a citizen to a hearing and the right to be heard by an impartial Tribunal. The independence of judiciary is recognized as a salient feature of the Constitution and the right to access to justice includes the right to have one's civil entitlements and obligations adjudicated by a Tribunal or Court that is a neutral arbiter of the law. The importance of these rights was formally recognized when Article 10-A of the Constitution was introduced in the Constitution by the 18th Constitutional Amendment to afford a textual basis to such rights. The right to access justice and the role of an independent adjudicatory Tribunal to uphold such right was emphasized by the august Supreme Court in significant detail in ***Mehram Ali and others vs. Federation of Pakistan and others*** ***(PLD 1998 SC 1445)***.

8. It was held by the Full Bench of the learned Sindh High Court in ***M/s Pak-Saudi Fertilizers Limited vs. Federation of***

Pakistan and others ***(2002 PTD Karachi 679)***, in relation to the Income Tax Ordinance, 1979, that, *"while the disputes in the shape of appeals are pending, no coercive actions are to be taken."* In this case the department was found to have pressed for recoveries after passing assessment order with tremendous haste, by freezing the bank accounts of the taxpayer and drawing funds therefrom, in a fact pattern similar to that in the instant matter. The learned Sindh High Court observed that determination of amount due from the taxpayer remained to be made by an appellate forum it was consequently held that recovery proceedings initiated by the tax department, *"and adoption of coercive measures through notices under Section 92 of the Ordinance freezing of the bank accounts of the petitioner,"* were without lawful authority in view of pending appeals/disputes. And that, *"till disposal of the appeals by the department hierarchies up to the Income Tax Appellate Tribunal the respondents are restrained from adopting any coercive measures towards recoveries."* The question of the right of a taxpayer to have his fiscal obligations adjudicated by an independent forum outside the hierarchy of FBR has also been settled in ***Brothers Textile Mills Limited vs. Federation of Pakistan through Secretary and 03 others*** ***(2003 PTD Lahore 2834)***, wherein the learned Lahore High Court held that the taxpayer was entitled to interim relief till such time that the demand generated by the tax department was adjudicated by one appellate forum. Again in ***Z. N. Exports Private Limited vs. Collector of Sales Tax*** ***(2003 PTD Lahore 1746)*** the learned Lahore High Court held that, *"in all fairness, equity and*

justice, an assessee should not be forced to pay a demand created by a Revenue Authority unless the order creating such demand has undergone the scrutiny of at least one independent forum,". While identifying the Tribunal as such forum, it was held that, *"before a recovery created by an impugned order by a Departmental Authority can be effected, an assessee, appellant must be heard by a forum outside the departmental hierarchy."* These precedents were then explained by the learned Lahore High Court in ***Sun-Rise Bottling Company Private Limited through Chief Executive vs. Federation of Pakistan and 04 others (2006 PTD Lahore 535)*** where the question before the Court was whether a recovery could be affected when injunction granted by the Tribunal had expired after six months under Section 46(4) of the Sales Tax Act, 1990. Relying on the law laid down in ***Mehram Ali***, the learned Lahore High Court reiterated that an essential feature of the fundamental right of access to justice was the determination of a grievance by an independent forum while reiterating the law laid down in ***Z. N. Exports Private Limited***. In ***Commissioner of Income Tax and others vs. Messrs Media Network and others (2006 PTD SC 2502)*** the august Supreme Court explained that the right to natural justice could not be disregarded and that to uphold such right *"it might suffice if reasonable opportunity of hearing is granted to a person before an adverse action or decision is taken against him."*

9. Let us now refer to the scheme provided within the Ordinance. Section 137(2) of the Ordinance states the following:-

> ***Section 137. Due date for payment of tax.***-- *(2) Where any tax is payable under an assessment order or an amended assessment order or any other order issued by the Commissioner under this Ordinance, a notice shall be served upon the taxpayer in the prescribed form specifying the amount payable and thereupon the sum so specified shall be paid within thirty days from the date of service of the notice.*

10. Sections 137, 138 and 140 read together with Section 124 of the Ordinance are machinery provisions that relate to the mechanism for recovery after an assessment is made. It is during the assessment phase that the tax due from the taxpayer is determined. The recovery provisions then seek to recover the tax that has been determined to be due and payable and in this context Section 137(2) of the Ordinance requires the tax authorities to notify the taxpayer of the tax amount that has been determined to be due and payable by the taxpayer together with prescribing that such payable amount is to be paid within thirty days from the date of service of notice, thus specifying the time provided for discharge of the tax liability. In the event that a taxpayer chooses not to contest the tax liability as determined by the tax authorities pursuant to a Section 137 notice, he is informed of the payment due as well as the timeframe within which such payment has to be made. In the event that the tax liability determined to be due and payable by the tax department is amended by the Commissioner Appeals, the Tribunal, High Court or the Supreme Court, there is a mechanism provided under Section 124 of the Ordinance requiring the tax authorities to issue notice in order to give effect to a determination by the Commissioner Appeals, Tribunal, High

Court or Supreme Court, through which mechanism the taxpayer is informed of the amount due as determined by the appellate authorities and the timeframe within which such liability is to be discharged.

11. The question before us is, however, different, as it relates to obligation of the tax authorities where an assessment order has been upheld by the Commissioner Appeals, Tribunal, High Court or Supreme Court. Does such order by any of the aforementioned authorities confirming the assessment order by the Commissioner Inland Revenue automatically bring back to life the Section 137 notice originally issued by the Commissioner to the taxpayer? And if so what is the timeframe within which the taxpayer would be deemed to be obliged to discharge the tax liability, given that the original 30-day time period prescribed under Section 137(2) of the Ordinance would have elapsed during the adjudicatory process? This is where Section 138 of the Ordinance comes into play. Section 138(1) states the following:-

> ***Section 138. Recovery of tax out of property and through arrest of taxpayer.--*** *(1) For the purpose of recovering any tax due by a taxpayer, the Commissioner may serve upon the taxpayer a notice in the prescribed form requiring him to pay the said amount within such time as may be specified in the notice.*

12. This provision is independent of Section 138(2) of the Ordinance, which empowers the tax authorities to affect coercive recovery from the taxpayer in the event that the time period prescribed under a notice under Section 138(1) of the Ordinance

to discharge a tax liability determined to be due or payable is not discharged within such period. The affiliated question is whether Section 140 of the Ordinance, which empowers the tax authorities to affect recovery from third parties who hold money on behalf of the taxpayer is completely independent of Section 138 of the Ordinance, and that recovery can be affected from such third parties even without issuing a notice to the taxpayer under Section 138(1) of the Ordinance.

13. The question of the relationship between Sections 137, 138 and 140 of the Ordinance came before this Court in ***Huawei Technologies Pakistan Private Limited***, wherein it was held that, *"the respondent department before invoking section 140 of the Ordinance is required to issue a notice intimating the taxpayer regarding the invocation of section 140 ibid and requiring him to make payment of the tax liability within a reasonable time"*. Relying on the law as explained by this Court, the learned Lahore High Court in ***Fouzia Razzak*** held that, *"the Respondent-Department before invoking Section 140 of the Ordinance is required to issue a notice under Section 138 of the Ordinance intimating the taxpayer regarding the invocation of Section 140 ibid and requiring him to make payment of tax liability within a reasonable time".* Reaffirming the law as explained in ***Fouzia Razzak*** the learned Lahore High Court in ***Romex International*** held that, *"bypassing of the Section 138 has already been declared illegal by another learned Single Bench of this Court in judgment Mst. Fouzia Razzak v. Federal Board of Revenue and others (2021 PTD 162). Until this*

judgment holds field the respondents are bound to comply with the decision."

14. A reason why it has been held by this Court (as well as the learned Lahore High Court) that it is mandatory to issue a Section 138(1) notice before resorting to coercive use of State authority and affecting recovery form a third party pursuant to Section 140 of the Ordinance is that there is an obligation on behalf of the State to give a taxpayer due notice of his obligation to pay the tax liability adjudicated against him and areasonable opportunity to discharge such liability within the timeframe notified to him by the tax authorities. In case of Section 137(2) of the Ordinance this timeframe has been prescribed by the legislature as a 30-day period. However, where the taxpayer files an appeal against the assessment order, the tax department is restrained as a matter of routine from affecting coercive recovery pending adjudication of the appeals as the principle is now settled that no coercive recovery is to be affected till tax liability has been adjudicated by at least one appellate forum outside the hierarchy of the tax department, which has been declared to mean the learned Tribunal. If the tax liability as determined through an assessment order by the Commissioner is upheld by the Commissioner Appeals (or even by the learned Tribunal), the tax due from the taxpayer as determined by assessment order might have not changed, but the taxpayer still needs to be notified of the timeframe within which the taxpayer is required to discharge such tax liability, failing which the State could resort the exercise of its coercive power to enforce recovery under Section 138(2) or Section 140 of the

Ordinance. If this were not the purpose of Section 138(1) of the Ordinance, the said provision would be redundant. The power to enforce coercive recovery against the taxpayer is provided under Section 138(2) of the Ordinance. Thus, there is no need to promulgate Section 138(1) of the Ordinance if upon affirmation of an assessment order of the Commissioner, the tax authorities could immediately seek to exercise their coercive powers to affect recovery under Section 138(2) or Section 140 of the Ordinance without first putting the taxpayer on notice that the tax liability, as affirmed by an appellate authority, is to be discharged within such reasonable time as stated in the notice under Section 138(1) of the Ordinance. It is settled law that redundancy cannot be attributed to the legislature. It cannot be imagined that Section 138(1) of the Ordinance was introduced by the legislature without purpose.

15. There is a second more essential purpose of Section 138(1) of the Ordinance. It is to inform the taxpayer that the tax liability created by the Commissioner has been affirmed by the appellate authority and would be recovered by the State unless such assessment is interfered with by a higher appellate forum. Section 138(1) notice requires the tax authorities to prescribe a time period within which the liability is to be discharged. And such time period has to be a reasonable time period in view of the requirement of Section 24 of the Act. It is within such period that a window is created for the taxpayer to appeal the assessment order, as upheld by an appellate authority before a higher appellate authority, thereby upholding the right of the taxpayer to access justice through a fair trial and due process as

guaranteed by Article 10-A of the Constitution. If Sections 137 and 138 of the Ordinance were to be interpreted such that a notice under Section 137(2) of the Ordinance would automatically stand resurrected upon decision by the Commissioner Appeals upholding an assessment order and the due date by which the tax assessment was payable could be deemed to a date that had already passed rendering such liability to be overdue and authorizing the tax authorities to resort to coercive means under Section 140 of the Ordinance to recover such liability, the scheme would frustrate the right of the taxpayer to file an appeal before the learned Tribunal as provided under Sections 130 and 131 of the Ordinance. Such interpretation would fall foul of the right of the taxpayer to access justice and to have his/her civil rights and liabilities adjudicated by an impartial arbiter of the law.

16. While the State is within its right to collect the tax due from citizens, it is under an obligation to inform the citizens of the tax due as well as the date by which such liability is to be discharged, failing which the State could resort to use of coercive means for recovery. Once a taxpayer files an appeal against the assessment order, the 30-day period prescribed under Section 137(2) of the Ordinance becomes irrelevant (unless the appeal is filed and decided within such 30-day period). Thus, Section 138(1) of the Ordinance has been enacted, which logically provides that in order to recover tax due by the taxpayer the Commissioner may serve a notice specifying the liability due as well as the time-period within which it is to be discharged. The requirement to issue Section 138(1) notice is thus mandatory

where the taxpayer files an appeal against an assessment order and the Commissioner Appeals or the Tribunal affirms the assessment order. The issuance of such notice discharges the obligation of the State to put the taxpayer on notice that a tax liability due to the State ought to be paid within the period specified in such notice, failing which the State would be within its right to use coercive means for recovery. Such notice also gives fair warning to the taxpayer to avail his remedy of appeal before the Tribunal or file a reference before the High Court as the case may be. The provisions of the Ordinance cannot be interpreted in a manner that frustrates the statutory right of appeal or that of filing a reference made available to a taxpayer aggrieved by the order of the Commissioner Appeals or the Tribunal.

17. Now, we return to the facts of the instant case. Respondent No.3 had issued a notice under Section 140 of the Ordinance and had recovered the tax as determined to be due by the Commissioner and Commissioner Appeals from the banks within thirty minutes of the Commissioner Appeals uploading its order on IRIS. It is inconceivable that the Deputy Commissioner (respondent No.3) would be able to function with such alacrity if the Deputy Commissioner, had also become aware of the decision of the Commissioner Appeals at 03:30 p.m on 09.03.2022 when the decision was uploaded in IRIS for the information of the petitioner. The decision of respondent No.3 to not issue a notice under Section 138(1) of the Ordinance to the petitioner, and seeking attachment of the bank accounts of the petitioner and affecting coercive recovery of tax determined in

the Assessment Order (despite the law laid down by this Court and the learned Lahore High Court declaring that a notice under Section 138(1) of the Ordinance is a mandatory requirement of law), appears to be aimed at frustrating the right of the petitioner to seek injunctive relief from the learned Tribunal. The petitioner did seek such relief the very next day (i.e. 10.03.2022) and was granted an injunctive order. But the amount sought to be recovered by the tax department under the Assessment Order had already been recovered in exercise of the coercive authority of the State under Section 140 of the Ordinance. The failure of tax authorities to put the petitioner on notice that tax was due and payable by the petitioner as determined in the Assessment Order as upheld by Commissioner Appeals and prescribing a timeframe for discharge of such liability within which time the petitioner would be free to avail its remedy of appeal before the learned Tribunal, is tantamount to playing a fraud on the statute.

18. Public servants who discharging State authorities under the Ordinance cannot assume the role of revenue generators on behalf of the State working with premeditation to meet monthly, quarterly, biannual or annual quotas. Public servants acting as tax authorities exercising powers under recovery provisions of the Ordinance cannot act like bankers with monthly fund-raising targets that they must meet as a measure of their performance. Public servants are under obligation to act in just, fair and reasonable manner and as functionaries of the State they are under an obligation to exercise their authority under the Ordinance such that it does not undermine the rights of

taxpayers to due process, fair trial and access to justice. Tax authorities are under an obligation to afford the protection of law to the citizens rather than becoming instruments of denuding taxpayer of such protection.

19. In view of the opinion above and the reasons stated, the instant petition is ***allowed*** and the impugned notice dated 09.03.2022 issued in exercise of authority under Section 140 of the Ordinance without complying with the mandatory requirement of issuing a notice under Section 138(1) of the Ordinance is devoid of legal authority and is ***void ab initio*** being a fraud on the statute. Section 138(1) of the Ordinance conceives that a reasonable timeframe is to be specified by the Commissioner within which the tax due is to be paid. It is inconceivable that such reasonable time could be a period of less than 7 days as the purpose of such provision is to put the taxpayer on notice to discharge the tax obligation within a reasonable period and also afford the taxpayer an opportunity to avail his statutory right of appeal, if so advised. Consequently, whether it is the Commissioner Appeals, the Tribunal or the High Court upholding an assessment order, the tax authorities are under an obligation to issue a notice under Section 138(1) of the Ordinance before they resort to use of coercive means under Section 138(2) or Section 140 of the Ordinance.

20. As the impugned notice has been declared to be *void ab initio* and set-aside, respondents No.2 & 3 will ensure that the amount recovered from the bank accounts of the petitioner pursuant to the impugned notice under Section 140 of the

Ordinance is reimbursed to the petitioner or credited to the same bank accounts within a period of fifteen days.

21. In view of the facts of the case, this Court is of the view that respondent No.3 might be liable for abuse of authority and maladministration in the manner in which authority has been exercised under Section 140 of the Ordinance. This Court, therefore, refers the matter to the learned Federal Tax Ombudsman, who is expected to inquire into the matter and share his findings and recommendations with this Court within a period of three months. The office will send a copy the petition along with the record and a copy of this judgment to the learned Federal Tax Ombudsman.

22. Before parting of this judgment, this Court would like to observe that the pernicious practice of forcing tax officials to use state power to meet fixed fund-raising targets must end. The State is responsible to uphold Constitutional guarantees made to the citizens and not act as a blunt tool undermining the same. The baleful practice of back-dating notices or not serving them at all to frustrate the right of taxpayers to follow the right to due process and fair trial must come to end. It does not behoove the State to assume the role of a trickster and undermine the social contract with the citizen.

23. Let the office send a copy of this judgment to Chairman, FBR for his information, who will place the same before the Board of FBR to ensure that the powers vested in taxation authorities under fiscal statutes are not used such that

they undermine fundamental rights of citizens as guaranteed under the Constitution.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 07.09.2022.

JUDGE

Approved for Reporting.

A.Rahman Abbasi.