

*HCJD/C-121*  
**JUDGMENT SHEET**  
**IN THE SLAMABAD HIGH COURT, ISLAMABAD**

**Writ Petition No.4216 of 2021**

**Fauji Cement Company Ltd. through its Manager  
Taxation**

***Versus***

**Commissioner Inland Revenue, etc**

**Petitioners by** : **Hafiz Mohammad Idris,  
Syed Farid Bukhari, and  
Faisal Khursheed Awan,  
Advocates.**

**Respondents by** : **Barrister Atif Rahim  
Burki, Sh. Anwar ul Haq  
and Babar Bilal,  
Advocates.**

**Date of Decision** : **21.06.2022**

**Babar Sattar, J:-** Through this judgment this Court seeks to decide the petitions listed in Annexure-A.

**2.** The petitioners are aggrieved by their selection for audit in exercise of powers conferred under Section 25 of the Sales Tax Act, 1990 ("STA") and Section 46 of the Federal Excise Act, 2005 ("FEA"), on the basis of sectoral audit instructions issued by the Federal Board of Revenue (FBR) in relation to (i) the cement sector, (ii) oil marketing companies, and (iii) manufacturers of storage batteries, by letters dated 29.01.2021, 10.03.2021 and 24.02.2021, respectively.

**3.** The learned counsels for the petitioners submitted that the audit had been ordered in view of FBR's sectoral audit instructions mentioned above for initiation of audit for all taxpayers within the sectors in relation to which such sectoral

audit instructions were issued. They submitted that selection for audit had not been undertaken in accordance with provisions of the STA through independent exercise of authority and discretion of the relevant Commissioners, but had been initiated pursuant to mandatory instructions issued by the FBR. And that the impugned instructions and orders passed pursuant to the sectoral audit instructions were illegal in view of the scheme of the STA as well as the law laid down by this Court in **M/s Pakistan Tobacco Company Limited Vs. Federation of Pakistan through the Secretary, Ministry of Finance, etc (W.P. No.272 of 2021)**

4. The learned counsels appearing on behalf of the tax department acknowledged that the orders impugned in the petitions were based on sectoral audit instructions by FBR that had been declared illegal by this Court in **M/s Pakistan Tobacco Company Limited.** They however took up two objections to the maintainability of the petitions. One, that in an I.C.A. filed by the petitioner in W.P. No.4251/2021 one of the grounds was that the audit had been initiated on the basis of sectoral audit letter and that a Division Bench of this Court had passed an injunctive order in I.C.A. No.548/2021 and that such petitioner could not simultaneously seek the same remedy before a Divisional Bench of this Court and a Single Bench of this Court. And two, that in the previous round of litigation some of the petitioners had not taken up the jurisdictional objection that they had raised in the present petitions and were estopped by raising the jurisdictional objection in the present petitions in view of the Order II Rule 2 of CPC.

5. Both the objections to maintainability are misconceived. Merely because some of the petitioners were unaware of the fact that audit into their tax affairs had on the basis of sectoral audit instructions by FBR does not disentitled them from challenging the legality of the orders passed on the basis of such sectoral audit instructions once it has come to their attention that the orders suffer from jurisdictional defect. It is a settled proposition that a jurisdictional defect goes to the heart of the authority being exercised by a public official and such legal objection can be taken up at any point in the legal proceedings. The principle of waiver and abandonment of a claim, as incorporated under Order II Rule 2 of CPC, is not applicable in relation to a challenge brought against an order on the basis that it has been passed without lawful authority. It is settled law that there is no estoppel against law and therefore Order II Rule 2 is not a bar against taking up an objection to exercise of authority by a public official which is devoid of jurisdiction. It has also been settled by the august Supreme Court in **Lahore Cantt. Cooperative Housing Society Ltd. Vs. Inamullah Khan (1996 SCMR 1195)** and **Tara Chand and others Vs. Karachi Water and Sewerage Board, Karachi (2005 SCMR 499)** that the benefit of a precedent ought to be afforded to non-contesting parties as well and that the ratio of such precedent is to be followed subsequently.

6. This Court has passed a judgment declaring that the initiation of audit on the basis of mandatory sectoral audit instructions issued by FBR is illegal. Merely because any petitioner was not party to the proceedings in which such order

was passed or that a petitioner had not taken up such objection before the Court being unaware that an audit into its tax affairs had been initiated on the basis of a sectoral audit instructions issued by FBR is not a reason to allow the tax department to proceed with the audit of such taxpayers on the basis of an order devoid of legal authority. For these reasons, the objections to the maintainability of the petitions are without force.

**7.** The basic question of law raised in these petitions has already been adjudicated by this Court in **M/s Pakistan Tobacco Co. Ltd.** wherein for reasons stated in such judgment, the following was declared:

*(i) Every citizen has a right to be treated in accordance with law and a public official has an obligation to discharge the authority vested in him in accordance with law as mandated by Article 4 of the Constitution. A citizen on the receiving end of exercise of authority not backed by law has a right to have such exercise of authority subjected to the judicial review powers of a High Court under Article 199 of the Constitution, subject to the satisfaction of other requirements of maintainability prescribed therein.*

*(ii) FBR is vested with no authority under section 206 read with sections 213 and 214 of the Ordinance of 2001 or any provision of the Sales Tax Act or the Federal Excise Act to issue a directive or circular to Commissioners directing such Commissioners to undertake sectoral audits or otherwise bind them in terms of how they are to exercise their*

*discretionary authority under section 177(1) of the Ordinance of 2001 or section 25(1) of the Sales Tax Act or section 46 of the Federal Excise Act. Any such directive is devoid of justification and a nullity. Thus, an audit selection notice issued by the Commissioner under section 177(1) to an Oil Marketing Company on the basis of the sectoral audit directive issued by FBR is tantamount to a notice issued for extraneous reasons and is liable to be set-aside.*

*(iii) Audit proceedings initiated on the basis of a directive issued by the FBR having been declared to be void would also be devoid of lawful authority and would cease. This would, however, not inhibit the Commissioner from independently exercising his/her authority under section 177 of the Ordinance of 2001 on the basis of reasons that satisfy the requirements of section 177.*

**8.** The instant petitions are therefore ***allowed*** in terms of the judgment of this Court in **M/s Pakistan Tobacco Co. Ltd.** and any orders for initiation of audit on the basis of sectoral audit instructions issued by FBR dated 29.01.2021, 24.02.2021 and 10.03.2021, are declared to be devoid of legal authority for being issued for extraneous reasons.

**(BABAR SATTAR)**  
**JUDGE**

## Annexure-A

| S. No. | Petition Number    | Title  |
|--------|--------------------|--|
| 1.     | W.P. No.4216/2021  | Fauji Cement Co. Ltd. through its Manager Taxation Vs. CIR and others              |
| 2.     | W.P. No.4217/2021  | --do--   |
| 3.     | W.P. No.4218/2021  | Askari Cement Ltd. through its Manager Taxation Vs. CIR and other                  |
| 4.     | W.P. No.4251/ 2021 | Force Batteries (Pvt.) Ltd. Vs. Deputy Commissioner Inland Revenue, Islamabad, etc |
| 5.     | W.P. No.4244/ 2021 | Force Batteries (Pvt.) Ltd. Vs. Deputy Commissioner Inland Revenue, Islamabad, etc |
| 6.     | W.P. No.4219/ 2021 | Askari Cement Ltd. through its Manager Taxation Vs. CIR and other                  |
| 7.     | W.P. No.4220/ 2021 | Fauji Cement Co. Ltd. through its Manager Taxation Vs. CIR and other               |
| 8.     | W.P. No.4221/ 2021 | Bestway Cement Ltd. through Senior Deputy Financial Controller Vs. CIR and others  |
| 9.     | W.P. No.4222/2021  | Askari Cement Ltd. through its Manager Taxation Vs. CIR and other                  |
| 10.    | W.P. No.4245/2021  | Force Batteries (Pvt.) Ltd. Vs. Deputy Commissioner Inland Revenue, Islamabad, etc |
| 11.    | W.P. No.4246/2021  | --do--   |
| 12.    | W.P. No.4247/2021  | --do--   |
| 13.    | W.P. No.4248/2021  | --do--   |
| 14.    | W.P. No.4249/2021  | --do--   |
| 15.    | W.P. No.4250/2021  | --do--   |
| 16.    | W.P. No.784/2022   | Jadeed Oil Extraction (Pvt.) Ltd. Vs. CIR and others                               |