

JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P. No.29586 of 2023

China Machinery Engineering Corporation, Pakistan Branch

Versus

Federation of Pakistan, etc.

JUDGMENT

Date of hearing	26.09.2023
Petitioner by	Mr. Faisal Islam, ASC
Federation of Pakistan by	Mr. Muhammad Mansoor Ali Sial, Assistant Attorney General
Respondents No.3 to 5 by	Barrister Ahmad Pervez ASC
Respondent No.6 by	Mr. Usman Akram Sahi, Advocate with Hammad Altaf Khan, Chief legal Officer and Aurangzeb Shami, Manager Legal

Raheel Kamran, J. The petitioner has assailed recovery of Rs.759,059,945/- from the accounts of the petitioner maintained at HBL and Standard Chartered Bank in purported exercise of authority under section 140 of the Income Tax Ordinance, 2001 (‘The Ordinance’) without issuance of prior notice under section 138(1) of the Ordinance after dismissal of appeal of the petitioner by the Commissioner, Inland Revenue (Appeals). A prayer for the return of the aforementioned amount recovered from the petitioner has also been made.

2. The facts of the case briefly are that the petitioner namely Pakistan Branch of the China Machinery Engineering Corporation (CMEC) having been registered with the Securities and Exchange

Commission of Pakistan filed its e-return of income for the tax year 2021 declaring a loss of Rs.691,446,147/- upon which respondent No.5 issued a notice dated 18.04.2022 under section 122(9) read with section 122(5A) of the Ordinance to amend the assessment. After affording an opportunity of hearing, amended assessment order was passed on 24.11.2022 determining the income of the petitioner as Rs.25,252,330,012/- for the recovery of tax of an amount of Rs.6,881,058,090/- and thus, issued a notice under section 137(2) of the Ordinance for payment of the tax payable. The aforementioned amended assessment order was assailed in appeal on 13.12.2022 wherein stay was granted restraining recovery of the impugned demand, which was ultimately extended on 06.04.2023 for thirty days. During subsistence of the stay order, respondent No.5 issued notice dated 26.04.2023 in purported exercise of authority under section 138(1) of the Ordinance for the payment of tax by 28.04.2023. On 03.05.2023, respondent No.3 decided appeal of the petitioner while confirming the assessment order and on the same day, after issuing notice under section 140 of the Ordinance read with Rule 69 of the Income Tax Rules, 2002, respondents No.2 to 5 recovered an amount of Rs.759,059,945/- as the tax due from the two bank accounts of the petitioner. Against the order of Commissioner Inland Revenue (Appeals), the petitioner also filed an appeal before the Appellate Tribunal Inland Revenue (ATIR) wherein stay of 30 days was granted. It is claimed that respondents No.2 to 5 issued a recovery notice to Punjab Thermal Power (Pvt.) Ltd (respondent No.6) which is owner of the project. Meanwhile, it has been apprised, appeal of the petitioner was dismissed by the ATIR, and Income Tax Reference Application of the petitioner has been entertained by the Division Bench of this Court wherein interim relief has also been granted against recovery of the tax assessed. The instant petition essentially calls into question jurisdiction of respondents No. 2 to 5 to recover the amount of

Rs.759,059,945/- from bank accounts of the petitioner in purported exercise of authority under Section 140 of the Ordinance.

3. Learned counsel for the petitioner contends that during pendency of the appeal preferred by the petitioner before the Commissioner Inland Revenue, stay order against recovery was extended for 30 days or till the decision of the appeal, whichever was earlier. During pendency of the stay order, notice for recovery under section 138(1) was issued on 26.04.2023 by the Assistant Commissioner/Deputy Commissioner, Inland Revenue with due date specified therein as 28.04.2023. Such notice was issued without lawful authority in the presence of a stay order passed by the Commissioner, Inland Revenue (Appeals). He adds that nothing was due at that juncture, therefore, the mandatory prerequisite of section 138(1) i.e. recovery of the amount due on the date of issuance of the notice was non-existent. He further contends that appeal of the petitioner was dismissed at 12:06 p.m. on 03.05.2023 by the Commissioner Inland Revenue (Appeals), whereas recovery of the aforementioned amount was effected at 2:00 p.m. from the bank accounts maintained by the petitioner with respondents No.7 and 8. According to him, not only fresh notice under section 138(1) of the Ordinance was to be issued for the amount which had become due in consequence of dismissal of appeal of the petitioner by the Commissioner Inland Revenue (Appeals) but also a reasonable time, being not less than 7 days, was to be allowed to the petitioner to avail the remedy of appeal before the Appellate Tribunal Inland Revenue before effecting the impugned recovery. It is finally contended by the learned counsel for the petitioner that provisions of section 48 of the Ordinance are *pari materia* with those of section 137 of the Ordinance which has also been construed in a manner that fresh notice is required to be issued on re-assessment made by taxation officer. In support of above contentions, learned counsel for the petitioner has placed reliance on judgments in the cases of Mubashir Yameen v. Assistant/Deputy Commissioner Inland

Revenue, RTO, Rawalpindi and others (2023 PTD 146), Messrs Pakistan LNG Limited through Authorized Representative vs. Federation of Pakistan, through Secretary Revenue Division, Ministry of Finance, Islamabad and 2 others (2022 PTD 1763), Sungi Development Foundation Employees Provident Fund Trustees v. Federation of Pakistan through Secretary Ministry of Finance, Revenue and Economic Affairs and others (2022 PTD 1690), Mst. Fouzia Razzak v. Federal Board of Revenue and others (2021 PTD 162), Quaid-e-Azam Thermal Private Limited through Chief Executive Officer, Lahore v. Federal Board of Revenue through Chairman, Lahore and others (2020 PTD 165) and Messrs Huawei Technologies Pakistan (Pvt.) Ltd. v. Commissioner Inland Revenue and others (2016 PTD 1799).

4. Conversely, Barrister Ahmad Pervez, learned counsel for the revenue authorities states that order in original determined tax liability of the petitioner in the sum of Rs.6.8-Billion (approximately) on 24.11.2022. According to him, the interim relief granted in favour of the petitioner was to the effect that recovery of the impugned demand was stayed. He maintains that neither the order in original was suspended nor was there any injunction against issuance of the notice under section 138(1) of the Ordinance, therefore, the notice was properly issued on 26.04.2023 in accordance with law. He adds that the determined liability existed when the stay order was granted, therefore, recovery of the amount was subject to the outcome of the appeal. He further contends that in the judgments relied upon by learned counsel for the petitioner, all that was held that it was mandatory to issue notice under section 138 of the Ordinance before invoking provisions of section 140 of the Ordinance which requirement has been complied with in the instant case as notice under section 138(1) of the Ordinance was issued on 26.04.2023 and that the recovery was made 7 days thereafter, on the day when the appeal was dismissed and tax liability of the petitioner was upheld by the Commissioner Inland

Revenue (Appeals). He finally states that the requirement of a fresh notice may be warranted in cases where tax liability is modified, however, law does not envisage repeated issuance of notice under section 138 of the Ordinance.

5. Learned counsel for respondent No.6 has emphasized that the notice under section 138(1) dated 26.04.2023 specified the due date to be 28.04.2023 for recovery of the amount of tax specified therein whereas at that stage appeal of the petitioner was still *sub-judice* and stay against recovery was in field. He adds that service of fresh notice under section 138(1) of the Ordinance, after decision of the appellate authority, is necessary for the reason explained in paragraphs 14 and 15 of the judgment in the case of Messrs Pakistan LNG Limited through Authorized Representative vs. Federation of Pakistan, through Secretary Revenue Division, Ministry of Finance, Islamabad and 2 others (2022 PTD 1763).

6. Heard. Available record perused with the assistance of learned counsel for the parties.

7. Sections 137, 138 and 140 read with section 124 of the Ordinance are provisions that relate to the mechanism for recovery of tax after an assessment is made. In order to properly appreciate the scope of above provisions, the same are reproduced herein below: -

“137. Due date for payment of tax.-- (1) The tax payable by a taxpayer on the taxable income of the taxpayer [including the tax payable under section 113 or 113A] for a tax year shall be due on the due date for furnishing the taxpayer’s return of income for that year.

(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.

Provided that the due date for payment of tax payable under sub-section (7) of section 147 shall be the date specified in sub-section (5) or sub-section (5A) or first proviso to sub-section (5B) of section 147.

- (3)
- (4)
- (5)
- (6)

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.

(2) If the amount referred to in the notice issued under sub-section (1) is not paid within the time specified therein or within the further time, if any, allowed by the Commissioner, the Commissioner may proceed to recover from the taxpayer the said amount by one or more of the following modes, namely:--

- (a) attachment and sale of any movable or immovable property of the taxpayer;
- (b) appointment of a receiver for the management of the movable or immovable property of the taxpayer;
- (c) arrest of the taxpayer and his detention in prison for a period not exceeding six months; and
- (d) as specified under clauses (a), (ca) and (d) of sub-section (I) of section 48 of the Sales Tax Act, 1990.

(3) For the purposes of recovery of tax under sub-section (2), the Commissioner shall have the same powers as a Civil Court has under the Code of Civil Procedure, 1908 (Act V of 1908), for the purposes of the recovery of any amount due under a decree.

(4) The Board may make rules regulating the procedure for the recovery of tax under this section and any other matter connected with, or incidental to, the operation of this section.

140. Recovery of tax from persons holding money on behalf of a taxpayer.-- (1) For the purpose of recovering any tax due by a taxpayer, the Commissioner may, by notice, in writing, require any person--

- (a) owing or who may owe money to the taxpayer; or
- (b) holding or who may hold money for, or on account of the taxpayer;
- (c) holding or who may hold money on account of some other person for payment to the taxpayer; or
- (d) having authority of some other person to pay money to the taxpayer,

to pay to the Commissioner so much of the money as set out in the notice by the date set out in the notice.

Provided that the Commissioner shall not issue notice under this sub-section for recovery of any tax due from a taxpayer if the said taxpayer has filed an appeal under section 127 in respect of the order under which the tax sought to be recovered has become payable and the appeal has not been decided by the Commissioner (Appeals), subject to the condition that ten per cent of the said amount of tax due has been paid by the taxpayer.

(2) Subject to sub-section (3), the amount set out in a notice under subsection (1) –

- (a) where the amount of the money is equal to or less than the amount of tax due by the taxpayer, shall not exceed the amount of the money; or
- (b) in any other case, shall be so much of the money as is sufficient to pay the amount of tax due by the taxpayer.

(3) Where a person is liable to make a series of payments (such as salary) to a taxpayer, a notice under sub-section (1) may specify an

amount to be paid out of each payment until the amount of tax due by the taxpayer has been paid.

(4) The date for payment specified in a notice under sub-section (1) shall not be a date before the money becomes payable to the taxpayer or held on the taxpayer's behalf.

(5) The provisions of sections 160, 161, 162 and 163, so far as may be, shall apply to an amount due under this section as if the amount were required to be deducted from a payment under Division III of Part V of this Chapter.

(6) Any person who has paid any amount in compliance with a notice under sub-section (1) shall be treated as having paid such amount under the authority of the taxpayer and the receipt of the Commissioner constitutes a good and sufficient discharge of the liability of such person to the taxpayer to the extent of the amount referred to in such receipt.

(10) In this section, "person" includes any Court, Tribunal or any other authority."

From perusal of section 137 *ibid*, it is manifest that its provisions outline due dates for the payment of tax under various provisions of the Ordinance. Sections 138 and 140 *ibid* provide mechanisms for the recovery of tax due from a taxpayer. Section 138(1) of the Ordinance manifestly postulates that for every recovery of the tax due, notice has to be served upon the taxpayer requiring him to pay the said amount within the time specified therein. Subsection (2) of section 138 of the Ordinance allows the Commissioner Inland Revenue to recover the amount under subsection (1), if not paid within the time specified in the notice under section 138(1) *ibid* by invoking one or more of the coercive modes of recovery of tax out of property or arrest of the taxpayer whereas section 140 *ibid* provides for the mode of such recovery of tax from a person holding money on behalf of the taxpayer.

8. The issues for determination of this Court are: firstly, whether a notice issued to a taxpayer under section 138(1) of the Ordinance for the recovery of tax due during subsistence of a stay order is valid and lawful? and secondly, whether, after an amended assessment order has been upheld by the Commissioner Inland Revenue (Appeals) or the Appellate Tribunal Inland Revenue, the tax authorities are required to serve upon the taxpayer a fresh notice under section 138(1) of the Ordinance requiring him to pay the

amount of tax due within the time specified therein before invoking coercive mechanism under section 138(2) or 140 of the Ordinance?

9. Section 140 of the Ordinance does not contain any *non-obstante* clause to give it effect overriding the provisions of section 138 of the Ordinance, therefore, the requirement of prior notice under section 138(1) of the Ordinance is mandatory. Section 140 *ibid* provides for recovery of the tax due from person holding money on behalf of a taxpayer and before invoking its provisions, it would be necessary to assume recovery procedure under section 138(1) of the Ordinance to enable a taxpayer, particularly a public limited company, to manage its financial arrangements while prioritizing payments of fiscal dues. The reason why it has been so held in several cases is that there is an obligation on behalf of the State to give the taxpayer due notice of its obligation to pay the tax liability adjudicated against it and a reasonable opportunity to discharge such liability within the timeframe notified to him by the tax authorities¹. By now it is well settled that no coercive recovery is to be effected till tax liability has been adjudicated by at least one appellate forum outside the revenue hierarchy² such as the Appellate Tribunal Inland Revenue. If the tax liability, as determined through an amended assessment order by the Commissioner is upheld by the Commissioner (Appeals) or even by the Appellate Tribunal Inland Revenue, 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

¹ *Mubashir Yameen v. Assistant/Deputy Commissioner Inland Revenue, RTO, Rawalpindi and others (2023 PTD 146)*; *Messrs Pakistan LNG Limited through Authorized Representative v. Federation of Pakistan, through Secretary Revenue Division, Ministry of Finance, Islamabad and 2 others (2022 PTD 1763)*; *Sungi Development Foundation Employees Provident Fund Trustees v. Federation of Pakistan through Secretary Ministry of Finance, Revenue and Economic Affairs and others (2022 PTD 1690)*; *Mst. Fouzia Razzak vs. Federal Board of Revenue and others (2021 PTD 162)*; *Quaid-e-Azam Thermal Private Limited through Chief Executive Officer, Lahore v. Federal Board of Revenue through Chairman, Lahore and others (2020 PTD 165)* and *Messrs Huawei Technologies Pakistan (Pvt.) Ltd v. Commissioner Inland Revenue and others (2016 PTD 1799)*.

² *Brothers Textile Mills Limited vs. Federation of Pakistan through Secretary and 03 others (2003 PTD Lahore 2834)*; *Z. N. Exports Private Limited vs. Collector of Sales Tax (2003 PTD Lahore 1746)* and *M/s Pak-Saudi Fertilizers Limited vs. Federation of Pakistan and others (2002 PTD Karachi 679)*.

discharge such tax liability, failing which the State could resort to the exercise of its coercive power to enforce recovery under section 138(2) or section 140 of the Ordinance. If this is not the purpose of section 138(1) of the Ordinance, the said provision would be redundant and there is a presumption in law against redundancy of the legislative expression³.

10. Section 138(1) of the Ordinance serves another essential purpose, that 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 forum in appeal or tax reference. The notice under section 138(1) requires the tax authorities to prescribe a reasonable time period within which the liability is to be discharged. If provisions of section 138 of the Ordinance were to be interpreted such that a notice under those sections would automatically stand resurrected upon decision by the Commissioner (Appeals) upholding an assessment order and the due date by which the tax assessed was payable could be deemed to be 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 avail remedies of appeal before the Tribunal or tax reference before the High Court as provided under sections 130, 131 and 133 of the Ordinance. Such interpretation would restrict right of the taxpayer to access justice and to have its civil rights and liabilities adjudicated by an impartial arbiter of the law.

11. Adverting now to the facts of the instant case, respondent No.5 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 two hours of the Commissioner Appeals uploading its order on IRIS. It is

³ *Messrs Pakistan Television Corporation Limited vs. Commissioner Inland Revenue (Legal), LTU, Islamabad and others* (2017 SCMR 1136).

implausible that the Deputy Commissioner (respondent No.5) would be able to function with such alacrity if he had also become aware of the decision of the Commissioner (Appeals) immediately after its uploading in IRIS on 03.05.2023 for information of the petitioner. The amount of tax liability which was disputed by the petitioner in appeal could not be deemed to have become due and recoverable under section 138(1) of the Ordinance in the presence of the stay order while appeal of the petitioner was still pending, therefore, issuance of the recovery notice dated 26.04.2023 at that juncture was manifestly without lawful authority and the same was of no legal effect. The decision of respondent No.3 not to issue a notice under Section 138(1) of the Ordinance to the petitioner after decision of its appeal and seeking attachment of the bank accounts of the petitioner and effecting coercive recovery of tax determined in the Assessment Order (despite the law laid down by this 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 Appellate Tribunal. The petitioner did seek relief one day thereafter (i.e. 05.05.2023) by filing the instant petition before this Court but the amount sought to be recovered by the tax department under the Assessment Order had already been taken away 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 and upheld by Commissioner (Appeals) and prescribing a timeframe for discharge of such liability within which the petitioner would be free to avail its remedy of appeal before the learned Tribunal, is tantamount to playing a fraud on the statute.

12. Revenue functionaries have 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 denying taxpayer of such protection.

13 Upshot of the above discussion is that regardless 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. It is observed that 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.

14. For the foregoing reasons, the instant petition is allowed and the impugned notice dated 03.05.2023 issued in purported 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 declared to be without lawful authority and of no legal effect. Resultantly, respondents No. 2 to 5 are directed to 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 30 days, unless otherwise the same is liable to be recovered or retained in accordance with law. There shall be no order as to costs.

(RAHEEL KAMRAN)
JUDGE

Announced in open Court on 11.12.2023.

JUDGE

APPROVED FOR REPORTING