

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

W. P. No. 805/2015.

Oil and Gas Development Company Limited
through Mr. Muhammad Aziz Manager (Pricing)

VERSUS

The Federal Board of Revenue
through its Chairman & 2 others

Petitioner by : Mr. Nasim Sikandar, Mr. Jawad Hassan, Barrister Omer Azad Malik, Mr. Abdul Shakoor Paracha, Mr. Haseeb Shakoor Paracha, Advocates.

Respondents by : Mr. Babar Bilal, Mr. Saeed Ahmed Zaidi, Hafiz Munawar Iqbal, Malik Waris Khokhar, Advocates.

Date of Hearing : 18-04-2016

ATHAR MINALLAH, J. Through this consolidated judgment, I shall decide the instant petition along with the petitions listed in the Annexure-A hereto, as common questions of law and facts are involved.

2. The facts, in brief, are that the petitioner, in writ petition no.805/2015, is a listed joint stock public limited company. The Government of Pakistan owns the majority of shares in the said company. The company is, *inter alia*, engaged in the exploration and production of

oil and gas. The other petitioners are also juridical persons and, *inter alia*, engaged in the exploration and production of petroleum products under various concession agreements executed with the Government of Pakistan. The petitioners have assailed respective show cause notices issued by the Inland Revenue Officer. However, the designation mentioned in the show cause notice is 'Officer of Inland Revenue'. The show cause notices have been challenged, *inter alia*, on the ground that the officer who has issued the same is not vested with the power or jurisdiction of adjudication under the Sales Tax Act 1990 (*hereinafter referred to as the 'Act of 1990'*).

3. The learned counsels appearing on behalf of the petitioners have contended that; the show cause notices have been issued by the respective Inland Revenue Officers; the Inland Revenue Officers were not empowered nor had the jurisdiction to issue a show cause notice under section 11 of the Act of 1990; the show cause notices contain allegations which are not covered under sub-sections (1) or (2) of section 11 of the Act of 1990; the allegations mentioned in the show cause notices relate to non-levy or short levy of sales tax and, therefore, sub-section (3) and (4) would be attracted; section 30 empowers the Federal Board of Revenue (*hereinafter referred to as the 'Board'*) to appoint in relation to an area, person or class of persons an Officer of Inland Revenue with a specific designation; the 'Officer of Inland Revenue' by itself is not a specific designation; under section 31 the powers are conferred on such Officer of Inland Revenue as the Board may by general or special order specify; delegation of power can only be exercised under section 32 of the Act of

1990; the person i.e. the Inland Revenue Officer who has issued the impugned show cause notices could not provide any notification whereby he has been empowered to exercise the powers of an Officer Inland Revenue under section 11 of the Act of 1990; the show cause notices are, therefore, without jurisdiction and void.

4. The learned counsels appearing on behalf of the respondents have contended that; the Commissioner, vide Notification dated 23-01-2014, has conferred upon the Inland Revenue Officer the power and jurisdiction of adjudication under the Act of 1990; the Inland Revenue Officer was competent and vested with jurisdiction to issue the show cause notices.

5. Syed Ghulam Abbas Kazmi, Commissioner IR, Zone-II and Mr. Nasir Khan, Commissioner IR, Zone-III, Large Taxpayers' Unit had made a request to allow them to explain the questions raised in the instant petitions. They also submitted written submissions in response to the queries raised by this Court. The written submissions, dated 28-12-2015, are as follows.-

"1. *That the notice issued by Inland Revenue Officer in the cases is in accordance with law as the Federal Board of Revenue have duly notified the officer as Inland Revenue Officer (OPS), LTU, Islamabad vide notification No.1496-M.III/2010 dated 01.07.2010 (Annex-I).*

2. *That in terms of sub section 1 of section 30 read with sub section 18 of section 2 the Inland Revenue Officer, as notified vide Federal Board of Revenue supra, was competent enough to issue notice under sub section 2 of section 11 of the Sales Tax Act, 1990.*
3. *That the jurisdiction of cases was assigned to the Commissioner Inland Revenue vide Federal Board of Revenue notification No.1(48)Jurisdiction/2014/ 10297-R dated 21.01.2014 in exercise of powers vested in Federal Board of Revenue under sub section 1 of section 30 (Annex-II).*
4. *That the Commissioner Inland Revenue assigned functions in respect of persons or classes of persons or such area as mentioned in Commissioner Inland Revenue's order issued vide No.CIR(Audit)/LTU/2014/895 dated 23.01.2014 (Annex-III) in exercise of powers vested in Commission Inland Revenue under sub section 3 of section 30.*
5. *That the Inland Revenue Officer has discharged his duties in exercise of his powers as conferred on him under Sales Tax Act, 1990 as enunciated u/s 31 of the Sales Tax Act, 1990.*
6. *That without prejudice to the above, section 32 is not applicable in the current cases as no issue of delegation of power of a senior post to a junior officer is involved in the current situation. Section 32 caters for the situation where power of senior post are delegated to a junior officer."*

6. The learned counsels and the learned Commissioners have been heard and the written submissions submitted by the latter considered. The record was also perused with their able assistance.

7. The fundamental question raised in the instant petitions, and requiring consideration, relates to the jurisdiction of the officer who has issued the impugned show cause notices. The show cause notices mention the designation of the issuing authority as 'Officer Inland Revenue'. However, on a query raised by this Court it was informed that the actual designation of the officer who has issued the show cause notices is 'Inland Revenue Officer' and that 'Officer Inland Revenue' is not a designation, as would be discussed later. Thus the questions for consideration are.-

- (i) Whether the show cause notices have been issued under sub-section (2) or sub-sections (3) & (4) of section 11 of the Act of 1990?
- (ii) Who is competent i.e. vested with power and jurisdiction to issue a show cause notice under section 11?
- (iii) Whether the Commissioner is vested with the power and jurisdiction to delegate the powers conferred upon him by the Act of 1990 to a subordinate officer. If the answer is in the negative, then what is the status of the notification dated 23-01-2014, whereby powers have been delegated by the Commissioner to an officer having the designation of 'Inland Revenue Officer'; and lastly -
- (iv) Whether the petitions are maintainable on the ground that a mere show cause notice has been issued.

8. In order to answer the above questions, it would be essential to examine the relevant provisions and scheme of the Act of 1990. The first question for consideration is the distinction between the various sub-sections of section 11 of the Act of 1990.

9. The Act of 1990 was promulgated to consolidate and amend the law relating to the levy of a tax on the sale, importation, exportation, production, manufacture or consumption of goods. The said tax is known as the sales tax. The Act of 1990 came into force on 01-11-1990 by virtue of a notification, dated 28-10-1990, issued under sub-section (3) of section 1 *ibid*. At the time of the promulgation of the Act of 1990 there were two distinct provisions relating to the adjudication of cases i.e. section 11 and section 36. Section 36 was omitted vide the Finance Act 2012 and the provisions thereof were inserted in section 11 as sub-sections (3) and (4). The legislature, therefore, consolidated the provisions relating to adjudication by substituting section 11. Sub-section (1) of section 11 is attracted when a person, who is required to file a tax return, fails to file the return for a tax period by the due date, or pays an amount which, because of some miscalculation, is less than the amount of tax actually paid. It is obvious from the language of the said provision that it contemplates a situation which does not involve a dispute regarding the actual amount payable as tax by the registered person. Likewise, sub-section (2) envisages a situation where a person has not paid the tax due on supplies made by him, or has made short payment, or has claimed input tax credit or a refund which is not admissible under the Act of 1990

for reasons other than those specified in sub-section (1). The language clearly shows that sub-section (2) also envisages eventualities which do not involve the short levy or non-levy of tax i.e. the tax due is not disputed. On the other hand, however, sub-section (3) and (4) are attracted when the allegation relates to a tax or charge not having been 'levied or made', or having been 'short levied' or erroneously refunded. The four sub-sections obviously envisage distinct eventualities. If the argument advanced by the learned counsel for the respondents to the effect that there is no difference in the four sub-sections is accepted, then it would tantamount to declaring some as redundant. It is settled law that redundancy cannot be attributed to the legislature; every word used in a statute must be given its true meaning and the provisions construed together in a harmonious manner. Moreover, it is not legal or proper to apply one provision of law in isolation from the other provision, as surplus ages or redundancy cannot be attributed. Reliance is placed on "Messrs Master Forum Pvt. Ltd. and 07 others versus GOP through Secretary, M/O Finance and 02 others" [PLD 2005 SC 373], "Shahid Nabi Malik and another versus Chief Election Commissioner Islamabad and 07 others" [PLD 1997 SC 32], "Messrs Karachi Steam Navigation Company etc versus Messrs Abdul Rahman-Abdul Gani" [PLD 1962 SC 90], "Dr. Raja Aamer Zaman versus Omar Ayub Khan and others" [2015 SCMR 1303], "District Bar Association, Rawalpindi and others versus FOP and others" [PLD 2015 SC 401] and "Collector of Sales Tax and Central Excise (Enforcement) and another versus Messrs Mega Tech Pvt. Ltd." [2005 SCMR 1166].

10. As already noted above, at the time of the promulgation of the Act of 1990, sub-sections (1) and (2), as they stand today, were part of section 11, while sub-sections (3) and (4) were part of another distinct provision i.e. section 36. The legislature, in its wisdom, has used separate expressions which clearly distinguishes each sub-section from the other. The crucial expression which distinguishes sub-sections (3) and (4) from sub-sections (1) and (2) are 'tax not levied' or 'short levied'. The Black's Law Dictionary 8th Edition defines the expression 'levy' as follows.-

"Levy (lev-ee), n. 1. *The imposition of a fine or tax; the fine or tax so imposed. ____ Also termed tax levy. [Cases: Taxation 295. C.J.S. Taxation 423.] 2.* *The enlistment of soldiers into the military; the soldiers so enlisted. 3.* *The legally sanctioned seizure and sale of property; the money obtained from such a sale. ____ Also termed (in sense 3) levy of execution. [Cases: Execution 122-147. C.J.S. Executions 100, 102-127, 146-147, 149, 151, 203.]*

Levy, vb. 1. *To impose or assess (a fine or a tax) by legal authority <levy a tax on gasoline>. 2.* *To enlist for service in the military <the troops were quickly levied>. 3.* *To declare or wage (a war) <the rival clans levied war against each other>. 4.* *To take or seize property in execution of a judgment <the judgment creditor may levy on the debtor's assets>. [Cases: Execution – 122-147, C.J.S. Executions 100, 102-127, 146-147, 149, 151, 203.]*

11. It is obvious from the above that the imposition, assessment and collection of a tax fall within the ambit of the expression 'levy'. As a corollary the question of whether the tax has been imposed, assessed or collected by the registered person falls within the ambit of sub sections

(3) and (4) and, therefore, an allegation relating thereto will be adjudicated there under.

12. A perusal of the impugned show cause notices shows that the allegations mentioned there in relate to failure to impose or collect sales tax. It is not an allegation which would attract sub-section (1) or sub-section (2). The allegations, therefore, fall within the ambit of tax having not been levied or short levied and, consequently, would either fall under sub-section (3) or sub-section (4) of section 11 as the case may be. Though the show cause notices mention in their title that they have been issued under sub-section (2) of section 11, the same would not render them illegal as it is settled law that the mentioning of a wrong title would not affect the validity of a notice.

13. The next question, or rather the fundamental question for consideration is the power and jurisdiction of an officer with the designation of 'Inland Revenue Officer', particularly in the context of the adjudication of cases under section 11 of the Act of 1990. The relevant provisions for determining the powers, jurisdiction and functions of an officer are, *inter alia*, sections 30, 31 and 32 of the Act of 1990. Section 30 empowers the Board to appoint in relation to an area, person or class of persons an Officer of Inland Revenue having a specific designation. Section 2(18) defines the expression 'officer of Inland Revenue' as an officer appointed under section 30. The said definition is exhaustive and unambiguously shows that the expression in itself is not a specific officer

but refers to all the officers appointed under section 30. The appointment is, therefore, made on the basis of a specific designation of an officer. Clauses (a) to (ia) of sub-section (1) of section 30 explicitly enumerate the various designations of officers of the Inland Revenue. Clause (j) provides that the Board may appoint an officer of the Inland Revenue with any other designation. Each officer necessarily has to have a specific designation in order to exercise the powers and functions under the Act of 1990. The expression 'Officer Inland Revenue' is, therefore, a general expression or phrase for all the officers having a specific designation and empowered to exercise powers under the various provisions of the Act of 1990. In the instant case, the show cause notices have been issued by an officer having the designation of Inland Revenue Officer as mentioned in clause (g) of sub-section (1) of section 30. Sub-sections (1), (2), (3) and (4) of section 11 expressly provide that the show cause notice under the relevant provision shall be issued by an Officer of Inland Revenue. Section 31 provides that an officer of Inland Revenue appointed under section 30 shall exercise such powers and discharge such duties as are conferred or imposed upon him or her under the Act of 1990. It further unambiguously declares that such an officer shall also be competent to exercise all powers and discharge all duties conferred or imposed upon any officer subordinate to him. The proviso to section 31 empowers the Board to impose limitations or conditions on the exercise of such powers and discharge of such duties by general or special order. The said proviso contains a non-obstante clause in relation to the Act of 1990 or the rules made there under. The Board, therefore, by general or special order determines the limitations or conditions on the exercise of powers and discharge of duties in the case of officers appointed under section 31.

Section 32 confers upon the Board or the Chief Commissioner the power of delegation. The Commissioner, however, can exercise powers subject to approval of the Board. Clause (a) to clause (d) describe the extent of the delegation of powers. It is also pertinent to refer to sections 30A to 30E of the Act of 1990. The said provisions relate to such entities or offices not covered under section 30 of the Act of 1990 as officers of Inland Revenue. The powers and functions of the various Directorates described in section 30-A to section 30-DD are specified by the Board by notification in the official gazette. Sections 30-A to 30-E are in respect of the respective Directorates and are distinct from the officers of Inland Revenue appointed under section 30 read with section 31.

14. A cumulative reading of the above provisions clearly shows the intention of the legislature. Each officer appointed under section 30 by the Board falls within the generic expression of 'officer of Inland Revenue'. However, every officer of Inland Revenue who is appointed under section 30 ought to have a designation as explicitly mentioned in clauses (a) to (ia). However, clause (j) has empowered the Board to appoint an officer of Inland Revenue with any other designation as well. Likewise, the Board is vested with the exclusive power to confer jurisdiction or vest power in any officer of the Inland Revenue for the purposes of the various provisions of the Act of 1990. The powers of delegation are also circumscribed under section 32 of the Act of 1990. If the officer of Inland Revenue has been specified under a provision then only such officer can exercise powers there under, otherwise the Board through a general or special order delegates the power to an officer appointed under section

30, subject to such conditions or limitations as it may deem necessary. It is, therefore, obvious that the Board empowers one of the officer of Inland Revenue specified under section 30 to exercise powers and jurisdiction under sub-sections (1)(2)(3) and (4) of section 11 of the Act of 1990.

15. The Board, in exercise of its powers vested under sub-section (1) of section 30 read with section 31 of the Act of 1990, issued the order dated 21-01-2014. Column II of the order specifies the designation of the officer of Inland Revenue while column III describes the powers and functions conferred or to be exercised by such officers. The powers relating to Sales Tax, *inter alia*, includes in clause (m) adjudication under the Act of 1990. In Column II the said power has been expressly conferred on the Commissioner of the Inland Revenue. The Commissioner, however, vide order dated 23-01-2014, delegated the power to the Inland Revenue Officers, which had been conferred upon him by the Board pursuant to an order dated 21-01-2014. The Board had expressly conferred the powers on the Commissioner and the latter, vide order dated 23-01-2014, delegated the same to the Inland Revenue Officer. The power and jurisdiction of adjudication under the Act of 1990, which the Board had conferred on the Commissioner, was also delegated to the Inland Revenue Officer.

16. The written submissions, dated 28-12-2015, submitted by the learned Commissioners have been reproduced above. It appears that the Commissioner issued the order dated 23-01-2014 on the assumption

that the latter could assign functions to any officer subordinate to him, pursuant to the powers vested in him under sub-section (3) of section 30 of the Act of 1990. Sub-section (3) of section 30 envisages that the Commissioner Inland Revenue is empowered to direct any officer, with the designation specified in the said provision, to perform functions in respect of any person or class of persons or such areas. The said sub-section merely empowers the Commissioner to assign to the specified officers or class of persons or areas in respect of performance of their functions as may be directed by the latter. There is a distinction between the expressions 'functions' and 'power'. Functions can only be performed by persons who are already conferred with power and jurisdiction. It would, therefore, be pertinent to examine the definition of the expressions 'power', 'function' and 'jurisdiction' so as to explain the distinction between the said expressions. The Eight Edition of Black's Law Dictionary defines 'power', 'function' and 'jurisdiction' as follows.-

"Power. 1. *The ability to act or not act; esp., a person's capacity for acting in such a manner as to control someone else's response. 2. Dominance, control, or influence over another; control over one's subordinates. 3. The legal right or authorization to act or not act; a person's or organization's ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another."*

"Function, n. 1. *Activity that is appropriate to a particular business or profession <a court's function is to administer justice>. 2. Office; duty; the occupation of an office <presidential function>. [Cases: Officers and Public Employees 110. C.J.S. Officers and Public Employees 234-245.]"*

"Jurisdiction, n. 1. *A government's general power to exercise authority over all persons and things within its territory; esp., a*

state's power to create interests that will be recognized under common-law principles as valid in other states <New Jersey's jurisdiction>. [Cases: State 1. C.J.S. States 2, 16.] 2. A court's power to decide a case or issue a decree <the constitutional grant of federal-question jurisdiction>. – Also termed (in sense 2) competent jurisdiction; (in both senses) coram judice. [Cases; Courts 3; Federal Courts 3.1, 161. C.J.S. Courts 9, 18].”

17. It is, therefore, obvious from the above definitions that the three expressions are distinct and separate. The power or jurisdiction conferred on an officer of Inland Revenue precedes the performance of functions. The conferment of power or jurisdiction is a pre-condition for the performance of functions. By no stretch of the imagination does sub-section (3) of section 30 empower the Commissioner to confer power or jurisdiction. However, a Commissioner pursuant to sub-section (3) can assign persons or areas in respect of the officers specified therein for the purpose of the performance of functions with regard to the scope of the power and jurisdiction already conferred on such officers. Such officers, in order to perform their respective functions, have to be vested with power or jurisdiction. In the instant case the learned counsels appearing on behalf of the Department have not been able to show any provision of the Act of 1990 which empowers the Commissioner to issue the order dated 23-01-2014 and further delegate the powers and jurisdiction conferred upon him or her by the Board pursuant to the order dated 21-01-2014. The reliance of the Commissioners on the notification dated 01.07.2010 is misplaced as the same does not confer the power of adjudication under section 11 of the Act of 1990.

18. It is settled law that a delegate cannot further delegate its powers unless expressly authorized under the law. It is also settled law that in order to enable a person to delegate the powers or functions, there must be an authority, expressed or implied, to delegate. When power is conferred on a particular person, then that person alone has to exercise the powers and cannot transfer its exercise to another person. The august Supreme Court in the case titled '*Muhammad Ashraf Tiwana and others v. Pakistan and others*' [2013 SCMR 1159] while examining the power of appointment of Commissioners vested in the Federal Government under the Securities and Exchange Commission of Pakistan Act 1997, observed and held that it was well settled law that a statutory delegate could not sub-delegate his or her powers. It would also be pertinent to quote relevant paragraph from the celebrated treatise titled 'De Smith's Judicial Review Seventh Edition' as follows.-

"A discretionary power must, in general, be exercised only by the public authority to which it has been committed. It is a well-known principle of law that when a power has been conferred to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another."

The Indian Supreme Court in the case titled '*Sahni Silk Mills (P) Ltd. and another v. Employee's State Insurance Corporation*' [(1994 5 Supreme Court Cases 346)] has held as follows.-

"By now it is almost settled that the legislature can permit any statutory authority to delegate its power to any other authority, of course, after the policy has been indicated in the statute itself within the framework of which such delegatee is to exercise the

power. The real problem or the controversy arises when there is a sub-delegation. It is said that when Parliament has specifically appointed authority to discharge a function, it cannot be readily presumed that it had intended that its delegate should be free to empower another person or body to act in its place."

19. In the light of the above, the order dated 23-01-2014 issued by the Commissioner Inland Revenue was without lawful authority and jurisdiction. The Board had expressly conferred the power of adjudication under the Act of 1990 on the Commissioner vide order dated 21-01-2014. The latter had no authority or jurisdiction to further delegate the power and jurisdiction of adjudication conferred by the Board vide order dated 21-01-2014. It is settled law that if the basic order is void, then any superstructure built thereon is also illegal and liable to fall. The Inland Revenue Officer was, therefore, not vested with power nor had the jurisdiction to issue a show cause notice under section 11 of the Act of 1990. The Commissioner alone was vested with power and jurisdiction under section 11 of the Act of 1990, pursuant to the Board's order dated 21-01-2014.

20. Lastly I shall advert to the question of maintainability of the petition. There is no cavil to the proposition that a mere notice or a show cause notice is not an adverse order and, therefore, a petition under Article 199 of the Constitution would not be competent. The exception to this general rule is a grievance relating to the notice or show cause notice suffering from want of jurisdiction. It has been held by the august Supreme Court in the judgment titled "*Commissioner of Income Tax versus Eli Lilly Pakistan Pvt. Ltd.*" [2009 SCMR 1279] that the rule barring

jurisdiction in the case of exercising powers under Article 199 of the Constitution when a show cause notice has been assailed is not an absolute rule, but rather a rule by which the jurisdiction is regulated. The exercise of jurisdiction in the case of a show cause notice has been held to be justified when the said notice is palpably without jurisdiction and / or issued on the basis of malafide. Reliance is placed on "*Gatron (Industries) Ltd. Versus Government of Pakistan and others*" [1999 SCMR 1072] and "*Murree Brewery Co. Ltd. Versus Pakistan through Secretary to GOP, Works and Division and 02 others*" [PLD 1972 S.C. 279].

21. For what has been discussed above, the instant petitions are allowed. The show cause notices are declared as having been issued by persons not vested with power or jurisdiction. However, it shall be open for the Commissioner or such officer vested with the powers and jurisdiction to adjudicate under section 11 of the Act of 1990, if he deems necessary, to issue fresh show cause notices.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 29-04-2016


JUDGE

Approved for reporting.