

**ORDER SHEET.**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

Crl.Misc.No.746-B/2015  
Fawad Ali Vs The State etc

<b>S. No. of order/ proceedings</b>	<b>Date of order/ proceedings</b>	<b>Order with signature of Judge and that of parties or counsel where necessary.</b>
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08.4.2016.	Barrister Salman Safdar, along with Petitioner. Hafiz Ehsan Ahmed Khokher & Mr. Muhammad Amin Feroz Khan for respondents. Syed Hasnain Ibrahim Kazmi, D.A.G. Mr. Qaiser Masud, Addl. Director FIA. Mr. Hamayun Sarfraz, I.O. Mr. Fazal Mehboob, S.I, FIA.
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Through the instant bail application under section 498 Cr.P.C, petitioner Fawad Ali son of Muhammad Hasham Babar, seeks bail before arrest bail in case FIR No.07/2015 dated 19.6.2015 for offence under sections 2(37), 33(11) and 33(13) of the Sales Tax Act, 1990 lodged with Police Station Directorate of Intelligence & Investigation (Inland Revenue), Islamabad.

2. The case of the petitioner is that the M/s Forte Associates is an Association of Persons with Hasham Babar and Sajjad Kiyani as its partners and committed tax fraud by concealing its income from the Sales Tax Department knowingly and dishonestly in order to evade sales tax. In this behalf it was alleged that the copies of invoices amounting to Rs.300 Million of Sales during the period tax 2011 to tax year 2015 were received by the

Directorate whereas M/s Forte Associates declared less sale than actual during the same period. The petitioner filed bail before arrest which was dismissed vide order dated 14.11.2015 by Judge Customs Court Rawalpindi.

3. Learned counsel for the Petitioner, interalia, submitted that on 24<sup>th</sup> of May, 2015 the computer system of the firm M/s Forte Associates was hacked by an unknown person and with respect to the same a complaint was filed before FIA and matter is under investigation; that FIR has not been lodged by an official person. It was further contended that the initial enquiry /investigation by FIA shows that the system was hacked by the Intelligence and Investigation Department of Inland Revenue, Islamabad and any evidence/information based there upon is unlawful and illegal, therefore, cannot be relied upon or form basis for lodging FIR. In support of his contention learned counsel placed reliance on case titled F.O.P Vs M/s Master Enterprises Pvt. Ltd (2003 PTD 1034) as well tax appeal No.1140/LB of 2009 (2012 PTD (Tribunal) 1416, Collector of Sales Tax etc Vs M/s Food Consults Pvt.Ltd(2007 PTD 2356), Kh.Shahbaz Ahmad Vs Deputy Director,

Directorate General and Investigation, Range Office Gujranwala (2012 P CrI.L.J 1378). It was further contended that the liability vis-a-vis registered person M/s Forte Associates is yet to be adjudicated and in absence of the same it is a case of further enquiry. Learned counsel also submitted that the grounds available for the post arrest bail are also applicable in proceedings for bail before arrest and can be taken into consideration by this court. In support of his contentions learned counsel placed reliance on Dr.Hassan Jalisi Vs The State etc (PLD 2004 Karachi 388), Muhammad Ramzan Vs Zafrullah (1986 SCMR 1380) and Nazar Muhammad Vs The State (2012 P.CrI.L.J 430). Learned counsel also submitted that petitioner has been implicated in the case with malafide for ulterior motives and if present bail petition is dismissed he shall suffers humiliation, therefore, is entitled to the bail before arrest; that the offences with which petitioner has been charged with do not fall in prohibitory clause and in such like cases the grant of bail is a rule and refusal is an exception. Reliance was placed on case titled Riaz Jafar Natiq Vs Muhammad Nadeem Dar etc (2011 SCMR 1708) and Zafar Iqbal Vs Muhammad Anwar (2009 SCMR 1488) and

Murad Khan Vs Fazal-e-Subhan etc (PLD 1983 SC 82).

4. Learned counsel for the respondents ,interalia, submitted that the petitioner is a partner in M/s Forte Associates and evaded Rs.59.00 million as tax. It was further contended that the enquiry has shown that petitioner filed wrong returns by concealing actual sales. In response to the query of the court whether the system was hacked by the Intelligence and Investigation department of Inland Revenue, Islamabad, it was contended that it was not done after lodging of the FIR, however, submitted that respondent is authorised to have access to the system of the firm/registered persons under section 38 of the Sales Tax Act, 1990. In support of his contention learned counsel placed reliance on case titled Rizwan Latif Vs The State (Crl.Misc.No.608-B-2008), Muhammad Ishaq Saqi Vs The State (2007 P.Crl.L.J 927) and Zaheer Hussain Vs The State (Criminal Bail Application No.09/2006). It was also contended that since the petitioner is a fugitive from law, therefore, cannot seek the concession of bail. Reliance was placed on case reported as PLD 1985 SC 402.

5. Arguments of the learned counsels for the parties heard and record perused with their able assistance.

6. Petitioner has been charged with an offence u/s 2 (37) of the Sales Tax Act, 1990 read with Section 33(11) and 33(13) ibid. The offences with which petitioner has been charged with do not fall in the prohibitory clause as provided in Section 497 of Code of Criminal Procedure 1908 and in such like cases grant of bail is a rule and refusal is an exception. Reliance is placed on case titled Tariq Bashir Vs The State (PLD 1995 SC 34), Riaz Jafar Natiq Vs Muhammad Nadeem Dar etc (2011 SCMR 1708) and Zafar Iqbal Vs Muhammad Anwar (2009 SCMR 1488). Petitioner has filed bail before arrest primarily on the ground that the system of the registered person i.e M/s Forte Associates was hacked i.e there was an unauthorised access, therefore, the information obtained from such unauthorised access tantamount to unlawfully obtaining the evidence which cannot be relied upon. In this behalf Fazal Muhammad, S.I, FIA, confirmed that on 24<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> May, 2015 the system of M/s Forte Associates was accessed from the system at the site of Intelligence and Investigation Inland Revenue,

Islamabad. It was also confirmed by the referred FIA officer that the system was accessed by the user I.D of one Uzma Hafeez who has made a statement that she is an ex-employee of M/s Forte Associates, however, never accessed the system. In this behalf for further investigation Assistant Accountant of M/s Forte Associates was called up. In view of the statement and enquiry report of FIA it is clear that the Intelligence and Investigation Wing of Inland Revenue, Islamabad unlawfully accessed the system of M/s Forte Associates. The stance taken by the learned counsel for the respondents is that u/s 38 of the Sales Tax Act, 1990 alongwith Section 40 ibid the department has authority to access the record. In this behalf for the sake of brevity the relevant provision of law is reproduced below and is as follows:-

*38. Authorised officers to have access to premises, stocks, accounts and records.-- (1) Any officer authorised in this behalf by the Board or the Commissioner shall have free access to business or manufacturing premises, registered office or any other place where any stocks, business records or documents required under this Act are kept or maintained belonging to any registered person or a person liable for registration or whose business activities are covered under this Act or who may be required for any inquiry or*

*investigation in any tax fraud committed by him or his agent or any other person; and such officer may, at any time, inspect the goods, stocks, records, data, documents, correspondence, accounts and statements, utility bills, bank statements, information regarding nature and sources of funds or assets with which his business is financed, and any other records or documents, including those which are required under any of the Federal, Provincial or local laws maintained in any form or mode and may take into his custody such records, statements, diskettes, documents or any part thereof, in original or copies thereof in such form as the authorised officer may deem fit against a signed receipt.*

*(2) The registered person, his agent or any other person specified in sub-section (1) shall be bound to answer any question or furnish such information or explanation as may be asked by the authorised officer. (3) The department of direct and indirect taxes or any other Government department, local bodies, autonomous bodies, corporations or such other institutions shall supply requisite information and render necessary assistance to the authorised officer in the course of inquiry or investigation under this section.*

7. The bare examination of the above provision of law shows that any officer authorised by the FBR or Commissioner shall have access to the business or manufacturing premises / registered office or any other place of the registered person where documents required or belonging to it or required for any

enquiry or any investigation in any tax fraud committed are maintained. However, referred section does not provide any officer to gain unauthorised access to the system/record maintained by any registered person. Moreover, under the referred provision of law in order to access the record an officer should be specifically authorised by the FBR or Commissioner. In the instant case no authorisation is on record nor any officer visited the place of business / registered office of the registered person to access the system of M/s Forte Associates. In this view of the matter any information gathered by the department of Intelligence and Investigation Inland Revenue, Islamabad is illegal and cannot form basis for prosecution against the registered person. In this behalf the case law relied upon by the learned counsel for the petitioner is instructive. In case titled F.O.P Vs M/s Master Enterprises Pvt.Ltd (2003 PTD 1034), the Honourable Supreme Court of Pakistan held that all searches made under the Sales Tax Act, 1990 or the Rules were to be carried out in accordance with the procedure laid in Section 96, 98, 99-A, 100 and 103 of Cr.P.C and where this is not the case the entire action is without lawful authority. Similarly, in



2012 PTD 1416 it was held that where evidence was collected by illegal means regardless of how incriminating, it is the same partakes the colour of a confession extracted through torture which was not admissible in evidence in any legal tradition/jurisdiction of the world and such evidence needs to be discarded.

8. Though the instant petition is for bail before arrest, however, the grounds which are available to the petitioner for bail after arrest can also be agitated in the instant petition. In this behalf reliance is placed on case titled Muhammad Ramzan Vs Zafrullah (1986 SCMR 1380) wherein the Honourable Supreme Court of Pakistan held that no useful purpose was likely to be served if bail of accused was cancelled on any technical ground because after arrest he could again be allowed bail on the ground that similarly placed other accused were already on bail. Similarly, Dr. Hassan Jalisi Vs The State etc (PLD 2004 Karachi 388) wherein Honourable Supreme Court held that since the accused would be entitled to post arrest bail tomorrow if they were sent to jail today, therefore, the petition for cancellation of pre-arrest bail was dismissed accordingly. Finally in case titled Nazar Muhammad etc Vs

The State (2012 P Cr.L.J 430) the Honurabnle Sindh High Court summarised to the law on bail before arrest in the following terms:-

- a) Grant of bail before arrest is an extraordinary relief to be granted only in extraordinary situations to protect innocent persons against victimization through abuse of law for ulterior motives;
- b) Pre-arrest bail is not to be used as a substitute or as an alternative for post-arrest bail;
- c) Bail before arrest cannot be granted unless the person seeking it satisfies the conditions specified through subsection (2) of section 497 of Code of Criminal Procedure i.e unless he established the existence of reasonable grounds leading to a belief that he was not guilty of the offence alleged against him and that there were, in fact, sufficient grounds warranting further inquiry into his guilt;
- d) Not just this but in addition thereto, he must also show that his arrest was being sought for ulterior motive, particularly on the part of the police; to cause irreparable humiliation to him and to B disagree and dishonour him;
- e) Such a petitioner should further establish that he had not done or suffered any act

which would disentitle him to a discretionary relief in enquiry e.g. he had no past criminal record or that he had not been a fugitive at law; and finally that;

- f) In the absence of a reasonable and a justifiable cause, a person desiring his admission to bail before arrest, must in the first instance approach the Court of first instance i.e the Court of Session, before petitioning the High Court for the purpose.

It was also held that considerations for grant of pre-arrest bail are not at all different from the considerations for grant of post arrest bail, as far as merits of the case are concerned and the only difference is that there must be additional basis of humiliation, harassment, mala-fides, intention to disgrace and dishonour. If a person is otherwise entitled to bail, no useful purpose shall be served by putting him firstly behind bars and then allowing him bail; court has to keep a balance and if a fit case for grant of bail is made out, bail before arrest should be allowed in appropriate cases. Similarly the Honourable Supreme Court of Pakistan in case titled Murad Khan Vs Fazal-e-Subhan etc (PLD 1983 SC 82) held that the basic condition for grant of pre-arrest bail is that arrest is for ulterior motive

such as humiliation and unjustified harassment, prosecution motivated by ulterior motive so as to cause irreparable injury to reputation and liberty then bail before arrest should be allowed.

9. In the instant case learned counsel for the respondents submitted that an anonymous complaint was received against M/s Forte Associates / registered person and thereafter an enquiry was conducted by obtaining the invoices from customers of the registered persons. The fact also remains that the system was accessed by Intelligence and Investigation Inland Revenue, Islamabad by using the user I.D of an ex-employee of M/s Forte Associates for which no plausible explanation has been rendered by the learned counsel for the respondents, therefore, ulterior motive / malafide on part of the respondents cannot be ruled out in such facts and circumstances. As already observed hereinabove that the offences with which the petitioner has been charged do not fall in prohibitory clause and case fall within scope of further enquiry in as much as the liability has not been adjudicated/determined by any competent forum.

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10. In view of the above, the instant petition is allowed. Ad-interim bail granted earlier is confirmed subject to furnishing fresh bail bonds in the sum of Rupees one million with two sureties in the like amount to the satisfaction of the Deputy Registrar (Judl) of this court.

  
(AAMER FAROOQ)  
JUDGE

**M.S.ZAKI.**

Approved For Reporting