JUDGEMENT SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 2510/2017

Masud Reza
Vs.
The Federation of Pakistan through President & others

PETITIONER BY:	Mr. Waheed Shahzad Butt, Advocate.
RESPONDENTS BY:	Mr. Adnan Haider Randhawa, Advocate for the respondents. Mr. Aqeel Akhtar Raja, Assistant Attorney General.
DATE OF DECISION:	22.03.2023.

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BABAR SATTAR, J.- The petitioner has impugned an order dated 31.05.2017 passed by the President of Pakistan, whereby findings and recommendations of the learned Federal Tax Ombudsman (FTO) dated 20.02.2017 were set-aside on a representation filed by respondent No.2 (Federal Board of Revenue (FBR)).

2. The learned counsel for the petitioner submitted that the Assessing Officer of the tax department attached the petitioner's bank accounts almost two years after passage of the assessment order under Section 140 of the Income Tax Ordinance, 2001 ***("ITO")***, without serving any tax demand under the assessment order upon the petitioner. The petitioner filed an appeal against demand generated by the tax department and the Commissioner Appeals by order dated 11.11.2016 stayed the recovery of demand in exercise of authority under Section 128(1A) of the ITO. The appeal was subsequently

allowed by order dated 28.11.2016 and the Commissioner Appeals observed that, *"proceedings under Section 121(1)(d) in this case were wrongly concluded without even discussing the various sources of income already offered by the appellant through return electronically filed which include services income, rental income, bank profit, imports etc. I am of the considered view that without ascertaining quantum of actual income not offered to tax, the assessing officer could not allege any income on estimate basis."* The Commissioner Appeals further observed that the DCIR was under a duty to identify any sources of income not declared by the appellant which duty was not discharged and consequently the assessment order was set-aside. The Commissioner Appeals, however, remanded the matter back to the Assessing Officer for a fresh assessment. The petitioner then challenged the remand order before the learned Appellate Tribunal Inland Revenue, which by order dated 18.04.2018 set-aside the remand order and observed that, *"the patently illegal intervention by the taxation officer while passed void order under Section 121(1)(d) the Worthy CIR (Appeals) was not justified to remand the matter to the department."* And consequently the assessment order was set-aside. And with that the issue of a demand generated by tax department was found to be illegal and the declaration of illegality with regard to such order attained finality.

3. The learned counsel for the petitioner submitted that the grievance of the petitioner emanated from the refusal of the tax department to abide by the stay order issued by the Commissioner Appeals on 11.11.2016 despite the passage of

which the bank accounts of the petitioner were not detached. He submitted that the accounts were finally detached on 10.01.2017, whereby instructions were issued to banks with regard to recall of orders under Section 140 of the ITO. The petitioner then filed a complaint before the learned FTO on the basis that officials of FBR who disregarded the stay order dated 11.11.2016 issued by the Commissioner Appeals in exercise of authority under Section 128(1A) of the ITO were liable for maladministration in terms of the Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000 ***("FTO Ordinance")***. The learned FTO in his order dated 20.02.2017 found that lapse in giving effect to the stay order dated 11.11.2016 was borne out by the record as produced before the learned FTO, who concluded that failure to implement a stay order by the Commissioner Appeal was tantamount to maladministration under Section 2(3)(i)(b) of the FTO Ordinance and recommended that the Chief Commissioner Inland Revenue *"take suitable action against the official for failure to comply with CIR (Appeals) stay order in the manner required by law."* He submitted that against the order of the learned FTO respondents No.2 and 3 filed a representation before the President of Pakistan, who by order dated 31.05.2017 found that the recommendations of the learned FTO were in excess of his jurisdiction as the learned FTO had no power to interfere with the matter of assessment of tax and interpretation of law and set-aside the findings of the learned FTO. He submitted that the exercise of authority by the learned FTO was within the scope of powers vested in him under Section 14 of the FTO Ordinance. All

that the learned FTO has done was issued directions to the Chief Commissioner Inland Revenue to take departmental action against officers responsible to disregard the stay order issued by the Commissioner Appeals. And therefore the decision of the President of Pakistan was liable to be set-aside as he had misconceived the nature of the controversy before the learned FTO and the decision rendered by him.

4. The learned counsel for FBR submitted that the petition was not maintainable as the decision of the learned FTO had been issued in Lahore and consequently the petition in relation to such order ought to have been filed before the learned Lahore High Court. He further submitted that one of the grounds for filing of a representation before the President of Pakistan was that the relevant official of the tax department, who had jurisdiction over the case, had never been served with the copy of the stay order passed by the Commissioner Appeals and consequently the petitioner had failed to establish that the relevant Assessing Officer had knowledge of the stay order but disregarded it nevertheless.

5. The objection of the learned counsel for FBR to the maintainability of the petition is misconceived. The petitioner has sought judicial review of a decision rendered by the President of Pakistan dated 31.05.2017 for being illegal for having been passed in disregard of provisions of the FTO Ordinance. Judicial review has been sought against an order passed within the jurisdiction of this Court. Consequently, this Court has

subject-matter as well as territorial jurisdiction to exercise judicial review.

6. The second contention that the Assessing Officer within the hierarchy of FBR had no notice of the stay order dated 11.11.2016 issued by the Commissioner Appeals is equally without merit. The appeal was filed pursuant to provisions of the ITO and Section 128(1A) of the ITO states that it where Commissioner Appeals, *"is of the opinion that the recovery of tax levied under this Ordinance, shall cause undue hardship to the taxpayer, he, after affording opportunity of being heard to the Commissioner against whose order appeal has been made, may stay the recovery of such tax for a period not exceeding thirty days in aggregate."* The petitioner filed the appeal before the Commissioner Appeals on 11.08.2016, which was fixed for hearing on 11.11.2016, when the stay order was passed. The stay order itself reflects the name of the Assessing Officer and makes an explicit reference to Section 128(1A) of the ITO. It is therefore inconceivable that the Commissioner Appeals who also falls within the hierarchy of FBR would fix an appeal for hearing for purposes of Section 128(1A) of the ITO without issuing a notice to the Commissioner Inland Revenue and/or the relevant Assessing Officer. Further, the stay order dated 11.11.2016 has been copied by the Commissioner Appeals to the Chief Commissioner, Regional Tax Office (RTO), Islamabad, alongwith the appellant. The record therefore reflects that the stay order was sent by the Commissioner Appeals to the relevant Chief Commissioner, and FBR cannot take a position that the officials working under its hierarchy while discharging assessment

functions had no knowledge of an order passed by the Commissioner Appeals also working within the hierarchy of FBR. If FBR were to contend that Commissioners could feign ignorance to orders of Commissioner (Appeals), it would in effect be writing a charge sheet against itself, as that would be admission of its own malfeasance under the Federal Board of Revenue Act, 2007.

7. The appeal was fixed after issuance of a notice to the relevant Commissioner Inland Revenue. Further, the stay order itself was copied to the Chief Commissioner, RTO, Islamabad. And thus the question of the appellant establishing that the stay order had been communicated to the relevant officials of the tax department doesn't arise. Even otherwise, the petitioner has placed on record letters dated 16.11.2016 and 19.12.2016, which were addressed by counsel of the petitioner to Deputy Commissioner Inland Revenue, RTO, Islamabad. Further, while the complaint was filed by the petitioner before the learned FTO, the tax officials were issued notices as respondents and the hearings were duly attended by the officials of the tax department on behalf of FBR. Thus however improbable, had they been unaware of the proceedings before Commissioner (Appeals) and his orders, they had an opportunity to establish the same through record.

8. A perusal of the order of the learned FTO dated 20.02.2017 reflects that the FBR never took a position before the learned FTO that the stay order issued by the Commissioner Appeals was never communicated to the Commissioner Inland

Revenue or the Assessment Officer delegated authority by the Commissioner Inland Revenue. If such were the case, it would have been an additional ground of maladministration on part of FBR and its officials as it cannot be countenanced that one arm of the FBR can claim ignorance in relation to the orders issued by another arm of the FBR. The Commissioner Appeals as mentioned above falls within the hierarchy of FBR and it is not for the taxpayer to demonstrate effecting notice of orders passed by the Commissioner Appeals on the relevant officials within the hierarchy of the Commissioner Inland Revenue to seek the enforcement of such order and the appeal is to be fixed after issuance of notice to the relevant Commissioner pursuant to Section 128 of the ITO. As a matter of practice, the Commissioner Appeals also endorses a copy any order passed under Section 128(1A) of the ITO to the relevant Commissioner Inland Revenue. For FBR to take a position that the Commissioner Inland Revenue was never made aware of a stay order issued by the Commissioner Appeals would amount to FBR denying the taxpayers the right to a fair and just tax system. It is the duty of FBR to ensure that the taxpayers are treated justly and fairly during the adjudication process. And it is not for FBR to deny knowledge or dodge service of any orders issued by the Commissioner Appeals and thereby deny any benefit of a stay order issued by the Commissioner Appeals in favor of the taxpayer.

9. Consequently the denial of knowledge is without merit and would constitute an independent ground for FBR, under the relevant provisions of the Federal Board of Revenue Act, 2007,

to initiate an inquiry and take disciplinary action against officials who claimed that they were unaware of the stay order passed by the Commissioner Appeal dated 11.11.2016.

10. Notwithstanding the above, the President of Pakistan did not pass the impugned decision dated 31.05.2017 on the basis that the relevant officials of the tax department were never notified of the stay order. The considerations that prevailed with the President of Pakistan were that the learned FTO had exceeded his authority by interfering with the matter of assessment of tax and interpretation of law. That obviously was not the case. The question of legality of the assessment order passed against the taxpayer had been settled by the learned Tribunal as detailed in the submissions of the learned counsel for the petitioner recorded above. The question before the learned FTO was with regard to the maladministration on part of the Assessing Officers as defined under Section 2(3)(i) of the FTO Ordinance. The finding of the learned FTO was that the failure or refusal of the relevant tax officials to honor and implement the stay order issued by the Commissioner Appeals was perverse, arbitrary, unjust and oppressive. And such conduct fell within the definition of maladministration under Section 2(3)(i)(b) of the FTO Ordinance. After reaching such conclusion, the learned FTO issued recommendations to the Chief Commissioner Inland Revenue to take suitable action against the officials responsible for failure to comply with the order of the Commissioner Appeals. Such recommendations fell within the powers vested in the learned FTO under Section 14(6) of the FTO Ordinance, which states the following:-

> ***14. Powers of the Federal Tax Ombudsman. –*** *(6) If the Federal Tax Ombudsman has reason to believe that any Tax Employee has acted in a manner warranting criminal or disciplinary proceedings against him, he may refer the matter to the appropriate authority for necessary action to be taken within the time specified by the Federal Tax Ombudsman.*

11. It appears that while hearing the representation against the order of the learned FTO, the President of Pakistan misapplied himself to the relevant facts and the law and consequently passed an impugned order setting aside the order of the learned FTO in a manner that is not sustainable in the eyes of law.

12. In view of the above, the petition is ***allowed***. The decision of the President of Pakistan dated 31.05.2017 is ***set-aside*** for not being in accordance with law and the decision of the learned FTO dated 20.02.2017 is upheld. FBR will ensure that the recommendation passed by the learned FTO is given effect in accordance with provisions of law.

(BABAR SATTAR)
JUDGE

A. Rahman Abbasi.