Form No: HCJD/C-121.
ORDER SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Criminal Misc. No. 2217-B of 2024

Shahid Hussain Khawaja
Versus
The State and another.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	23.12.2024.	Mr. Muhammad Ahmed Masood, Advocate for the petitioner. Mr. Razi Ul Haq Qureshi, Deputy Director I&I-IR, Islamabad. Raja Inam Ameen Minhas and Ch. Ehtisham Ul Haq, Special Prosecutor, I&I, FBR.

The petitioner is seeking bail after having been arrested in the case registered pursuant to F.I.R. No.7/2024 in terms of Section 2(37) of the Sales Tax Act, 1990 **("Sales Tax Act")** read with the punishments mentioned at Serial No.11 and 13 of Column 1 of the table under Section 33 of the Sales Tax Act.

2. It is the State's case that Kineses Energy and Power Innovations (Pvt.) Limited **("Taxpayer")** is liable for sales tax fraud in the amount of approximately Rs.3.2 billion. The petitioner is the branch manager of First Women Bank, Imperial Court Branch, Karachi and has been arrested for aiding and abetting the Taxpayer by opening their accounts in the branch.

3. The learned counsel for the petitioner submitted that the petitioner was not nominated in the F.I.R. and has no role whatsoever to play in the business of the Taxpayer. He had no duties and obligations in relation to the Taxpayer and could therefore not be held liable for the Taxpayer understating its

tax liability, even if that were found to be true. He could therefore not be held liable for any tax fraud as defined in Section 2(37) of the Sales Tax Act. There was no material on record to establish that he was liable for punishment under Section 33 or either in relation to an offence mentioned under clause 11 or clause 13 of the table under Section 33 of the Sales Tax Act. He submitted that the maximum jail time in relation to offences under Serial No. 11 and 13 of the table under Section 33 of the Sales Tax Act was three years and five years, respectively. Further, the punishment was compoundable in terms of Section 37(a)(iv) of the Sales Tax Act. The Lahore High Court has held in ***Taj International (Pvt.) LTD vs. Federal Board of Revenue*** **(2014 PTD 1807)** that no criminal proceedings could be initiated under section 33 until tax due by a taxpayer had been determined after adjudication and assessment of tax under Section 11 of the Sales Tax Act. Consequently, the arrest and detention of the petitioner was illegal and the petitioner was also entitled to grant of bail as the offences did not fall under the prohibitory clause.

4. The learned Special Prosecutor submitted that the Taxpayer was liable for tax fraud as he had aided and abetted such tax fraud. He submitted that there was no obligation to first undertake tax assessment for purpose of Section 11 of the Sales Tax Act as civil and criminal proceedings could proceed simultaneously. He submitted that in the investigation undertaken by the tax department, it had been concluded that the petitioner had aided and abetted tax fraud and in the event

that the arrest of the petitioner for purpose of investigation was delayed till after assessment of the Taxpayer, vital evidence would have been lost which would frustrate criminal proceedings undertaken at a subsequent stage. He submitted that the arrest was in accordance with law, the petitioner was liable for causing massive loss to the state exchequer and was not entitled to grant of bail.

5. The State has placed no material on the record whatsoever identifying the petitioner's role in any tax fraud undertaken by the Taxpayer. The contention of the learned Special Prosecutor that civil and criminal proceedings can run independently and simultaneously is not without merit. However, the principles providing guidance to where civil and criminal proceedings can run simultaneously and where criminal proceedings are to be stayed till after civil proceedings end is now settled. And in cases of tax fraud under the Sales Tax Act, unless it has been determined that there was tax due from a taxpayer, which liability it failed to discharge, the question of the taxpayer committing fraud with the exchequer cannot arise.

6. The pillar judgment laying explaining the principle as to when criminal proceedings must be stayed is ***Muhammad Akbar vs. The State*** **(PLD 1968 Supreme Court 281)**, in which it was held that, *"normally it is true, that criminal proceedings should not be postponed pending the disposal of civil litigation connected with the same subject-matter. But where it is clear that the criminal liability is dependent upon the result of the civil litigation or is so intimately connected*

with it that there is a danger of grave injustice being done in the case if there be a conflict of decision between the Civil Court and the Criminal Court, in such event it is equally clear that the Criminal Court has not only the right to but should also stay its hand until the civil litigation is disposed of, for, it is not desirable that when the title to the property itself is in dispute, the Criminal Courts should give a finding in respect of the same question… There is now consensus of opinion that there is no invariable rule that a criminal proceeding should be stayed pending the decision of the Civil Suit, but the matter is one of discretion entirely. In exercising this discretion, the guiding principle should be to see as to whether the accused is likely to be prejudiced if the criminal proceeding is not stayed. In cases of disputed title, where it is difficult to draw a line between a bona fide claim and the criminal action alleged, a stay can be made in the proper exercise of that discretion."

7. It is also settled that simultaneous civil and criminal proceedings related to the same subject-matter can continue[1] except where the determination of criminal liability is contingent on the prior determination of civil rights and obligations that are in question[2]. In such case, the correct course of action is to stay the criminal proceedings till the civil rights and obligations of the contesting parties have been finally determined by the Court of competent jurisdiction[3].

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[1] *M. Tufail vs. The State* ***(1979 SCMR 437)****, Talib Hussain vs. Angar Gul Khan* ***(1993 SCMR 2177)****, Seema Fareed vs. The State* ***(2008 SCMR 839)****, State vs. Jahangir Akhtar* ***(2018 SCMR 733)***

[2] *Muhammad Akbar vs. The State* ***(PLD 1968 SC 281)****, Muhammad Azam vs. Muhammad Iqbal* ***(PLD 1984 SC 95)***

[3] *Akhlaq Hussain Kayani vs. Zafar Iqbal Kiyani* ***(2010 SCMR 1835)***

8. The question of whether criminal proceedings on the charge of a taxpayer having committed tax fraud could be initiated prior to determination of tax liability in terms of Section 11 of the Sales Tax Act was determined by the Lahore High Court in ***Taj International (Pvt.) LTD***. This judgment was impugned before the Supreme Court by the ***Directorate of Intelligence and Investigation, FBR*** in **Civil Appeals No.350 to 698/2016** and by order dated 04.12.2024 the appeals were dismissed for reasons that have not yet been released by the Supreme Court. The law laid down by the Lahore High Court in ***Taj International (Pvt.) LTD*** has however attained finality.

9. This court is in complete agreement with the reasoning of the Lahore High Court in ***Taj International (Pvt.) LTD***, which are being reproduced in some detail here.

> *"18. Review of the penalties above, clearly shows that the measure of sentence is linked with the "amount or loss of tax involved." In fact, the above linkage, uses the tool of penalty as a mode of recovery of tax. Hence, criminalization under the Act goes beyond the pale of retribution and deterrence and appears to be principally focused on recovery of tax…*
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> *19. The background and the departmental justification to this over-criminalization has been frankly pointed out by the learned counsel for the respondent department. He submitted that the civil proceedings leading to assessment of tax and penalties followed by the recovery procedure under section 48 has not proved successful over the years. Hence, to fast-track recovery, it had to be criminalized. Without commenting on the legality of this over-criminalization, it is settled law that recovery of tax is possible only after the tax has been duly assessed*

and the amount of "tax due" determined under the Act. Recovery under civil law is initiated once tax has been assessed through the civil adjudicatory process provided under the Act. Tax assessment becomes doubly necessary, when recovery stands criminalized and entails criminal consequences. Other than the penalties hinged on "amount or loss of tax involved," criminalization of recovery of tax is also evident from section 37A(4) of the Act. This provision permits compoundability of the offence if the amount of tax due and penalties as determined under the Act are paid at any stage of the criminal proceedings. Criminal mode of recovery, reinforces the requirement of prior assessment of tax liability under the Act.

22. Collective reading of sections 11, 25(5), 33, 37A and 72B of the Act indicates that the criminalization under the Act is principally to effectuate recovery or is being largely used to effectuate recovery. Two clear pointers are: dependence of fine on the "amount or loss of tax involved" and the window of compoundability available to the taxpayer who can pay the "amount of tax due along with such default surcharge and penalty as determined under the provisions of this Act." If the purpose was simple retribution and deterrence, there was no need to load the fine with the amount or loss of tax involved. However, if the fine under criminal prosecution is to be loaded with the amount or loss of tax, such a criminal construct must be prefaced with the mandatory requirement of assessment of tax through civil adjudication provided under section 11 of the Act. This precondition is the minimum constitutional requirement to ensure fair trial and due process under Articles 4 and 10-A of the Constitution.

23. …the process of hauling up taxpayers and effecting recovery of self-determined amount of sales tax by the officer of the Inland Revenue is brutally unconstitutional.

10. The ruling of the Lahore High Court addresses all the contentions raised by the learned counsel for the Tax Department opposing the bail (who was oblivious to the fact that appeals against ***Taj International (Pvt.) LTD*** had been dismissed by the Supreme Court). The Lahore High Court while acknowledging that civil and criminal proceedings can run independently and simultaneously concluded that in relation to a tax fraud under provisions of the Sales Tax Act "*criminal prosecution follows adjudication and assessment of tax under Section 11 of the Act*". The Lahore High Court further held that, "*the pre-trial steps including arrest and detention cannot be given effect to unless the tax liability of the taxpayer is determined in accordance with Section 11 of the Act*."

11. This makes abundant sense. The actus reus for an offense under section 33 is failure of a taxpayer to discharge its tax liability found to be due. There exists no *actus reus* till after the tax due has been determined through the assessment process prescribed under the Sales Tax Act. The question of *mens rea* can therefore not arise till after the guilty act is found to have transpired. The offenses under section 33 of the Sales Tax Act are not thought crimes. Where there is no failure to discharge tax liability as duly determined under the Sales Tax Act, no criminal liability can be imagined or founded. Our Constitution requires in Article 10A that determination of civil liabilities must be the product of due process. That such process takes time and bestows on the citizen the right of appeal does not entitle the state to ride roughshod over the constitutionally guaranteed rights of citizens, including their

right to liberty and dignity. Further, the assessment process is based on documents, which the taxpayer is obliged to preserve for a period of at least 5 years. The question of vital evidence being lost in cases of sales tax fraud also doesn't arise. Instead of approaching taxpayers with a sledgehammer, whose tax liability remains to be determined, the tax department can quite easily design the filing regime such that it minimizes the potential of sales tax fraud.

12. The state has placed no material before this court to establish how the petitioner is liable for the offence of tax fraud punishable in terms of Serial No. 11 and/or 13 of the table under Section 33 of the Sales Tax Act. The maximum punishment for the said offences is three years and five years, respectively, and fine has also been prescribed as an alternate punishment. The offenses are also compoundable in terms of section 37A(4) of the Sales Tax Act. The petitioner is not named in the FIR, which alleges that the Taxpayer is liable for tax fraud for seeking tax credits and/or tax benefits on the basis of fake sales tax invoices. It is not contested that no assessment of tax due by the Taxpayer has been undertaken under Section 11 of the Sales Tax Act. It is prior to the determination of such tax liability that the pre-trial steps of arrest and detention have been taken by the tax department in breach of the law laid down by the Lahore High Court in ***Taj International (Pvt.) LTD.*** and upheld by the Supreme Court in ***Directorate of Intelligence and Investigation, FBR vs. Taj International (Pvt.) LTD*** by order dated 04.12.2024.

13. The Court therefore finds that the arrest and detention has been undertaken in breach of the law laid down by the Lahore High Court in ***Taj International (Pvt.) LTD.*** and upheld by the Supreme Court by order dated 04.12.2024. The tax department has initiated criminal proceedings while being privy to the law laid down in ***Taj International (Pvt.) LTD.,*** which amounts to colourable exercise of authority and abuse of power undermining the petitioner's right to liberty, dignity, equality and due process guaranteed by Articles 9, 14, 25 and 10A of the Constitution. In their zeal for maximizing tax collection, public officials comprising the tax department have thwarted the law laid down in ***Taj International (Pvt.) LTD.*** and have abused the powers vested in them under the Sales Tax Act and have undermined petitioner’s fundamental rights guaranteed by the Constitution.

14. It is also a shame that neither the Magistrate granting remand nor the Court denying bail took into account provisions of Sales Tax Act as enumerated in ***Taj International (Pvt.) LTD.***, and have instead acted as cheerleaders for the misguided tax recovery steps undertaken by the tax department instead of being the protectors and enforcers of fundamental rights guaranteed by the Constitution. While the question of legality of the criminal proceedings initiated against the petitioner is not before this court, it expects that the trial Court seized of the matter will take into account the legality of the proceedings it terms of the law laid down in ***Taj International (Pvt.) LTD.***

15. For these reasons, the bail application is **allowed** and the petitioner is admitted to bail, subject to furnishing bail bonds in the sum of Rs.100/- (Rupees One Hundred) to the satisfaction of the trial Court. The petitioner shall be at liberty to deposit cash surety in accordance with the policy of this Court.

16. Let a copy of this order also be sent to Chairman FBR who will ensure that the order together with the judgment of Lahore High Court in ***Taj International (Pvt.) LTD*** is circulated to the relevant tax officials exercising powers under the Sales Tax Act within the territorial jurisdiction of this Court. As any action taken while initiating criminal proceedings in breach of the law laid down in ***Taj International (Pvt.) LTD*** will expose the Federal Board of Revenue as well as the officers who have been delegated powers under the Sales Tax Act to penal consequences for abuse of power. Let them remember that as public officials the statutory and police powers of the state delegated to them are to be exercised as a trust, in accordance with law.

(BABAR SATTAR)
JUDGE

Approved for Reporting.

Shakeel Afzal/-