

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 728 of 2021

Usman Arshad

Vs

Federation of Pakistan through Secretary Revenue, Islamabad
and others.

PETITIONERS BY: M/s Ch. Naeem ul Haq, Muhammad
Faheem ul Haq and Muhammad Imran ul
Haq, Advocates.

RESPONDENTS BY: Barrister Atif Raheem Burki, Advocate.
Raja Khalid Mehmood Khan, Deputy
Attorney General and Mr. Farrukh
Shahzad Dall, Assistant Attorney
General.

DATE OF HEARING: 25.11.2021.

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BABAR SATTAR, J.- Through this judgment the instant writ petition together with ***W.P No. 890/2021 (Gul Asghar Khan Vs. Federation of Pakistan, etc.)*** and ***W.P No. 924/2021 (Muhammad Saleem Vs. Federation of Pakistan, etc.)*** will be decided as they raised common questions of law impugning S.R.O. No.115(I)/2015 dated 09.02.2015 (***"Impugned SRO"***) for being ultra vires the provisions of Section 230, 208 and 209 of the Income Tax Ordinance, 2001 (***"Ordinance"***) and further impugn notices issued in exercise of powers under Section 176(1)(b) of the Ordinance by tax officials serving in the Directorate General (Intelligence and Investigation), Inland Revenue (***"DG(I&I)"***).

2. The learned counsel for the petitioners stated that DG(I&I) has been vested with authority by the Federal Board of Revenue (FBR) through the Impugned SRO, in exercise of which the impugned notices have been issued. He further stated that the Impugned SRO was challenged before the learned Lahore High Court in **Nestle Pakistan Limited and another Vs. Federation of Pakistan & others (2021 PTD 521)**, wherein the Impugned SRO was declared ultra vires the provisions of the Ordinance and the FBR was directed to initiate the process of specifying the functions and jurisdiction of the officers of the DG(I&I) within a period of two month. That the Impugned SRO was declared ultra vires for providing no rational basis for delegation of authority to the DG(I&I). That the impugned notices issued under the authority of such SRO have been issued without lawful authority and suffer from jurisdictional defect. The learned counsel for the petitioner while relying on **Nestle Pakistan** submitted that through the Impugned SRO the FBR had exercised the authority vested in it under Section 230 read together with Sections 208 and 209 of the Ordinance in an arbitrary manner, which was liable to be judicially reviewed. He submitted that the powers, functions and jurisdiction of the DG(I&I) had not been defined in the Impugned SRO, which made such exercise of discretion unreasonable. He further submitted that through the Impugned SRO a parallel structure had been created in the form of DG(I&I) and neither tax officials working within the hierarchy of the DG(I&I) nor taxpayers subject to jurisdiction of the DG(I&I) had any basis to determine whether the powers vested in Inland Revenue Officers under the Ordinance in relation to

their affairs was to be exercised by the Regional Tax Office or DG(I&I). And consequently such exercise of discretion was contrary to principles underlying the concept of rule of law, whereby citizens have a right to know who is authorized to exercise discretion on behalf of the executive authority of the State. He further submitted that the tax officials working in the hierarchy of the DG(I&I) did not have the expertise to scrutinize accounts and documents for purposes of Section 177(1)(b) of the Ordinance.

3. The learned counsel for FBR submitted that the petitions were not maintainable as through them show cause notices have been impugned, which were not without jurisdiction or *coram non judice* or *malafide* and in view of the law settled in relation to bringing legal challenges against show cause notices through writ petitions, the petitions were liable to be dismissed. He further submitted that the distinction between powers, functions and jurisdiction, which was relied upon by the learned counsel for the petitioners in order to seek declaration that the Impugned SRO is ultra vires provisions of the Ordinance was settled by the august Supreme Court in **The Commissioner Inland Revenue, Zone-III, RTO-II, Lahore vs. Messrs Hamza Nasir Wire and others (2020 PTD 1790)**, wherein it had been held that where functions of an office are allocated to an authority, the power under law also stand vested in the appointee. He further contended that the judgment of the learned Lahore High Court in **Nestle Pakistan** was not binding on this Court. That the Impugned SRO was challenged before the learned Sindh High

Court as well in **Saleem Butt Vs. Pakistan through Secretary Revenue Division & others (Suit No. 1872 of 2016)** in which after discussing the law laid down by the august Supreme Court in **Hamza Nasir Wire** the Court held that the impugned SRO was not *ultra vires* the Ordinance for amounting to excessive delegation or for its failure to comply with requirements of Section 230 of the Ordinance. He submitted that FBR had now enacted SRO 272(I)/2021 which had superseded the impugned SRO. He submitted that the petitioners had failed to point out how the impugned SRO was *ultra vires* the Ordinance, and given that the petitions had essentially been challenged show cause notices they were liable to be dismissed for not being maintainable.

4. This Court shares emphatically the admiration expressed by the learned Sindh High Court for the learned Judge of the Lahore High Court who authored **Nestle Pakistan** and further agrees with the learned Sindh High Court in expressing its inability to adopt the reasoning in **Nestle Pakistan**. By holding that the Impugned SRO did not suffer from infirmity on ground of excessive delegation, the learned Sindh High Court in **Saleem Butt** held the following:

9. Short of stating that "essential legislative power" cannot be delegated, learned counsel for the Plaintiff was unable to demonstrate how the specifying of functions and area-jurisdiction of the DG I&I and its officers, and permitting them to exercise specified powers, can be said to be an „essential“ legislative power. In fact, the powers conferred on the FBR under sub-section (2) of section 230 of the Ordinance are more of "administrative" powers than "legislative" powers, which also align with the powers of the

FBR under section 4 of the Federal Board of Revenue Act, 2007. Therefore, reliance placed by learned counsel for the Plaintiff on the doctrine of excessive delegation is misconceived.

10. There is a more critical aspect of the matter. In Lahore Development Authority v. Imrana Tiwana (2015 SCMR 1739), while observing that the power to strike down or declare a legislative enactment void has to be exercised with the greatest care and caution, the Supreme Court summarized as follows the rules which must be applied before declaring laws to be unconstitutional:

"I. There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;

II. Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;

III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;

IV. If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;

V. The Court will not decide a larger constitutional question than is necessary for the determination of the case;

VI. The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;

VII. The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;

VIII. The Court will not strike down statutes on principles of republican or democratic government unless those principles are placed beyond legislative encroachment by the Constitution."

Imrana Tiwana went on to reiterate :

"71. This Court has on several occasions held that where a statute is not ex-facie repugnant to Fundamental Rights but is capable of being so administered it cannot be struck down unless the party challenging it can prove that it has been actually so administered".

Therefore, it was never sufficient for the Plaintiff to argue that sub-section (2) of section 230 of the Income Tax Ordinance was unconstitutional for being excessive delegation of legislative power, and the Plaintiff had also to demonstrate that the use of powers under said provision had lead to an infringement of his Fundamental Right under Article 25 of the Constitution. Whether that has been done by the Plaintiff or not, is dealt with under Issue No. (iv) infra. The upshot is that the challenge to the vires of sub-section (2) of section 230 of the Income Tax Ordinance on the ground of excessive delegation, cannot succeed.

5. While addressing arguments impugning the SRO for being in breach of provisions of section 230 of the Ordinance, the learned Sindh High Court held the following in **Saleem Butt:**

20. Given that the challenge in this suit to the jurisdiction of the DG I&I emanates from a notice issued under section 176(1) of the Income Tax Ordinance, it will suffice to examine SRO 115 only for that power. As already observed, sub-section (2)(b) of section 230 of the Ordinance unambiguously empowers the FBR to "confer the powers of authorities specified in section 207" upon the DG I&I and its officers. Therefore, there is no room for intendment, and it is not sufficient to argue that the same powers as that of authorities listed under section 207 cannot be conferred on the DG I&I and its officers. As regards the requirement of sub-section (2)(a) of section 230, viz., to specify the functions and jurisdiction of the DG I&I and its officers, in my view that too was fulfilled simultaneously by SRO 115 by stipulating the specific provision of section 176 of the Ordinance along with subject-matter and territorial jurisdiction, and nothing more was required to be stated to enable the concerned officer to perform said function. Such

convergence of powers and functions has also been explained by the Honourable Supreme Court in Commissioner Inland Revenue Zone-III, RTO-II Lahore v. Hamza Nasir Wire (2020 PTD 1790) as under:

"The learned Judge has relied to a great extent on this distinction between functions and powers to quash the disputed show cause notices. There is no cavil with the proposition that to exercise the functions of an office a statutory functionary must possess the relevant powers. However, what was perhaps not highlighted to the learned Court was that the exercise of powers forms part of the performance of the functions of an office. Therefore, when functions of an office are allocated by a competent instrument, the powers appurtenant thereto under the law stand vested in the appointee for exercise thereof."

In other words, SRO 115 was in sufficient compliance of sub-section (2) of section 230 of the Income Tax Ordinance. The instant challenge fails to appreciate that section 230 of the Income Tax Ordinance, 2001 and SRO 115 issued thereunder, are provisions in aid of assessment and recovery of tax, and thus relate to the machinery of tax assessment and recovery. It is settled law that unlike a charging provision, a machinery provision in a fiscal statute has to be construed liberally and in a manner that facilitates the realization of tax. It was imperative to view said provisions from that vantage point.

21. Having concluded that SRO 115(I)/2015 was within the jurisdiction of the FBR, the impugned notice issued by the DG I&I pursuant thereto is not without jurisdiction. Issue No. (ii) is answered in the negative. However, since the FBR has issued the superseding SRO 272(I)/2021, the effect of this enunciation, as discussed in para 18 above, would be that in the Province of Sindh, SRO 115(I)/2015 would be taken to have been repealed with the consequence of section 6 of the General Clauses Act, 1897.

6. The learned Sindh High Court in **Saleem Butt** also relied on **Hassan Shahjehan v. FPSC (PLD 2017 Lahore 665)** to conclude that a declaration issued by the learned Lahore High Court in **Nestle Pakistan** with regard to the impugned SRO would have effect within the territorial jurisdiction of such court and not in territory beyond the jurisdiction of such court. It also noted that in view of a judgment rendered by a High Court, if a federal authority made necessary amendments in the law in question the erstwhile law in other provinces would be treated as having been repealed with attendant consequences in terms of Section 6 of the General Clauses Act, 1897.

7. This Court is in an envious position for having the benefit of two reasoned judgments rendered by two High Courts in relation to whether or not the impugned SRO is ultra vires the provisions of the Ordinance. The petitioners have relied exclusively on the reasoning of the learned Lahore High Court in **Nestle Pakistan**. The learned counsel for the petitioners had very fairly submitted, when asked whether **Nestle Pakistan** was binding on FBR in relation to exercise of jurisdiction within Islamabad Capital Territory, that the Judgment would only have effect within the territorial jurisdiction of the learned Lahore High Court in view of the law laid down by the learned Lahore High Court in **Hassan Shahjehan**, as also held in **Saleem Butt**.

8. The challenge to the vires of Section 210 read together with section 122 of the Ordinance on ground of excessive delegation came before this Court in **Pakistan Tobacco Company Ltd. Vs.**

Federation of Pakistan and others (2016 PTD 596), wherein the following was held.

19. It is, therefore, settled law that legislative power cannot be delegated, as this would tantamount to violation of the letter of the Constitution. The doctrine of excessive delegation and its extent has been settled as discussed above. By no stretch of the imagination can sections 122 and 210 of the Ordinance be construed as conferring any legislative powers or functions to the Commissioner. The argument advanced by the learned counsel for the petitioners in this regard is misconceived and fallacious.

20. Sections 122 and 210 of the Ordinance are in the nature of machinery provisions. They provide for the machinery and procedure for assessment and collecting tax. It is settled law that unlike the principle of strict construction in the case of charging sections, the machinery provisions are construed liberally so as to effectuate the charging provisions. The august Supreme Court has observed and held in the case of 'Pearl Continental Hotel and another v. Government of N.-W.F.P. and others' [2010 PTD 2018] that 'We are in no doubt that the machinery provisions, where provided, have to be construed liberally and in a manner aiding the realization of proper tax and to prevent avoidance of the tax'.

9. The dictum of this Court in **Pakistan Tobacco Company** supports the reasoning of the learned Sindh High Court in **Saleem Butt**. In **Pakistan Tobacco Company** this Court, while also relying on the law laid down by the august Supreme Court in **Lahore Development Authority Vs. Ms. Imrana Tiwana (2015 SCMR 1739)** in relation to the general principles to be taken into account while considering a challenge to vires of the law as well as the law developed in relation to fiscal statutes, held the following:

"A fiscal statute cannot be declared ultra vires on the touchstone of reasonableness or otherwise, as the same has been declared by the august Supreme Court to be a matter of legislative policy and not for the Court to adjudicate upon."

10. In his treatise titled *The Judicial Review of Public Actions* (PP 1828, Second Edition, Pakistan Law House, 2018), Justice (R) Fazal Karim after discussing the law laid down by superior courts observed that, *"subordinate legislation is construed and interpreted in the same way as the primary legislation and the general principles applicable to the interpretation of statutes apply to the interpretation of subordinate legislation."* Justice (R) Fazal Karim identified the main grounds on which subordinate legislation may be held *ultra vires* as follows:

- i. Contravention of the Constitution.*
- ii. Inconsistency with or contravention of the enabling statute.*
- iii. Subordinate legislation seeking to take away or diminish the jurisdiction of the courts.*
- iv. Contravention of law other than the enabling enactment.*
- v. Subordinate legislation seeking to affect vested rights retrospectively.*

11. While enumerating the principles of judicial control *vis-a-vis* administrative actions in *Fundamental Law of Pakistan*, A.K Brohi relied on commentary from *Brundaban Chandra Vs. State of Orissa* (AIR (1953) Orissa 121), wherein the following was observed:

"At this stage it is well to recapitulate the well-known principles with reference to which the exercise of a

discretionary power vested by the statute in an administrative authority is open to be canvassed by the Courts. To start with, it may be taken as axiomatic that when power is conferred on somebody or authority by a Statute, the validity of the exercise of the power depends on its being strictly within the limits of the statute. As stated by Lord Justice J. Turner in –Tinkler v. The Bard of Works for the Wansworth District (1858), 2 De G & J 261 at P. 274, although it may not be obligatory upon persons who have obtained an Act of Parliament empowering them to do something to do it at all, still if they do proceed to exercise the powers conferred on them by the Act, it is their bounden duty to keep strictly within those powers. Similarly it has been held in R.H Galloway v. Mayor and Commonalty of London (1866), English & Ir AC 34-43 that it is a well-recognized principle that when persons have received authority from the Legislature to exercise certain extraordinary powers interfering with private rights of individual, the persons so authorized should be kept by the Courts strictly within the limits of the power conferred by statute and the Court should not allow them to exercise the powers for any collateral purposes.”

12. The provisions of the Ordinance relevant for our present purposes are Section 230 read together with Sections 207, 208 and 209 of the Ordinance and Sections 4 and 5 of the Federal Board of Revenue Act, 2007. Section 230 of the Ordinance details the composition of DG (I&I) and sub-section (2) of Section 230 of the Ordinance provides the following:

230. Directorate General (Intelligence and Investigation), Inland Revenue.

(2) The Board may, by notification in the official Gazette,—

(a) specify the functions and jurisdiction of the Directorate General and its officers; and

(b) confer the powers of authorities specified in section 207 upon the Directorate General and its officers.

Section 230(2) of the Ordinance clarifies that the powers conferred on officers that comprise DG(I&I) are those vested in authorities specified in Section 207. In other words, while specifying the functions and jurisdiction of DG(I&I) the Ordinance does not identify any powers to be exercised by DG(I&I) that are in addition to or otherwise not vested with any other authority identified by the Ordinance. The Ordinance confers powers on officers comprising DG(I&I) that are conferred on authorities identified in Section 207 of the Ordinance. Section 230 of the Ordinance thus does not require that the Board while conferring powers on authorities specified under Section 230(b) of the Ordinance do so while taking away those powers from the authorities in whom such powers are vested under Section 207 of the Ordinance. In other words Section 230 of the Ordinance does not prohibit the same powers being simultaneously vested in authorities specified in Section 207 of the Ordinance as well as officers of DG(I&I) in exercise of powers by the Board under section 230 of the Ordinance.

13. Section 207 identifies authorities that for purposes of Ordinance and Section 207(2) explicitly provides that, *"the Board shall examine, supervise and oversee the general administration of this Ordinance."* The scope of authority vested in the Board is further clarified by Section 208(1)(2) of the Ordinance, which provides the following:

208. Appointment of income tax authorities.— (1) *The Board may appoint as many Chief Commissioners Inland Revenue, Commissioners Inland Revenue, Commissioners Inland Revenue (Appeals), Additional Commissioners Inland Revenue, Deputy Commissioners Inland Revenue, Assistant Commissioners Inland Revenue, Inland Revenue Officers, Inland Revenue Audit Officers, District Taxation Officer Inland Revenue, Assistant Director Audit, Superintendents Inland Revenue, Inspectors Inland Revenue, Auditors Inland Revenue and such other executive or ministerial officers and staff as may be necessary.*

(2) Subject to such orders or directions as may be issued by the Board, any income tax authority may appoint any income tax authority subordinate to it and such other executive or ministerial officers and staff as may be necessary.

14. Section 209 of the Ordinance vests in the Board authority to determine the jurisdiction of the tax authorities and states the following:

209. Jurisdiction of income tax authorities.—(1) *Subject to this Ordinance, the Chief Commissioners, the Commissioners and the Commissioners (Appeals) shall perform all or such functions and exercise all or such powers under this Ordinance as may be assigned to them in respect of such persons or classes of persons or such areas as the 4 [Board] may direct:*

Provided that the Board or the Chief Commissioner, as the case may be, may transfer jurisdiction in respect of cases or persons from one Commissioner to another.

(2) The Board or the Chief Commissioner may, by an order, confer upon or assign to any officer of Inland Revenue all or any of the powers and functions conferred upon or assigned to the Commissioner, under this Ordinance, in respect of any person or persons or classes of persons or areas as may be specified in the order:

Provided that the Board may also confer upon or assign to any Officer of Inland Revenue the aforesaid powers and functions through Automated Case Selection System:

Provided further that the Board may make rules for conferment or assignment of such powers and functions through Automated Case Selection System.

Explanation.--- For the purpose of this sub-section, the expression "Automated Case Selection System" means an algorithm for randomized allocation of cases by using suitable technological modes.

(3) An order under sub-section (2) by the Chief Commissioner shall be made only with the approval of the Board.

(4) The Officer of Inland Revenue referred to in sub-section (2) shall, for the purposes of this Ordinance, be treated to be the Commissioner.

(5) Within the area assigned to him, the Commissioner shall have jurisdiction, —

(a) in respect of any person carrying on business, if the person's place of business is within such area, or where the business is carried on in more than one place, the person's principal place of business is within such area; or

(b) in respect of any other person, if the person resides in such area:

(6) Where a question arises as to whether a Commissioner has jurisdiction over a person, the question shall be decided by the Chief Commissioner or Chief Commissioners concerned and, if they are not in agreement, by the Board.

(7) No person shall call into question the jurisdiction of a Commissioner after that person has furnished a return of income to the Commissioner or, where the person has not furnished a return of income, after the time allowed by any notice served on the person for furnishing such return has expired.

(8) Notwithstanding anything contained in this section, every Commissioner shall have all the powers conferred by, or under, this Ordinance on him in respect of any income arising within the area assigned to him.

(8A) The power to confer jurisdiction under this section shall include the power to transfer jurisdiction from one income tax authority to another.

(9) Where, in respect of any proceedings under this Ordinance, an income tax authority is succeeded by another, the succeeding authority may continue the proceedings from the stage it was left by that authority's predecessor.

15. In essence what Section 230 of the Ordinance does is include within the list of authorities that may be permitted to exercise powers and functions pursuant to provisions of the Ordinance, officers of DG(I&I). It does so in a circular way by stating that the Board may confer on them the power of the authorities specified in Section 207 of the Ordinance and further specify their functions and jurisdiction. The powers of authorities mentioned in Section 207 of the Ordinance are provided under various provisions of the Ordinance and consequently Section 230 of the Ordinance does not delegate to the Board the power to create any fresh power to be exercised by the officers of DG(I&I), which is not otherwise created by the legislature through any provision of the Ordinance. In other words, Section 230 of the Ordinance does not vest in the Board the authority to create fresh power but only authorizes the Board to vest in officers of DG(I&I) the powers vested in other authorities mentioned in Section 207 of the Ordinance. Likewise, Section 208 vests in the Board the authority to appoint Income Tax authorities and places no restrictions on the number of the authorities that are appointed

by the Board in its discretion. Section 209 vests in the Board the authority to delineate the jurisdiction of Income Tax Ordinance, sub-clauses (5), (6) & (7) of Section 209 envisage that questions may arise with regard to overlapping jurisdiction of authorities exercising powers and functions under the Ordinance and provides a mechanism to resolve any conflict that arises by leaving the matter ultimately in the hands of the Board to resolve any of question of overlapping jurisdiction. Thus Section 230 of the Ordinance other than providing for the establishment of DG(I&I) and identifying the authorities that comprise DG(I&I) essentially places in the hands of the Board the power and discretion that the Board has under Sections 207, 208 and 209 of the Ordinance in relation to determining the jurisdiction and functions of authorities exercising power under provisions of the Ordinance.

16. The question of excessive delegation does not arise in the instant matter. The exercise of powers that has been brought into question in the instant petitions does not constitute an essential legislative function which has been delegated by the legislature to the executive in a manner prohibited by the Constitution. The petitions do not impugn Sections 207, 208 and 209 of the Ordinance which delegate to the Board the power and discretion to exercise authority for various administrative purposes. Section 230 of the Ordinance essentially extends the exercise of the same power and discretion in relation to officers comprising DG(I&I). The exercise of powers under Section 230 of the Ordinance amounts to exercise of administrative power and

not any adjudicatory power. The exercise of administrative rule-making power for purposes of general administration of the Ordinance is to be subjected to judicial scrutiny of a nature that is different from that to be exercised in relation to exercise of adjudicatory powers by a statutory functionary. We will revert to the standard of judicial review to be applied in relation to exercise of rule-making powers versus exercise of adjudicatory powers later in this opinion.

17. Delegated legislation is ultra vires the Constitution if enabling the parent statute is found to be unconstitutional. That however is not a ground for challenge in the instant matter. Delegated legislation would also be ultra vires the Constitution if it were found in breach of implied limits of authority set by the Constitution. This is where the question of excessive delegation comes in. Our scheme of rule of law is based on the principle of limited powers as enumerated by the Constitution. Separation of powers is a salient feature of our Constitution and therefore to the extent that the Constitution entrusts the legislature with a certain function it is not for the legislature to sub-delegate such function to another branch of the State such as the executive. Such sub-delegation would be seen as abdication of an essential legislative function. In the instant case the petitioners are not arguing that the legislature has sub-delegated an essential legislative function to the Board. Thus the question of excessive delegation does not arise.

18. Delegated legislation can be ultra vires the parent legislation when it is in conflict with provisions of the parent

statute, when it has been enacted without following the procedures prescribed in the parent statute, if it has been enacted in excess of powers conferred by the parent statute, if it has been enacted for mala fide or collateral purposes not envisaged by the parent statute or when exercise of authority is found to be arbitrary or capricious. In the instant matter the contention of the petitioners is that the exercise of the authority by the Board in enacting the impugned SRO is arbitrary and capricious and consequently the impugned SRO is ultra vires the provisions of the Ordinance. As has been highlighted above the Impugned SRO has been enacted in exercise of powers under Section 230, which does nothing other than declare that the officers comprising DG(I&I) will share with other tax authorities identified in Section 207 the power vested in such authorities, and discharge the functions as identified in the Impugned SRO within the jurisdiction also specified therein. Two of the arguments that prevailed with the learned Lahore High Court in **Nestle Pakistan** leading it to the conclusion that the impugned SRO is ultra vires section 230 of the Ordinance appear to be that (i) officers comprising DG(I&I) did not possess the requisite expertise to discharge the functions that they were authorized to perform pursuant to the impugned SRO, and (ii) that vesting of powers and functions in officers of DG(I&I) created a parallel structure which would result in a situation where officers staffed in a regional tax office as well as officers staffed in DG(I&I) would both have overlapping powers and functions.

19. A perusal of the provisions of the Federal Board of Revenue Act, 2007 ("**FBR Act**"), suggests that the legislature has left the administration of the taxation system with the Board instead of opting to micro manage human resource management by the Board. Section 5 of the FBR Act vests in the Board extremely wide powers for purposes of human resource management. Section 4 of the FBR Act identifies the powers and functions of the Board and includes, *inter alia*, the following:

4. Powers and functions of the Board.- (1) *The Board shall exercise powers and perform all such functions that are necessary to achieve the objects and purposes of this Act and include the following, namely:-*

(c) to adopt modern effective tax administration methods, information technology systems and policies in order to consolidate assessments; improve processes, organize registration of tax payers, widen the tax base, and make departmental remedies more efficient including enforcement of, or reduction or remission in, duty, penalty or tax, in accordance with the relevant law for the time being in force;

(d) to improve the productivity through a comprehensive and effective human resource strategy;

(e) to identify and select through Internal Job Posting process the employees for designated jobs;

(k) to implement the provisions of all the fiscal laws for the time being in force and to exercise all powers provided under the provisions of the fiscal laws and to take any action, make policy, issue rules or guidelines for the purpose to make the implementation of the fiscal laws clearer, transparent, effective and convenient;

(r) to create field formations of Board for greater efficiency in implementation of fiscal laws and refer to them with appropriate titles;

20. The legislative intent in view of provisions of the FBR Act read together with Section 207 of the Ordinance leaves no manner of doubt that the legislature had delegated to the Board extremely wide powers for purposes of administration of the tax machinery and human resource management within the tax structure. Creating parallel structures within the tax machinery may not be the smartest way of administering the tax collection system. Creating parallel structures may result in disputes and confusing regarding vesting of jurisdiction within tax officers. However, Section 209(6) clarifies that in the event of disagreement over who has jurisdiction in relation to a person such question is to be settled by the Board. Consequently there is a mechanism provided within the Ordinance to address any conflict or confusion regarding overlapping jurisdiction of officials exercising authority in relation to taxpayer.

21. For purposes of the instant petition, whether or not officers comprising DG(I&I) have requisite expertise to discharge the powers and functions vested in them pursuant to the Impugned SRO, and whether exercise of powers and functions vested in them could result in simultaneous exercise of powers by official comprising the RTO and officials comprising the DG(I&I), are hypothetical questions. None of the petitioners have argued that they have simultaneously received notices from the RTO as well as the DG(I&I). The question of expertise of officials discharging functions under the Ordinance falls, in the opinion of this Court, within the domain of policy. It has been left by the legislature to the Board to determine what expertise officials

discharging functions under the Ordinance must possess and whether or not they actually possess such expertise. This Court has no basis to conclude that officers comprising DG(I&I) are not vested with requisite expertise to discharge powers and functions vested in them pursuant to the Impugned SRO. It has also been held by the august Supreme Court that in view of the principle of separation of powers enshrined in our Constitution the adjudicator exercises judicial restraint in matters of government policy except where fundamental rights are violated (see for example OGRA through Secretary Vs. Midway II, CNG Station (2014 SCMR 220) and Power Construction Corporation Of China Ltd. Vs Pakistan Water And Power Development Authority (PLD 2017 SC 83)). This brings us to the question of parallel structures with RTO and DG (I&I) simultaneously exercising powers and functions in relation to one taxpayer. In the event that such fact emerged in any case, the taxpayer would be within his right to agitate the matter on the basis that he was being vexed twice in breach of the principle enshrined in Article 13 of the Constitution read together with section 209(6) of the Ordinance. In the event that officers comprising RTO and officers comprising DG(I&I) were simultaneously exercising powers under sections 176(1)(b) of the Ordinance or any other the provision of the Ordinance requiring a taxpayer to provide information in relation to his tax affairs, such exercise of authority under the Ordinance would undoubtedly be capricious and would fall foul of the principle that powers delegated to the executive must not be exercised in a unreasonable or arbitrary manner.

22. The jurisprudence in relation to the breach of fundamental rights as summarized by the august Supreme Court in **Lahore Development Authority Versus Ms. Imrana Tiwana (2015 SCMR 1739)** is that a legislative provision cannot be struck down merely on the basis that it was possible to give it effect in a manner that would be in breach of fundamental rights, but it also must be shown to have been given effect in a manner that was in breach of fundamental rights. As stated above, the possibility of simultaneous adjudication of the tax affairs of a taxpayer by the RTO and the DG(I&I) due to the powers and functions vested in DG(I&I) through the Impugned SRO is a hypothetical. And the Impugned SRO cannot be struck down on the basis of the possibility of such scenario arising. However, in the event that the powers vested in DG(I&I) pursuant to the impugned SRO were exercised in a manner that vexed a taxpayer a second time, by subjecting him/her to the adjudication of tax affairs already being adjudicated by the RTO, such exercise of authority of DG (I&I) would be unreasonable for being capricious and arbitrary and such exercise of authority could be declared to be suffering from jurisdictional defect. However, the Impugned SRO itself cannot be declared ultra vires on such basis.

23. In view of the principle of separation of powers which endows the court with the responsibility to ensure that the powers as enumerated by the Constitution are exercised by branch of the State in which such powers are vested, also requires this Court to exercise restraint while exercising judicial

review powers in relation to administrative and rule-making authority by the executive which is per se not in breach of fundamental rights of citizens. Where a petition invites the court to exercise judicial review over discharge of administrative and rule-making functions delegated by the legislature to the executive, the court would be slow in assuming jurisdiction and would undertake a deferential review only to ensure that the authority has been exercised by the executive within the bounds prescribed by the legislature. While exercising such deferential review the court would not second guess the manner in which such authority has been exercised merely because the court believes that there was a preferential manner in which such authority could have been exercised. However where a petitioner invites the court to exercise judicial review over exercise of adjudicatory authority or even rule-making and administrative authority by the executive in a manner that infringes the fundamental rights of the citizens, the court would subject such exercise of authority to strict scrutiny. This is because it cannot be assumed that the legislature would ever delegate authority to the executive with the assumption that such authority would be exercised to undermine or circumvent the fundamental rights of citizens as guaranteed by the Constitution.

24. In the instant petitions no question of breach of fundamental rights of the taxpayers is involved. The petitioners have not impugned the exercise of any adjudicatory power or function by officers comprising DG(I&I). They have only impugned the manner in which administrative discretion and rule-

making authority delegated by the legislature pursuant to the Ordinance and the FBR Act has been discharged by FBR on the ground that such exercise is liable to be struck down for being unreasonable. A deferential review of the Impugned SRO does not lead this Court to the conclusion that the exercise of authority by the Board is so unreasonable that no reasonable person could have exercised the administrative authority in such manner. Or that such exercise of authority is capricious or aimed at serving a collateral purpose not envisaged by Section 230 of the Ordinance.

25. It is for the above reasons that this Court is not in agreement with the opinion of the learned Lahore High Court in **Nestle Pakistan** and endorses the opinion of the learned Sindh High Court in **Saleem Butt**. The petitions are consequently without merit, as the impugned show cause notices are not marred by any jurisdictional defect, and are **dismissed** for not being maintainable.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 16.02.2022.

JUDGE