

Form No: HCJD/C
JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT
ISLAMABAD.

Writ Petition No.3876 of 2021

Oracle Systems Pakistan (Private) Limited
Versus
Pakistan through the Secretary Revenue & Ex Officio Chairman Federal
Board of Revenue FBR, Islamabad, etc.

Petitioner's by : Mr. Saad M. Hashmi, Advocate for the petitioner.

Respondent's by : Syed Ishfaq Hussain Naqvi, Advocate for the respondents.
Mr. Hassan Khawar, DC FBR.
Mr. Zulfiqar Ahmad, CIR.

Date of Decision : 10.11.2021.

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AAMER FAROOQ, J. - The petitioner has challenged notices dated 29.10.2021 issued by respondents for effecting recovery with respect to the Federal Excise Duty as well as surcharge and penalty from the petitioner. In this behalf, proceedings against the petitioner were instituted for recovery of Federal Excise Duty on account of franchise services royalty on technical services with respect to the Tax Year, 2016. The referred proceedings culminated in Order-in-Original No.02/73/2020 dated 23.11.2020. Respondents issued notice dated 23.02.2020 for payment of the liability pursuant to the said Order-in-Original. Second notice was issued on 26.03.2021. Meanwhile, the petitioner filed appeal before the Commissioner Inland Revenue (Appeals-I), Islamabad. Moreover, a petition under Article 199 of the Constitution was also filed (W.P No.1247/2021) in this Court seeking prohibition that the respondents be restrained from recovering the amount. This Court vide order dated 29.04.2021 disposed of the petition directing the Commissioner Inland Revenue (Appeals-I) to decide the stay

application within a period of thirty (30) days. The referred appeal was decided by the Commissioner (Appeals-I) on 27.10.2021, whereafter the impugned actions were taken against the petitioner and the amount in the various banks was attached/recovered.

2. Learned counsel for the petitioner, *inter-alia*, contended that no notice was sent to the petitioner before effecting recovery from the petitioner; that the order by the Commissioner Inland Revenue (Appeals-I) was received on 01.11.2021 by which time the pay order had already been prepared. It was submitted that the matter has been further agitated by way of appeal before Appellate (Tribunal), Inland Revenue, Islamabad. In support of his contentions that the attachment of the accounts of the petitioner and directing the banks to make the pay order is in violation of law, the learned counsel placed reliance on cases reported as "Attock Cement Pakistan Limited Vs. Collector of Customs, Collectorate of Customs and Central Excise Quetta and 4 others" **(1999 PTD 1892)**, Quaid-E-Azam Thermal Private Limited through Chief Executive Officer, Lahore Vs. Federal Board of Revenue through Chairman, Lahore and others **(2020 PTD 165)**, "Z.N Exports (Pvt.) Ltd. Vs. Collector of Sales Tax **(2003 PTD 1746)**, "Sun Rise Bottling Company (Pvt.) Limited through Chief Executive Vs. Federation of Pakistan and 4 others **(2006 PTD 535)** and "Messrs Yasir Board Industry through Proprietor Vs. Central Board of Revenue, Islamabad through Chairman and another **(2006 PTD 1054)**.

3. Learned counsel for the respondents, *inter-alia*, contended that after the liability was adjudged through Order-in-Original recovery notices were issued and the mandate of law has been complied with. It was submitted that it was only after the decision

in appeal was handed down, the needful was done for recovery of the amount. Reliance was placed on "Messrs Paramount Spinning Mills Limited Vs. Customs, Sales Tax and Central Excise Appellate Tribunal and another (2012 SCMR 1860) and Messrs Highnoon Laboratories Vs. Assistant Collector, Sales Tax and Central Excise and others (2003 PTD 2722).

4. The contentions of both the learned counsel have been listened with utmost care and the documents placed on record examined with their diligent assistance.

5. The petitioner is aggrieved of issuance of notices dated 29.10.2021 to its banks and/or attachment of the accounts maintained by it with referred banks for affecting recovery of the tax liability qua Federal excise duty as well as default surcharge and penalty etc. The means by which arrears of Federal Excise Duty can be recovered is provided in Rule 60 of Federal Excise Rules, 2005. For ease of convenience, the said Rule is reproduced below:-

"60. Recovery of arrears of duty.--(1) Where any amount of Federal excise duty or any other sum under the Act or these rules is due from any person, the officer of Federal excise may take or cause to be taken the following actions, namely:--

(a) deduct the amount from any money owing to person from whom such amount is recoverable and which may be at the disposal or in the control of such officer or any officer of Income Tax, Customs or Sales Tax Department;

(b) require by a notice in writing any person who holds or may subsequently hold any money for or on account of the person from whom duty may be recoverable to pay to such officer the amount specified in the notice;

(c) stop removal of any goods from the business premises of such person till such time the amount of duty is paid or recovered in full;

(d) require by a notice in writing any person to stop clearance of imported goods or manufactured goods or attach bank accounts;

(e) seal the business premises till such time the amount of duty is paid or recovered in full;

(f) attach and sell or sell without attachment any movable or immovable property of the registered person from whom duty is due; and

(g) may recover such amount by attachment and sale of any movable or immovable property of the guarantor, person, company, bank or financial institution where a guarantor or any other person, company, bank or financial institution fails to make payment under such guarantee, bond or instrument.

(2) The [officer of Federal excise], while making recovery of arrears of duty under this rule may dispense with the sequence of actions specified in clauses (a) to (g) of sub-rule (1).

(3) The procedure laid down in the Sales Tax Rules, 2005 regarding recovery shall, mutatis mutandis, be followed for the purpose of recovery of arrears of duty under this Chapter.

(4) For the purpose of recovery of duty, penalty or any other demand raised under the Act, or these rules, the officer of Federal excise shall have the same powers which under the Code of Civil Procedure 1908 (V of 1908), a Civil Court has for the purpose of recovery of an amount due under a decree."

The examination of the above provision of law shows that various means are available to the authority for recovery of its outstanding dues and any mode may be adopted without adhering to the sequence mentioned hereinabove. In order to recover the amount, the procedure that is to be followed by the authority is the one as provided in Sales Tax Rules 2005 (presently Rule 71 (1) of Sales Tax, Rules 2006). Under Rule, 71 (1) of the Sales Tax Rules, 2006, on expiry of thirty (30) days from the date on which the Government dues are adjudged, the referring authority shall deduct the amount from any money owing to the person whom such amount is recoverable and which may be at the disposal or in the control of such officer. The referred provision provides for adjustment by way of deduction by any officer, who is

holding money on account of the person from whom the tax recovery is to be made. Further, manner for recovery is provided in Rule 71 (2) which *inter-alia* includes attaching the bank account of the defaulter. Rules 72, 73, 74, 75 and 76 provide other ways of recovering the default liability. Rule 77 *ibid* provides for the mode of service of notices by laying down that the notices shall be served by tendering or sending them by registered post or courier service, to the person for whom these are intended or to his agent, at his last known address or if the same cannot be provided in clause (a), by affixing it on the notice board in the office of the Recovery Officer. There are other ancillary provisions regarding attachment and sale of immovable property, however, since they are not applicable to the facts and circumstances of the case, hence no discussion is required with respect to the same. The stance of the respondents is that after the adjudication of the liability through Order-in Original dated 23.11.2020, recovery notices were issued which fact is acknowledged by the petitioner. The referred notices were issued on 23.02.2020 and 26.03.2021. The latter notice was sent through Urgent Mail Service of Pakistan Post. The mechanism required under the law is through registered post or courier and it seems that the said provision had not been adhered in issuance of the same. Undoubtedly, the respondents have the power to recover the outstanding amount through modes provided in Rule 60 of the Federal Excise Rules, 2005 following the procedure as provided in Sales Tax Rules, 2006. Rule 60 *ibid* or any other provision under the Federal Excise Rules, 2005 does not prescribe any expiry of period or issuance of notice, but Rule 71 (1) provides for lapse of thirty (30) days period after adjudication of the liability. The liability was adjudged through Order-in-Original dated 23.11.2020, but was also subject matter of challenge. The

matter was pending for almost about 11 months, hence the propriety demanded that before taking the penal measures for recovery of the liability notice should have been served through registered Post or courier in the manner envisaged.

6. Even otherwise, over a period of time, the Courts have developed the jurisprudence that before affecting tax recovery there has to be adjudication by one independent forum and that being Appellate Tribunal Inland Revenue. Reliance is placed on case reported as "Sun-Rise Bottling Company (Pvt.) Limited through Chief Executive Vs. Federation of Pakistan and 4 others (2006 PTD 535)", "Z.N Exports (Pvt) Ltd. Vs. Collector of Sales Tax (2003 PTD 1746)" and Messrs Yasir Board Industry through Proprietor Vs. Central Board of Revenue, Islamabad through Chairman and another (2006 PTD 1054). The view taken in the above judgments have recently been affirmed and reiterated by the Hon'ble Lahore High Court in judgment reported as "Quaid-E-Azam Thermal Private Limited through Chief Executive Officer, Lahore Vs. Federal Board of Revenue through Chairman, Lahore and others (2020 PTD 165)" by observing as follows:

"Under the law, it is mandatory for any referring authority to first provide thirty days to such person against whom the dues are 'adjudged' to pay the tax amount due. Only after expiry of said period, the referring authority can deduct the amount from any money owing to the person from whom such amount is recoverable and which may be at the disposal or in the control of such officer. The department can only serve a notice under Rule 71(2) of the Rules of 2006 after the expiry of mandatory period prescribed under Rule 71 (1) ibid. Without observing the mandatory requirements provided in law, the recovery proceedings are not tenable. For ease of reference, Rule 71(1) of the Rules of 2006 is reproduced hereunder:-

"71. Initiation of recovery action.-- (1) On expiry of thirty days from the date on which the Government dues are adjudged, the referring authority shall deduct the amount from any money owing to the person from whom such amount is recoverable and which may be at the disposal or in the control of such officer."

7. The question arises as to whether time prescribed in Rule 71(1) ibid would also be granted after the decision of first

appellate authority, especially when remedy of second appeal before an independent forum i.e. Appellate Tribunal is still available to petitioner. In the instant case, assessment order was passed on 11.01.2018, whereby respondents created a demand of Rs.986,088,811/- along with default surcharge and penalty. Petitioner's appeal was rejected by CIR (Appeals) on 27.03.2019 and on the very next day i.e. 28.03.2019, respondent No.2 issued notice with direction to attach petitioner's bank accounts and remit the amount in favour of respondent No.3 under banking instruments. The impugned notice is reproduced hereunder:-

"SUBJECT:- NOTICE FOR ATTACHMENT OF BANK ACCOUNTS UNDER SECTION 48(1)(B) OF THE SALES TAX ACT, 1990 READ WITH RULES 71 (2)(B) AND 71(2)(D) OF CHAPTER XI (RECOVERY) OF THE SALES TAX RULES, 2006 FOR RECOVERY OF OUTSTANDING LIABILITIES.

WHEREAS, Government dues amounting to Rs.986,088,811/- along with default surcharge Rs.63,626,976/- under section 34(1) of the Sales Tax Act, 1990 (calculated upto 15/06/2017, to be re-calculated and recovered at the time of payment) and penalty Rs.29,582,664/- under section 33(19) of the Sales Tax Act, 1990 (i.e. total Rs.1,079,298,451) assessment Order No.10/2018 issued vide C.No.479 dated 11.01.2018 (for the tax periods of 04/2016, 05/2016, 12/2016 and 04/2017) Messrs Quaid-e-Azam Thermal Power (Pvt.) Limited, Office No.7-C, First Floor, Gulberg-III, Lahore, having Sales Tax Registration No.3277876115213 and NTN: 4421311-5 which they have failed to pay so far.

2. NOW, THEREFORE, in exercise of the powers conferred upon me under section 48(1)(b) of the Sales Tax Act, 1990 read with Rules 71(2)(b) and 71(2)(d) of Chapter XI of the Sales Tax Rules, 2006, I do hereby, require above mentioned banking authorities to attach all the Bank Account of the defaulters i.e. Messrs Quaid-e-Azam Thermal Power (Pvt.) Limited, Office No.7-C, First Floor, Gulberg-III, Lahore with immediate effect. "

8. The above notice shows that neither any order of first appellate authority i.e. Commissioner Inland Revenue (Appeals) has been referred nor its copy was directly sent to petitioner asking it to deposit the amount due, at least within a reasonable time. There is also no mention of any previous notice given to petitioner after passing of the assessment order. In the given circumstances, petitioner was entitled to be given thirty days to satisfy the demand and only thereafter, impugned coercive measure of deduction of amount from bank accounts of petitioner could be initiated.

10. The assessee has not been given reasonable time to approach the higher forum i.e. Appellate Tribunal and if such process is allowed, the remedy of appeal before said independent forum, provided under the Statute, will become redundant. Such course is not only harsh but also unreasonable. Normally, the superior courts suspend the recovery proceedings / coercive measures unless the order creating such demand has undergone the scrutiny of at least one independent forum, which in this case is the Appellate Tribunal before which an appeal was to be filed by the petitioner. Reference is made to the cases of Sun-Rise Bottling Company and Messrs Huawei Technologies Pakistan supra.

11. *Needless to say that an integral, intrinsic and incidental part of law under Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution") is the right to procedural due process, right to be treated fairly at all times, right to procedural fairness and right to procedural propriety. Petitioner, being a citizen of the Islamic Republic of Pakistan, has the right to a fair procedure, which has been constitutionally guaranteed in our country. Article 4 of our Constitution is a heroic and vibrant blend of the cardinal principle of natural justice, procedural fairness and procedural propriety of the English Jurisprudence and Procedural Due process of the American Jurisprudence. The Constitution has boldly recognized this right to be an immutable right of every citizen or of any other person for the time being in Pakistan. Reference can be made to Aftab Shahban Mirani v. President of Pakistan and others (1998 SCMR 1863), Babar Hussain Shah and another v. Mujeeb Ahmed Khan and another (2012 SCMR 1235), Sarfraz Saleem v. Federation of Pakistan and others (PLD 2014 Supreme Court 232), Naubahar Ali v. Vice-Chancellor and others (2010 PLC (C.S.) 783), Muhammad Umar v. D.G. Excise and Taxation and others (2011 PLC (C.S.) 384) and Shabbir Ahmed v. Kiran Khursheed and 8 others (2012 CLC 1236)".*

On the touchstone of the above case law it was appropriate that respondents ought to have waited for the outcome of the decision in the Appellate Tribunal before adopting coercive measures for recovery. Needless to observe that the referred jurisprudence developed over a period of time is not to frustrate the mechanism provided under the law for effecting recovery prior to the decision by the Appellate (Tribunal) Inland Revenue, however, is to be followed only where the tax liability is not disputed but where the tax liability is disputed and is the subject matter of appeals in various fora up until the Appellate Tribunal. The principles laid down in judgment in paragraph 6 supra should be adhered.

7. For the above reasons, the instant petition is **allowed** and the impugned notice dated 29.10.2021 alongwith action of preparation of pay order in favour of respondents is *set aside*. It is observed that the petitioner shall approach the Appellate Tribunal Inland Revenue for obtaining injunctive relief in its favour within a period of forty five (45) days from the date of decision in the

instant petition and in case of absence of any injunctive relief, respondents shall be at liberty to proceed for recovery of tax liability in accordance with law.

(AAMER FAROOQ)
JUDGE

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