

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

W.P. No. 2318 of 2015.

K.K. Oil and Ghee Mills Pvt. Ltd.

VERSUS

F.B.R. etc.

Petitioner by : Mr Mansoor Usman Awan, advocate.
Respondents by : Hafiz Ahsan Ahmed Khokhar, advocate.
Mr Muhammad Rahim Khan, Inspector
I.R.
Date of Hearing : 12-02-2016.

ATHAR MINALLAH, J:- The petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 (hereinafter referred to as the "***Constitution***"), challenging the notice, dated 23-06-2015, issued by the respondent No.3.

2. The facts relevant for deciding the instant petition are that the petitioner is a 'juridical person', incorporated under the Companies Ordinance, 1984 and, inter alia, engaged in the business of manufacture of Vanaspati Ghee and Cooking Oil in Pakistan. The manufacturing unit of the petitioner is located in District Attock of the Province of Punjab. The petitioner, vide application dated 15-06-2013, sought the issuance of an exemption certificate under section 65-D of the Income Tax Ordinance, 2001 (hereinafter referred to as the "***Ordinance***

of 2001). The application was initially declined by the relevant Commissioner Inland Revenue and the same was communicated to the petitioner vide letter dated 18-06-2013. The revision application, dated 19-06-2013, was filed before the Chief Commissioner Inland Revenue. The petitioner invoked the jurisdiction of this Court by filing W.P. No. 3375 of 2013, and consequently a direction was issued to the respondent / department to decide the pending revision application of the petitioner. The revision petition was ultimately dismissed on 18-09-2013. The order, dated 18-09-2013, was challenged before the Lahore High Court, Rawalpindi Bench, Rawalpindi through W.P. No. 75 of 2014. The petition was accepted by the Lahore High Court, Rawalpindi Bench, Rawalpindi and pursuant thereto the petitioner was extended the benefit under section 65-D of the Ordinance of 2001 vide letter dated 17-06-2014. The respondent No.3, vide notice dated 23-06-2015, initiated investigations to confirm the claim of the petitioner and its entitlement to the tax credit under section 65-D. Aggrieved by the issuance of the impugned notice and the action initiated by the respondent No.3, the jurisdiction of this Court under Article 199 of the Constitution has been invoked.

3. Mansur Usman Awan Advocate, the learned counsel appearing on behalf of the petitioner has contended that; the impugned notice is without lawful authority and jurisdiction; section 175 of the Ordinance of 2001 is being misinterpreted by the respondents; section 175 does not empower the respondents to use the same for the purposes

of carrying out an investigation; the power vested under section 175 can only be exercised for ancillary purposes; the Authority empowered under a particular provision can invoke section 175; section 175 does not empower the respondent No.3 to initiate proceedings under section 65-D; the powers under section 65-D are conferred on the Commissioner and not on the respondent No.3; the respondent No.3 can only exercise such power and functions vested in the Commissioner Inland Revenue, which have been expressly delegated to it; the powers and functions delegated to the respondent no. 3 are enumerated in SRO No.115(1)/2015 dated 09-02-2015 (hereinafter referred to as the **"Notification"**); the only substantive delegation of powers and functions to the respondent No.3 under the Notification are section 177 and section 180; in exercise of powers under section 177 or 180, the respondent No.3 would be entitled to invoke the powers under section 175; the impugned notice has been issued without jurisdiction, besides being based on malafide as the respondent No.3 is merely exercising power for irrelevant considerations; the powers under section 175 cannot be resorted to for carrying out a roving inquiry or fishing expeditions. Reliance has been placed on *"Income Tax Officer versus Seth Brothers"* [1969] 74 ITR 836, *"Lan Eseda Steels Ltd versus Assistant Commissioner CIT"* [1994] 209 ITR 901, *"Harmel Singh versus Union of India"* [1993] 204 ITR 334, *"Janake Raj Sharma versus Director of Inspection"* [1995] 111 PLR 140, *"P.R. Metrani versus CIT"* [2007] 1 SCC 789, *"Dr. G.Balakrishnan Nair versus CIT"* [1999] 237 ITR 70, *"Sibal (H.L.) versus CIT"* [1975] 101 ITR 112 and *"Dr.D.G.*

Srivastava versus Director of Income Tax" [2007] 212 CTR All 527. The impugned notice represents an arbitrary and perverse exercise of power.

4. On the other hand, Hafiz Ahsan Ahmed Khokhar, ASC has argued that; the respondent No.3 is vested with jurisdiction / authority to issue a notice under section 175 of the Ordinance of 2001, pursuant to the powers enumerated in the Notification; the Notification is to be read with section 208 and sub-section (1) of section 209; the exemption under section 65-D was issued pursuant to orders passed by this Court and the respondents were not restrained from enquiring into the bonafides of the claim; section 175 contemplates that the person vested with the said powers may use the same for enforcing any provision of the Ordinance of 2001; exemption provisions are to be construed strictly and in case of doubt the same are to be resolved in favour of revenue. Reliance has been placed on [2000 PTD 2958]; *Peshawar High Court in case titled "Mujahid Oil Refinery Pvt. Ltd. Versus Director I&I Inland Revenue and others"* [2015 PTD 2572] has declared the respondents No.2 & 3 to be vested with powers under section 175; the said judgment of the *Peshawar High Court* was upheld by the august Supreme Court as CPLAs were dismissed vide order dated 02-11-2015; the omission of section 65-D in the notification is of no relevance as section 175 confers the power to investigate matters under any provision, including section 65D.

5. The learned counsels have been heard and the record perused with their able assistance.

6. The questions for consideration are (i) the status, powers and functions of the respondent no. 3 (ii) the scope of powers contemplated under section 175 of the Ordinance of 2001 (iii) whether the respondent No.3 can exercise powers under section 175 to initiate investigations relating to those provisions where under the latter is not conferred with powers e.g. under section 65-D of the Ordinance of 2001. In order to answer these questions it would be pertinent to examine the scheme of the Ordinance of 2001 in the context of the office of the Directorate General (Intelligence and Investigation), Inland Revenue (hereinafter referred to as "DG I&I").

7. The office of DG I&I was established under the Ordinance of 2001 by inserting Section 230 through the Finance Act 2012. The respondent No.3 is an officer of the rank of Director in the said organization. Sub-section (2) of section 230 empowers the Board to specify the functions and jurisdiction of the officers and to confer upon them the powers vested in authorities specified in section 207. The functions and powers are conferred through the Notification published in the official gazette. Section 207(1) enumerates the Income Tax authorities. It is noted that officers of DG I&I are not included in clauses (a) to (l) of section 207(1) described as the Income Tax authorities. The provisions of the Ordinance of 2001, when read as a whole, clearly shows

that powers and functions are exclusively vested in the Income Tax authorities mentioned in section 207. It is, therefore, obvious that the DG I&I and its officers have not been declared as Income Tax authorities and cannot perform functions or exercise powers under the provisions of the Ordinance of 2001, unless the same have been specified or conferred by the Board in the manner prescribed in section 230(2). The DG I&I or any of its officers do not have inherent powers under any provision of the Ordinance of 2001. Pursuant to the powers under sub-section (2), the Board has issued the Notification. The officers specified in column no.2 of the Table given in the Notification have been conferred with the powers specified in column no.3 thereof. Column no.4 expressly mentions the powers and functions which may be exercised by the respective officers mentioned in column no.2. The jurisdiction has been specified in column no.5. The respondent No.3 is at serial No.2 of column no.2 and the powers and functions have been expressly mentioned in the corresponding part of column no.4. Column no.4 explicitly mentions the provisions in relation to which the powers of the Income Tax authorities have been conferred on the respondent no. 3. In other words, the respondent no. 3 can exercise powers and perform functions of the Income Tax authorities which have been expressly specified in column no.4 of the Table. The respondent no. 3 can, therefore, perform functions and exercise powers of the Commissioner Income Tax vested under section 177 or section 181. Likewise, powers under section 175, 176 etc can be lawfully exercised within the scope of such provisions. However, the respondent no. 3 has not been

conferred with powers under sections 121, 122 122-A and many other provisions. The respondent No.3 is, therefore, not empowered to exercise powers, directly or indirectly, under any provision which has not been specified in the corresponding part in column no.4. It is noted that the power or jurisdiction under section 65-D, vested in the Commissioner, has not been conferred as the said provision is not specified in column no. 4 of the Notification. The powers of a Commissioner under section 175 of the Ordinance of 2001 are indeed conferred on the respondent No. 3 but the question arises as to whether it also empowers the latter to exercise powers under those provisions which are not specified in column no.4 e.g. the powers and functions of the Commissioner under section 65-D. It is, therefore, essential to examine sections 175 and 65-D in order to answer this question.

8. Section 175 contemplates the power to "enter and search premises". The powers have been expressly mentioned in clauses (a) to (e) of section 175(1). These powers can either be exercised by the Commissioner or any officer authorised in writing by the Commissioner. However, the powers enumerated can only be exercised 'in order to enforce any provision of the Ordinance (including for the purpose of making an audit of a taxpayer or a survey of persons liable to tax)". It is, therefore, axiomatic that the power under clause (a) to (e) of section 175(1) cannot be exercised in a vacuum or independently. The respondent No. 3, therefore, cannot claim full and free access to any

premises, place, accounts, documents or computer unless some other provision is to be enforced and the latter is conferred with powers under such provision. As a corollary, the powers under section 175 can only be exercised in aid of some other power being enforced under the Ordinance of 2001. The power under clause (b) of section 175(1) to stamp, or make an extract or copy of any accounts, documents or computer-stored information, or under clause (c) to impound any accounts or documents and retain them for so long as may be necessary for examination, or for the purposes of prosecution, cannot be exercised without being empowered under the provision which is being sought to be enforced. Sub-section (3) of section 175 declares that the occupier of any premises or place to which access is sought under sub-section (1) shall provide all reasonable facilities and assistance for the effective exercise of the right of access. Sub-section (4) read with sub-section (5) prescribes the procedure for impounding or retaining accounts, documents or computers in sub-section (1) and the rights of a person from whom such items have been impounded and retained. Section 175, when read as a whole, can by no stretch of the imaginations be construed or interpreted as vesting the power or jurisdiction to initiate and conduct investigations relating to any other provision of the Ordinance of 2001. As already noted above, the expression 'in order to enforce any provision of this Ordinance' is indeed crucial and obviously makes the powers enumerated under clauses (a) to (e) subservient thereto. The purpose or object of the powers enumerated under section 175 is to enable an officer conferred with powers under some other provision to

enforce the same. Powers under section 175, therefore, have an explicit nexus with the enforcement of any provision of the Ordinance and its use is conditional thereto. The powers as such are ancillary powers, which can only be exercised for enforcing any other provision and not otherwise. It cannot be interpreted or construed as meaning that a person conferred with power under section 175 is empowered to exercise the same to conduct investigations or to exercise powers under other provisions in relation to which power has not been conferred. As an illustration the respondent no. 3, though conferred with powers under section 175, cannot use or invoke the same in order to enforce the powers vested in the Commissioner under sections 121, 122 or 65-D of the Ordinance of 2001 because the said powers are not specified in the corresponding part of column no.4 of the Table given in the Notification. The power under section 175 provides support in order to enforce another provision of the Ordinance of 2001.

9. It may also be noted that the powers under clauses (a) to (e) of section 175 (1) are definitely in the nature of encroaching upon, or may infringe the rights of privacy and liberty of a taxpayer. The powers, therefore, have to be exercised in such a manner that the rights of the taxpayer remain safeguarded. The powers are definitely coercive and consequently are to be exercised with great care and circumspection. The object for using the powers under section 175 is 'to enforce any other provision' of the Ordinance. Even if some other provision is sought to be enforced, the powers under section 175 cannot be readily

resorted to. The person empowered under section 175 has to justify on the basis of sufficient reasons for exercising the powers to be sustainable in law. This is implicit in the expression 'in order to enforce any other provision' of the Ordinance of 2001. The Black's Law Dictionary, Sixth Edition defines 'Enforce' as meaning 'To put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine, to compel obedience to.' 'Enforcement' is defined as 'The act of putting something such as law into effect; the execution of a law; the carrying out of a mandate or command'. The question of enforcing a provision in the context of the Ordinance of 2001 would arise if there is resistance or refusal on the part of the taxpayer to comply with a lawful order or direction passed by an authority empowered under any provision *ibid*. The resistance or refusal has to be of such a nature that there is no other choice left with the authority except to exercise powers under section 175 in order to enforce the provision under which powers are being exercised. If, therefore, a taxpayer refuses to provide documents to a Commissioner who is conducting an inquiry under sub section (4) of section 65-D, and the latter has exhausted all the other modes for seeking access to such documents, only then powers under section 175, if exercised, would be justified; otherwise it would amount to abuse of the powers conferred there under. The person, therefore, resorting to exercise the intrusive and coercive powers under section 175 of the Ordinance of 2001, inevitably having the effect of encroaching upon the rights of privacy and liberty, has to show that he or she had acted

bonafide and on the basis of reasonable grounds in order to achieve the object for which the powers have been conferred. By no stretch of the imagination can the power under section 175 be used or justified to carry out a fishing or roving inquiry or without sufficient reasons. The powers can only be exercised if the authority is satisfied that some other provision cannot be enforced unless the powers under section 175 are resorted to, subject to the condition that such authority is also conferred with powers under the provision sought to be enforced.

10. Next is the scope of section 65-D of the Ordinance of 2001 and the authorities empowered to exercise powers there under. The said provision was inserted through the Finance Act 2011 with the object of extending the concession of tax credit to newly established industrial undertakings. The eligibility, nature of the benefit and terms and conditions in respect thereof have been expressly described. The incorporated company fulfilling the eligibility criterion and other terms and conditions is entitled to the concession of tax credit equal to hundred percent of the tax payable, including on account of minimum tax and final taxes payable under any provision of the Ordinance of 2001. The concession is on taxable income arising from the entitled industrial undertaking for a period of five years, commencing from the date of setting up or the commencement of commercial production, whichever is later. The concession of tax credit allowed under sub section (1) of section 65-D can, however, be withdrawn by the Commissioner at any stage, if the latter discovers, based on

documents or otherwise that the conditions specified had not been fulfilled. The Commissioner in such eventuality may re-compute the tax payable for the relevant year. The Commissioner, therefore, is exclusively empowered under section 65-D to grant or withdraw the concession. If the Commissioner has sufficient grounds that the provisions of section 65-D cannot be enforced without resorting to the powers under section 175 then exercising such powers would be justified and sustainable in law.

11. In the light of the above discussion, it is held that the respondent no. 3 is not conferred with powers under section 65-D. As a consequence the powers under section 175 could not have been exercised to 'enforce' the provision of section 65-D. The respondent no. 3 has misinterpreted and misconstrued the powers conferred under section 175 as being in the nature of vesting jurisdiction to carry out investigations under any other provision of the Ordinance of 2001, in the instant case section 65-D *ibid*. The respondent no. 3 first has to be conferred with powers under section 65-D and only then resort can be made to powers under section 175 and not vice versa, and that too if there are sufficient grounds for doing so. It is settled law that what cannot be done directly can also not be achieved indirectly. The impugned notice, dated 23-06-2015, and all subsequent proceedings thereto are declared to be without lawful authority and jurisdiction.

12. I have carefully gone through the judgment of the Peshawar High Court in the case of Mujahid Oil Refinery

supra and have found the same distinguishable in the facts and circumstances of the instant petition. The grievance of the petitioner before the Peshawar High Court related to powers of the respondents in the context of section 177 of the Ordinance of 2001, particularly in the light of the judgment delivered by the Lahore High Court and the Peshawar High Court in the cases "*Messrs Chenone Stores Ltd. Through Executive Director (Finance Accounts) versus Federal Board of Revenue through Chairman and 02 others [2012 PTD 1815]*" and "*Northern Bottling Company Pvt. Ltd. Industrial Estate Peshawar versus Federation of Pakistan*" [2013 PTD 1552] respectively. The powers of the respondents under section 65-D read with section 175 was neither considered nor discussed or interpreted by the Peshawar High Court in the case of Mujahid Oil Refinery supra.

13. 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].

14. In the instant case the respondent No.3 was not vested with power or jurisdiction under section 65-D nor in the circumstances powers under section 175 could have been invoked. The impugned notice was, therefore, palpably without jurisdiction. Moreover, the impugned notice was definitely an adverse order as the actions completed therein were, inter alia, an infringement of the right to privacy, dignity and liberty of the petitioner. The instant petition is, therefore, held to be maintainable.

15. For what has been stated above, the instant petition is **allowed** and the impugned order, dated 23-06-2015, is declared to be without jurisdiction and lawful authority. However, it would be open for the respondent No.3 to send the information, which may be in his possession, to the relevant Commissioner Inland Revenue vested with powers under sub-section (4) of section 65-D of the Ordinance of 2001. If such information is placed before the relevant Commissioner Inland Revenue then this Court expects that the latter would examine the same and proceed strictly in accordance with the law. It is further clarified that

any observation made in this judgment shall not influence the relevant Commissioner while exercising powers under section 65-D(4) of the Ordinance of 2001.

**(ATHAR MINALLAH)
JUDGE**

Announced in the open Court on 18-03-2016.

JUDGE

Approved for reporting.

*Asad K/**

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