

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.171/2021

Sungi Development Foundation Employees Provident Fund Trustees.
Vs.
Federation of Pakistan through the Secretary Ministry of Finance,
Revenue and Economic Affairs & others.

PETITIONER BY: M/s Shezada Mazhar, Muhammad
Jawwad Khan Lodi, Osama Shahid
Khawaja, Advocates.

RESPONDENTS BY: Syed Ishfaq Hussain Naqvi,
Advocate for FBR.
Mr. Farrukh Shahzad Dall, Assistant
Attorney General.
Mr. Abdul Hameed Khan Kundi,
Advocate for respondent No.3.
Barrister Umer Aslam Khan,
Advocate for respondent No.6.

DATE OF HEARING: 17.02.2022.

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BABAR SATTAR, J.- The petitioner is aggrieved by attachment of its account by respondent No.3 pursuant to a notice under Section 140 of the Income Tax Ordinance, 2001 (**"Ordinance"**), dated 13.01.2021, which is a communication to the bank in relation to respondent No.4.

2. The learned counsel for the petitioner submitted that no tax proceedings are pending against the petitioner who has neither been issued a notice for demand nor a notice under Section 140 of the Ordinance. That on 07.01.2021, permission sought for attachment of bank account of respondent No.4 was granted. However, on 14.01.2021, the bank account of the petitioner was debited to the amount of Rs.3863423.77/-. The learned counsel for the petitioner drew this Court's attention to

the bank statement of the petitioner and the amount debited on 14.01.2021, which he stated has been done in pursuance of the order against respondent No.4. He submitted that the action of respondent No.3 in attaching the account of the petitioner was illegal and without jurisdiction. He submitted that the petitioner is an independent legal entity created under a trust deed dated 30.12.2008, with its own National Tax Number (NTN) No.7395983 and is not a subsidiary or part of respondent No.4 (which is a separate legal entity with NTN 2060052). That the funds of the petitioner are held and expended for the benefit of employees and are not held on behalf of or for the benefit of respondent No.4. That respondent No.3 issued an assessment order under Section 122 (5A) of the Ordinance and generated tax liability against respondent No.4. That the matter is presently pending adjudication before the learned Appellate Tribunal Inland Revenue, Islamabad, in which injunctive order was passed on 18.01.2021. But that the petitioner is not concerned with the tax affairs or liability of respondent No.4. That pursuant to the demand generated under the said assessment order, recovery notices were issued including a notice under Section 140 of the Ordinance issued to the Muslim Commercial Bank Limited (i.e. respondent No.6). That pursuant to this notice under Section 140 of the Ordinance, the bank issued a pay order in the amount of approximately Rs.7.2 Million to respondent No.3 on behalf of respondent No.4. He further submitted that approximately Rs.3.863 Million of said amount were debited from account No.0031388391001886, which belongs to the petitioner and not respondent No.4. That the rest

of the amount was debited from the bank accounts maintained by respondent No.4 in the said branch of MCB Bank. And consequently an amount of approximately Rs.3.863 Million was illegally deducted by MCB Bank from the account of the petitioner on the direction of respondent No.3 and handed over to tax authorities who are the beneficiary of such illegally seized funds of the petitioner.

3. The learned counsel for respondent No.3 submitted that it has no dispute with the petitioner and the tax liability generated was against respondent No.4 and through notice under Section 140 of the Ordinance, dated 13.01.2021, respondent No.3 explicitly sought to recover the tax demand from the accounts of respondent No.4. To the extent of the petitioner's claim in this case, respondent No.3 feigned ignorance regarding deduction of the funds from the account of the petitioner.

4. Conversely, learned counsel for the petitioner showed this Court the bank statement for account No.0031388391001886, which reflects a debit of approximately Rs.3.863 Million on 14.01.2021 and establishes that the amount deducted by MCB Bank in discharge of its obligation under Section 140 notice was discharged to the extent of the said amount by debiting the account of the petitioner as opposed to that of respondent No.4.

5. Respondent No.6 filed para-wise comments, which reflects that the amount was deducted from the account of the petitioner against whom no liability has been created by the Tax

Department. It was due to misreading of the NTN number by the bank in lieu of the demand created by the tax authorities through notice issued under section 140 of the Ordinance that it assumed that the demand was against the petitioner as opposed to respondent No.4, as at the time of opening of the said account of the petitioner the NTN used as a reference by the bank was that of respondent No.4.

6. The bank's response clarifies that it was due to a misunderstanding that the amount in question was deducted from the account of the petitioner. While the petitioner informed the bank that it had not received any notice under Section 138 of the Ordinance from FBR, the bank understood that to mean that there was no stay order against the recovery that was pending against the petitioner. Notwithstanding the events that led to respondent No.6 mistakenly deducting Rs.3.8 million from the account of the petitioner against a demand that was generated against respondent No.4, it was for respondents No. 3 & 5 to establish how the amount collected from respondent No.6 was a coercively affected legitimate recovery under Section 140 of the Ordinance in relation to a demand generated against respondent No.4.

7. The facts as have emerged from the pleadings and arguments of the parties are undisputed. It is admitted that respondents No.2 & 3 sought to recover tax demand generated against respondent No.4. But instead of affecting the recovery against respondent No.4, they appeared at the premises of respondent No.6 and affected recovery from the bank accounts

that included a bank account of the petitioner maintained with respondent No.6. The petitioner is a legal entity with its own NTN and has a legal identity distinct from that of respondent No.4, which has its own NTN. It is also undisputed that there was no tax demand generated by respondents No.2 & 3 against the petitioner. No recovery notice was issued against the petitioner and no liability was due to be discharged by the petitioner.

8. The crux of the arguments of respondents No.2 & 3 has been that they sought recovery against respondent No.4 in terms of Section 140 of the Ordinance and it was respondent No.6 that made a mistake by debiting the amount from the account of the petitioner in discharge of tax liability due to be recovered from respondent No.4. That as respondent No.2 & 3 were seeking to affect recovery against respondent No.4, they are not liable for the amount debited from the account of the petitioner that was handed over by respondent No.6 to respondents No.2 & 3.

9. This Court through various orders had invited respondent No.5 to take corrective step after it became evident that the amount received by respondent No.3 in lieu of tax liability generated against respondent No.4 was in fact recovered from the petitioner who was under no obligation to settle such liability of respondent No.4 and from whom no amount in lieu of discharge of the liability could be recovered by respondents No.2 & 3. This Court had brought the matter to the attention of the Chairman, FBR, as well as Member (Legal), FBR. The learned

Member (Legal), FBR, appeared before this Court and was afforded an opportunity to take remedial steps to return to the petitioner the amount wrongly debited from its account and confiscated by respondents No.2 & 3.

10. The learned counsel appearing on behalf of respondents No.1 & 5 expressed his inability to take any remedial steps even after respondents No.1, 2, 3 & 5 had become aware that the amount collected in lieu of the tax liability of respondent No.4 had been wrongly collected from respondent No.1. He submitted that there had never been a case before where an amount due from one taxpayer had been wrongly collected from another taxpayer and consequently there existed no mechanism for respondents No.1, 2, 3 & 5 to take any corrective measures to return such confiscated amount even after it became evident that it had been wrongly collected. He submitted that the only mechanism available was for the petitioner to seek a refund of the amount collected from the petitioner, which refund application would have to be processed in accordance with procedure prescribed in the Ordinance to allow the refund.

11. The contention of the learned counsel for respondent No.6 was that the record of respondent No.6 reflected that the NTN provided by the petitioner at the time when the account was opened was that of respondent No.4 and consequently the bank accounts opened in the name of the petitioner were tagged along with bank accounts opened in the name of respondent No.4, which caused the mistake of deduction of amounts from the bank account of the petitioner upon receipt of notice issued

by respondent No.3 under Section 140 of the Ordinance to affect recovery from the bank account of respondent No.4. The submissions by respondent No.6 defy logic. Respondent No.6 is under an obligation to undertake "Know Your Client" diligence as required by the Prudential Regulations issued by the State Bank of Pakistan. While undertaking such diligence commercial banks require their customers to re-verify their details in order to keep their accounts functional. It is therefore inexplicable that respondent No.6 would remain oblivious to the legal identity of the petitioner, which is an independent legal entity with an independent NTN and confuse the identity of the petitioner was that of respondent No.4 (which again is a different legal identity with an independent NTN). It also defies logic that even in the event that a search within the data base of respondent No.6 had thrown up bank accounts of both respondent No.4 as well as the petitioner when such search was conducted to comply with Section 140 notice issued by respondents No.2 & 3, that respondent No.6 would be unable to appreciate that the title of the petitioner's bank account is different from that of respondent No.4.

12. Respondent No.6, however, is a private commercial entity and the petitioner has sought no relief against respondent No.6. So notwithstanding the apparent failure of respondent No.6 to comply with requirements of the Prudential Regulations issued by the State Bank of Pakistan in verifying the required details of the petitioner, which led it to confusing the account of the petitioner with that of respondent No.4 by its own account,

this Court will abstain from making any further observations regarding the role of respondent No.6 in the instant matter.

13. Let us briefly consider the obligations of respondents No.2, 3 & 5 in relation to affecting recovery from a taxpayer against whom tax liability has been created and further, the obligation to take corrective action once it becomes evident that an amount in lieu of tax liability has been wrongfully collected from a taxpayer against whom no such liability exists.

14. FBR is conceived as a potent, dynamic and effective organization by the Federal Board of Revenue Act, 2007 ("**Act**"). The submission by its counsel that the hands of the Chairman and Members of FBR are tied in face of wrongful appropriation of funds from account of a citizen or taxpayer against whom no tax demand is outstanding, as the money has been deposited with the treasury, is truly boggles the mind. The rationale for promulgation of the Act according to its preamble was to, "enhance the capacity of the tax system to collect due taxes through application of modern techniques, providing assistance to taxpayers" and create a "modern, progressive, effective, autonomous and credible organization" that is "mindful of upholding values such as integrity, professionalism, teamwork, courtesy, fairness, transparency or responsiveness."

15. Section 4 of the Act defines powers and functions of the Board which, amongst others, include the following:-

(b) to promote voluntary tax compliance and to make the Board a service oriented organization; and to implement comprehensive policies and programs for the education and facilitation of taxpayers, stakeholders and employees, etc., in

order to develop the Board into a modern efficient authority;
or

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

(s) to set up mechanism and processes that facilitate removal of grievances and complaints of the taxpayers.

Under Section 4(2) of the Act, FBR has the authority to issue sub-statutory instruments to give effect to provisions of the Act.

16. Section 7 of the Act vests broad powers in Chairman FBR to take steps to redress the grievance of any person on the receiving end of maladministration meted out by the tax machinery, in the following terms:-

7. Representation to the Chairman. - *(1) Any person aggrieved by any action done or taken for the enforcement of the fiscal laws or due to any act of maladministration, corruption and misbehavior by any officer or employee of the Board or any unnecessary delay or hardship caused due to any administrative process may prefer representation to the Chairman for redressal of his grievance.*

(2) The Chairman or the Board or any other designated officer, as the case may be, on behalf of the Chairman, shall take the appropriate action to redress such grievance.

17. In view of the aforementioned provisions, it is evident that FBR has been endowed with the duty to facilitate taxpayers and establish mechanisms to address their grievances and complaints. Under fiscal laws, including the Ordinance, tax

officials are conferred vast powers to adopt coercive means to affect recovery of tax liability, including, under Section 140 of the Ordinance, from a person holding money on behalf of a taxpayer. Such power ought never be abused to meet collection targets by Commissioners or by adopting abhorrent procedures such as not serving the Section 140 notice in a timely fashion on the taxpayer and/or the third party from whom collection is to be made in order to pre-empt the opportunity for such persons to verify or challenge such demand or seek redressal against it. In the event that such power is abused by tax officials or wrongfully exercised leading to recovery from a person from whom collection could not be made under Section 140 of the Ordinance, there must be provided a grievance redressal mechanism in discharge of FBR's functions under Section 4(1)(s) of the Act. This is imperative to enable Chairman FBR to remedy the hardship caused to a person or taxpayer due to abuse of authority in terms of Section 140 of the Ordinance or its wrongful application. To the extent that any allegation is levelled against an officer of Inland Revenue for abusing coercive powers under Section 140 of the Ordinance backed by threat of sanction (as is the case where a third party, often a bank, refuses to hand over funds in an account maintained by it), there must be an intra-agency review process to scrutinize such allegation. What is the required level of diligence to be exercised by an officer of Inland Revenue before use of coercive powers to affect a tax demand (such as under Section 140 of the Ordinance) to ensure that such exercise of authority suffers from no procedural infirmity or is not exercised against the wrong person making

the recovery confiscatory? The required diligence and obligations of tax officials in such regard must be detailed in a proper sub-statutory instrument issued by FBR in exercise of its power under Section 4(2) of the Act, which instrument must also provide for a grievance redressal mechanism to an aggrieved party.

18. The suggestion of the learned counsel for FBR that the petitioner be directed apply for a refund to recover the amount wrongfully and forcefully collected from the petitioner's account (in exercise of Section 140 of the Ordinance powers by respondents No.2 & 3 in relation to a demand generated against respondent No.4) is bizarre to put it mildly. Section 170 of the Ordinance that deals with refunds states the following in sub-Section (1):-

170. Refunds.— (1) *A taxpayer who has paid tax in excess of the amount which the taxpayer is properly chargeable under this Ordinance may apply to the Commissioner for a refund of the excess.*

19. Section 170 of the Ordinance is not attracted in the instant case as the petitioner was neither liable for payment of any tax due nor paid any tax in lieu of any demand generated by the Commissioner. The question of refund of additional tax paid by the petitioner therefore does not arise. The nature of transaction that resulted in approximately Rs.3.86 Million being deducted from the bank account of the petitioner on the demand of respondents No.2 & 3, purportedly in exercise of power under Section 140 of the Ordinance, has no backing of law. And it can be described as nothing other than illegal and wrongful

confiscation of the petitioner's property by state officials in breach of the petitioner's Article 24 rights guaranteed by the Constitution. It is also unfortunate that even when it became apparent that the deduction of the said amount from the petitioner's account constituted wrongful expropriation, and the matter was brought to the attention of Chairman FBR and Member (Legal), FBR, those comprising the highest echelons of FBR's management did nothing other than to throw their hands up and insist that the petitioner (who had been wronged) ought now to file a refund and wait for the refund processes to grind along to re-acquire control over its confiscated funds.

20. In view of the above, this Court finds that the enforcement of the impugned notice under Section 140 of the Ordinance against the petitioner was illegal, in breach of provisions of the Ordinance and Article 24(1) of the Constitution and tantamounts to abuse of authority or reckless disregard of the need to exercise diligence by tax officials whose action resulted in confiscation of the funds of the petitioner from its bank account. Accordingly this Court issues the following directions:-

(a) Chairman FBR shall ensure that a cheque or pay order is issued in the name of the petitioner in an amount equal to that appropriated from the petitioner's account together with an interest calculated at the rate of KIBOR plus 2 percent from the date of misappropriation to the date when the cheque is issued and deposited before Deputy Registrar (Judicial) of this

Court, from whom it may be collected by the petitioner. Such cheque shall be deposited by or before 25.05.2022.

(b) A copy of the record of this case together with Court orders shall be sent to the learned Federal Tax Ombudsman, who shall conduct an inquiry to determine whether respondents No.2 & 3 and/or any other tax officials involved in exercise of powers resulting in confiscation of the petitioner's funds are liable for abuse of authority and/or maladministration, and submit its recommendations for the benefit of this Court preferably within a period of three months.

(c) Chairman FBR shall bring to the attention of the Board the absence of a grievance redressal mechanism for the benefit of persons whose funds are wrongfully appropriated by tax officials in exercise of powers under the Ordinance and the lack of prescription of standards of diligence to be employed by tax officials while exercising coercive powers to realize tax demand under provision of the Ordinance. FBR will exercise its powers under Section 4(2) of the Act to enact an appropriate sub-statutory instrument to breathe life into Section 4(1)(s) read together with Section 7 of the Act, within a period of six-months.

(d) Chairman FBR will conduct an inquiry to determine whether there exists a practice across tax jurisdictions in Pakistan whereby tax officials deny taxpayers and

third parties due notice of demand under provisions of the Ordinance to frustrate their right to seek remedy against such demand in order to meet recovery targets. FBR shall put in place a system of institutional checks against such practices in order to uphold the rights of taxpayers and third parties to avail legal remedies against any tax demand generated against them in accordance with law.

21. This petition is **allowed** in the above terms. Respondent No.5 shall be liable to pay the petitioner, in addition to the amount payable as mentioned in para-20(a) above, cost of litigation in the amount of Rs.500,000/- to the petitioner, within a period of thirty days. The learned counsel for respondent No.5 will file a certificate with the Deputy Registrar (Judicial), of this Court, certifying that the order as to cost has been complied with within such period.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 16.05.2022

JUDGE

Approved for reporting.