

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P.No.4187/2015

M/s Huawei Technologies Pakistan Pvt. Ltd.

Vs

The Commissioner Inland Revenue, etc

PETITIONER BY: Mr. Waseem Sajjad, Mr. Idrees
Ashraf and Hafiz Muhammad
Idrees, Advocates.

RESPONDENTS BY: Hafiz Munawar Iqbal and Babar
Bilal, Advocates for the
respondents.

DATE OF DECISION: 03.03.2016

AAMER FAROOQ, J. Through the instant petition under Article 199, the petitioner assails order dated 28.12.2015, passed by the respondents, attaching the accounts of the petitioner and recovery of the amount under the same.

2. The facts, in brief, are that the petitioner filed its Income Tax Return, for the year 2009, on 30.11.2009, which was deemed to be assessment order, issued to the petitioner, under section 120 of the Income Tax Ordinance, 2001 (***the Ordinance***). The petitioner received a show cause notice No.520, dated 30.05.2015, under section 122(5) (A) of the Ordinance for amendment in the assessment order.

The referred notice was challenged, by the petitioner, through a petition under Article 199 of the Constitution (**W.P.No.2175/2015**), before this Court. The said petition was admitted for regular hearing and the proceedings under the show cause notice were stayed to the extent that no final order was to be passed. During the course of proceedings, another show cause notice No.566, dated 29.06.2015, was issued, to the petitioner, being the final order under the earlier impugned show cause notice. The referred order was suspended, by this Court. In the said Constitution petition an amendment was sought which was allowed whereby the petitioner also assailed the Order-in-original. However, the referred order was also challenged in appeal before respondent No.4. Writ petition No.2175/2015 was dismissed by this Court vide judgement dated 24.11.2015. On 28.12.2015, respondents attached the accounts of the petitioner and sought to recover sum of Rs.502,408,906.46/-.

3. Learned counsel for the petitioner *inter alia* submitted that the appeal, filed by the petitioner, is pending before respondent No.4 and in light of the cases titled "*Z.N. Exports Pvt. Ltd. Vs Collector of Sales Tax*" (**2003 PTD 1746**), "*Sun-Rise Bottling Company Pvt. Ltd. Vs Federation of Pakistan*" (**2006 PTD 535**) & "*Karachi Shipyard & Engineering Works Ltd. Vs Additional Collector, Customs, Excise and Sales Tax (Adjudication-III), Government of Pakistan, Karachi*" (**2006 PTD 2207**), there should be an adjudication by one independent forum for effecting

recovery from the taxpayer. It was further contended that no notice, as required under section 137 of the Ordinance, was served upon the petitioner by respondents No.1 to 4; that before attaching the accounts of the petitioner under section 140 of the Ordinance, it was mandatory to serve a notice under section 138 *ibid* requiring a reasonable time to be given to the taxpayer for making payment of the tax due. In this behalf, reliance was placed on the decision of Appellate Tribunal Inland Revenue titled "*M/s Daewoo Pakistan Motorway Service Ltd., Lahore Vs Commissioner Inland Revenue Zone-II, Lahore*" **(2012 PTD (Tribunal) 1976)**. The learned counsel further submitted that though a notice under section 137 was issued in August, 2015, however, the same was not in accordance with law as under the same, fifteen days time period was provided, to the petitioner, for making payment whereas under 137 of the Ordinance, as amended in light of the Finance Act, 2015, thirty days time period is required to be given to the taxpayer for making payment of the tax liability in question. In this behalf, the learned counsel for the petitioner submitted that it is an established principle that amendment in the procedural law operates retrospectively and since the provision regarding service of notice is procedural, therefore, thirty days time was to be given to the petitioner. Reliance was placed on case titled "*Pakistan Steel Mills Corporation Vs. Muhammad Azam Katper and others*" **(2002 SCMR 1023)**. The learned counsel also contended that it is trite law that an act required to be done in a particular way has to be done in that manner or not at

all. Reliance was placed on case titled "*Commissioner (Legal) Inland Revenue Vs EFU General Insurance Ltd.*" **(2011 PTD 2042)**.

4. Learned counsel for the respondents *inter alia* submitted that notice under section 137 of the Ordinance was served on the petitioner in August, 2015, therefore, there is no violation of the referred provision. It was also contended that in order to exercise power under section 140 of the Ordinance, there is no need for attachment of the accounts or issue a notice prior thereto. In this behalf, it was categorically contended that section 140 of the Ordinance is independent of section 138 *ibid*.

5. In case titled "*Z.N. Exports Pvt. Ltd. Vs Collector of Sales Tax*" **(2003 PTD 1746)**, the Hon'ble Lahore High Court held that in all fairness, equity and justice, an assessee should not be forced to pay a demand created by a Revenue Authority unless the order creating such demand has undergone the scrutiny of atleast one independent forum. Similar view was taken in a subsequent decision by the referred Hon'ble High Court in case titled "*Sun-Rise Bottling Company Pvt. Ltd. Vs Federation of Pakistan*" **(2006 PTD 535)**, wherein it was observed that access to justice was a fundamental right and essential feature of such right was determination of any grievance or dispute by an independent Tribunal. In this regards, it was observed that the Appellate Tribunal provides the independent adjudication of the impugned tax liability. In case titled "*Karachi Shipyard & Engineering Works Ltd. Vs*

Additional Collector, Customs, Excise and Sales Tax (Adjudication-III), Government of Pakistan, Karachi" (2006 PTD 2207), the Hon'ble Division Bench of Sindh High Court endorsed the principle laid down in the above mentioned judgements.

6. In view of the aforementioned principle that has been consistently followed by this Court in a number of decisions, no coercive measures are to be adopted for recovery of the disputed tax liability till the decision by an independent forum. Since the appeal, filed by the petitioner, is pending before respondent No.4, therefore, in light of the above principle, coercive measures for the recovery are not to be effected till its decision.
7. Even otherwise, under section 137 (2) of the Ordinance, a notice has to be served on the tax payer specifying the amount payable within thirty days from the service of the notice. In this regards, the relevant provision of law is reproduced below and is as follows:

"COLLECTION AND RECOVERY OF TAX

137(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."*

8. The respondents did serve a notice under section 137 *ibid* on the taxpayer, however, the same was served in August, 2015, and required the petitioner to pay the disputed tax liability within a period of fifteen days. In this behalf, the law requires a notice under subsection 2 of section 137 to provide a period of thirty days for making payment from the date of service. The amendment regarding the change in the time period was made effective from 01.07.2015 by virtue of amendment, made in the Ordinance, under the Finance Act, 2015. Therefore, in this regards, the case law relied upon by the learned counsel for the petitioner is instructive inasmuch as it is an established principle that thing not done in a prescribed manner vitiates the proceedings. Reliance is placed on case titled "*Commissioner (Legal) Inland Revenue Vs EFU General Insurance Ltd.*" **(2011 PTD 2042)** in which the Hon'ble Sindh High Court held that if something is required to be done in a particular manner then it has to be done in that manner only; otherwise any deviation, in this regard, would vitiate the proceedings. Hence, notice issued under section 137 *ibid* to the petitioner was not in accordance with law and the proceedings taken subsequent thereto are not valid.
9. In the instant case, no notice under section 138 of the Ordinance was served on the taxpayer and after the dismissal of the Constitution Petition (W.P.No.2175/2015), respondents No.1 to 4 issued a notice under section 176 of the Ordinance to the

banks where the petitioner was maintaining accounts; wherein details of the accounts in the name of petitioner and then proceeded to attach the same vide letter dated 28.12.2015. The learned counsel for the petitioner vehemently argued that before invoking section 140 and attaching the accounts of the petitioner a notice under section 138 was mandatory; requiring the petitioner to pay the tax due within a reasonable time. In this behalf, under section 138 (1) of the Ordinance for the purpose of recovery of 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. Under subsection 2 of the referred section, in case of failure by the taxpayer to make the payment within the prescribed time, the Commissioner can proceed to attach and sell any moveable and immovable property of the taxpayer. The learned counsel for the respondents submitted that section 138 is independent and notice is required to be served only where attachment and sale is to be effected. In the afore noted letter dated 28.12.2015, the Commissioner Inland Revenue granted permission under section 140 of the Ordinance to attach all bank accounts of the petitioner for recovery of the tax liability. The respondent department by its conduct admitted that before invoking section 140 i.e. asking the person holding money on behalf of the taxpayer to pay to it, attachment is a pre-requisite. In this regards, the learned counsel for the petitioner placed reliance on the judgement of the Appellate Tribunal Inland Revenue titled "*M/s Daewoo Pakistan Motorway*

Service Ltd., Lahore Vs Commissioner Inland Revenue Zone-II, Lahore" (2012 PTD Tribunal 1976) in which it was observed as follows:-

"The practice of making recovery under section 140 without issuance of notice cannot be supported by any stretch of interpretation of the provisions of Income Tax Ordinance, 2001. Section 24-A of General Clauses Act, 1897 needs to be read as part of every Federal Statute. Its subsection (2) obliges an authority with a duty to give reasons and inform the person likely to affect prejudicially. Even before insertion of section 24-A in General Clauses Act, 1897, Apex Court of the country has held in number of cases that 'audi alteram partem' should be read as part of every Statute.

We are not in agreement with the submission by DR that action of attaching account under section 140 is not a coercive measure. It is indeed a coercive measure when you recover an amount from the bank of a taxpayer without his consent/permission. Under the circumstances this application is allowed. Department is restrained from taking any action under section

140 i.e. from recovering amount after attachment of account without prior notice till the decision by Commissioner (Appeals) in main cases."

10. Though the judgement mentioned above, is not binding on this Court, however, the principle laid down in the same, is sound and in accordance with law. The respondent department before invoking section 140 of the Ordinance is required to issue a notice intimating the taxpayer regarding the invocation of section 140 *ibid* and requiring him to make payment of the tax liability within a reasonable time. The Hon'ble Lahore High in case titled "*Sultan Mehmood Khan Vs Deputy Commissioner Inland Revenue and 3 others*" **(2015 PTD 458)** held that after insertion of Article 10-A in the Constitution of Pakistan, fair trial and due process are fundamental rights of every citizen for determination of his civil rights and obligations. In the instant case, no notice was served on the petitioner before invoking section 140, therefore, the impugned action of the respondents seeking recovery, from the banks of the petitioner, is without lawful authority.
11. For the foregoing reasons, the instant petition is allowed and order dated 28.12.2015, attaching the accounts of the petitioner effecting recovery is declared to be without lawful authority and no legal effect. Consequently, the obtaining of pay orders by respondent No.2, from the banks of the petitioner, is also declared to be without lawful authority, therefore,

amounts are to be credited back in the petitioners' accounts. Since the appeal filed by the petitioner is pending before respondent No.4, therefore, the referred respondent is directed to decide the same within a period of **sixty** days from the receipt of this Order and meanwhile no coercive measure shall be adopted by the respondent department for recovery of the disputed tax liability.

(AAMER FAROOQ)
JUDGE

M.AMIR

Approved for Reporting