

IN THE HIGH COURT OF SINDH, KARACHI

Constitution Petition Nos.D-3642 & 4059 of 2024

Date

Order with signature of Judge

Present: *Mr. Justice Muhammad Junaid Ghaffar*
Mr. Justice Mohammad Abdur Rahman

PETITIONER : Trading Corporation of Pakistan (Pvt.) Ltd.
(in both petitions) Through Mr. Rafiq A. Kalwar along with
Mr. Muhammad Yasir, Advocate.

RESPONDENT : Commissioner Inland Revenue, Zone-II,
LTO, Karachi
Through Mr. Mukesh Kumar Khatri, Advocate.

Federation of : Through Mr. Kashif Nazeer, Assistant
Pakistan Attorney General.

Date of Hearing : 05.09.2024

Date of Judgment : 05.09.2024

J U D G M E N T

Muhammad Junaid Ghaffar, J: Both these Petitions have been filed by the Petitioner being aggrieved with the recovery proceedings initiated by the concerned Commissioner(s) pursuant to passing of certain assessment orders by the department under the Income Tax Ordinance, 2001 and the Sales Tax Act, 1990. The petitioner has sought following relief(s):-

- A. *Direct the Respondents to refrain from initiating or taking any coercive recovery measures in respect of default surcharge amount of Rs. 851,128,977/- imposed vide Order dated 29.05.2024 in Appeal Effect Order No. 261/31/2023-24 by the Respondent No. 3 against the Petitioner till the constitution of the Alternative Dispute Resolution Committee under Section 47A of the Sales Tax Act, 1990;*
- B. *Direct the Respondents to decide and constitute Alternative Dispute Resolution Committee under Section 47A of the Sales Tax Act, 1990, on application of the Petitioner submitted on 23.07.2024, within the time stipulated under the law;*
- C. *Pass ad-interim orders by restraining the Respondents from taking any adverse or coercive recovery action against the Petitioner in respect of default surcharge*

amount of Rs. 851,128,977/- imposed vide Order dated 29.05.2024 in Appeal Effect Order No. 261/31/2023-24 by the Respondent No. 3, till the final disposal of the instant Petition;

D. Grant Costs;

E. Grant such further, additional or alternative relief, as this Hon'ble Court

2. Notices were ordered in both the petitions and ad-interim orders were also passed restraining the Respondents from taking any coercive measures. Thereafter on 12.08.2024 in CP No. D-3642 of 2024, an explanation was sought from the concerned officials as to adoption of coercive measures notwithstanding the fact that the Petitioner had already applied for constitution of ADR Committee. Subsequently, Member, Inland Revenue Operations was in attendance and on 26.08.2024 following order was passed:

"26.08.2024.

Mr. Rafiq Ahmed Kalwar, Advocate for Petitioner.

Mr. Kashif Nazeer, Assistant Attorney General.

M/s. Mukesh Kumar Khatri, Dr. Huma Sodher and Dr. Shah Nawaz Memon, Advocates for Respondent.

Mr. Mir Badshah Khan Wazir, Member (IR-Operations) Federal Board of Revenue.

Mr. Gardari Lal, Commissioner.

Pursuant to order dated 12.08.2024, Mr. Mir Badshah Khan Wazir, Member (IR-Operations), Federal Board of Revenue and Mr. Gardari Lal, are in attendance and their Counsel has filed statement along with documents including Letter dated 21.08.2024 whereby, a Dispute Resolution Committee has been constituted in respect of Petitioner's Application. The same is taken on record. However, we are not satisfied with this response as it only pertains to the Petitioner's case, whereas, in our considered view there has to be some procedure across the board for State Owned Enterprises vis-à-vis, their applications for meditation in fiscal matters. We are informed that some rules are yet to be finalized. Let a proper response be filed by Member (IR-Operations), Federal Board of Revenue on his behalf on the next date of hearing, as to what procedure has been formulated for resolution of the disputes as time and again State Owned Enterprises are approaching this Court invoking Constitutional jurisdiction under Article 199 of the Constitution against FBR's recovery notices.

To come up on 05.09.2024 along with C. P. NO. D-4059 of 2024 filed by the same Petitioner. Interim order passed earlier to continue till next date of hearing."

3. It is not in dispute that pursuant to Section 134-A of the Income Tax Ordinance, 2001 read with Section 47A92) of the Sales Tax Act, 1990 duly amended by Finance Act, 2024 a mechanism has been provided for State Owned Enterprises ("SOE") to approach FBR in respect of adverse orders passed by the Inland Revenue Department under both these fiscal laws. The most significant and the relevant amendment made, which in our view is fully applicable to the present Petitioner, is that now it is **mandatory** for SOE to go for ADR, whereas the limit of Rs.50 Million is also not applicable. Earlier, the management of an SOE was reluctant to go for mediation in any business transaction due to fear of prosecution, but through newly amended provisions, they have been protected from any suit, prosecution or other legal proceedings. Since referral to ADR is now mandatory for SOE, a right to appeal has also been provided to SOE when matter is not decided by ADRC within the stipulated period. The issue, which is being continuously brought before this Court, is the action of the department, whereby, coercive measures are adopted against petitioner /SOE's for recovery of the amount, as determined in the assessment orders. This action is notwithstanding the fact neither an SOE can file an appeal, nor is able to obtain any restraining orders from an appropriate Appellate Authority. Resultantly this compels them to approach this Court under its Constitutional jurisdiction conferred under Article 199 of the Constitution, which resultantly amounts to nothing but sheer wastage of precious time of this Court. In our considered view, once the referral of the matter to ADRC is mandatory, then perhaps there should not be any question of adopting coercive measures for recovery of the amount so determined against an SOE. When it has been provided in law that no appeal can be filed against adverse assessment orders; an SOE cannot be compelled to make payment at the same time. This new concept of mandatory mediation in tax matters under the fiscal laws including Section 134-A of the Ordinance, 2001 have been elaborately discussed

and interpreted by this Court vide judgment dated 30.05.2024 passed in Constitution Petition No.D-1513 of 2024 [**Re: Civil Aviation Authority of Pakistan v. Federation of Pakistan and others**]. It would be advantageous to refer to the relevant observations which read as under;

5. As to the fiscal laws and settlement of such disputes by way of ADR, a brief discussion of ADR in the context of fiscal statutes may be helpful. An ADR mechanism in fiscal laws was introduced for the first time through the Finance Act, 1996 when Section 47A was introduced in the Sales Tax Act, 1990 and an Indirect Taxes Settlement Commission was formed, whereby any aggrieved tax-payer could approach the Commission constituting 3 Members to be appointed by the Government. However, In the year 2000, this section was omitted. Thereafter, ADR was introduced in all Fiscal Laws in the year 2004, including the Customs Act,1969¹, Income Tax Ordinance, 2001², Sales Tax Act 1990³ and the Federal Excise Act, 2005⁴. As of 2005, the new ADR additions to the law provided a window to operate side by side with the existing conventional Appellate system; with simple procedures and lesser technicalities, recommendations of independent experts and an out-of-court settlement with the tax authorities. Initially, when this scheme was launched it had its teething problems for a number of reasons, including, but not limited to, the authority of FBR in terms of Section 134A(2) of the Ordinance not to accept the decision of an ADR committee, if it was in favor of the taxpayer; a right of further appeal if the taxpayer was not satisfied with the order of FBR; and composition of ADRC Committees which were headed by officers of FBR. This didn't work well and came under a lot of criticism by the taxpayers requiring corrective measures; hence, finally, from 2018 onwards certain amendments were brought in. These changes to the law included, inter alia, the decision of ADRC was made binding on the parties; the Taxpayer was required to withdraw its pending case from the Court; tax-payer was required to make an offer of settlement before approaching ADRC and he could not retract from the offered amount of tax. Thereafter some further amendments were also made in 2020 and it was provided that only such matters can be referred to ADRC wherein the amount of 100 million or more was in dispute; the decision of ADRC was not to be treated as a precedent in any other case and a further relief in the sense that all pending proceedings were stayed on constitution of ADR Committees. At the same time, there were some other restrictions in the referral of cases to ADRC, such as matters wherein criminal proceedings have been initiated; or where interpretation of question of law is involved could not be referred to ADRC. It was reiterated that the scope of ADR revolves around facts and circumstances; the burden of proof rests on the applicant; the applicant has to state and explain quite clearly: what is already agreed; what is disputed; what evidence is being produced; what are the applicant's contentions and why should, the matter be resolved in his/her favor. The most significant and much-awaited amendments were brought about with the composition of ADR Committees, which were now to be headed by a retired judge, not below the rank of a judge of a High Court as Chairperson; a Chief

¹ S.195C-Customs Act,1969 /Chapter XVII Customs Rules, 2001.

² S.134A-Income Tax Ordinance, 2001 / R.231 C Income Tax Rules, 2002.

³ S.47A-Sales Tax Act 1990 / Chapter X Sales Tax Rules,2004.

⁴ S.38-Federal Excise Act, 2005 /Rule 53 Federal Excise Rules,2005

Commissioner or Chief Collector having jurisdiction over the case; and a person to be nominated by the taxpayer from a panel notified by the Board comprising of (a) chartered accountants, cost and management accountants and advocates having a minimum of ten years' experience in the field of taxation; or (b) officers of the Inland Revenue Service who stood retired in BS 21 or above; or (c) reputable businessmen as nominated by the Chambers of Commerce and Industry. Finally, on 06.05.2024 Tax Laws (Amendment) Act, 2024 was promulgated, whereby, the newly amended Section 134A of the Ordinance is to apply mutatis mutandis on the Sales Tax Act, 1990 and the Federal Excise Act, 2005; the limit of Rs.100 Million has been reduced to Rs.50 Million. The most significant and relevant amendment made, which in our view is fully applicable to the present Petitioner, is that now it is mandatory for SOE to go for ADR, whereas, the limit of Rs.50 Million is also not applicable. Earlier, the management of an SOE was reluctant to go for mediation in any business transaction due to fear of prosecution, but through the newly amended provisions, they have been protected from any suit, prosecution or other legal proceedings. Since referral to ADR is now mandatory for SOE, a right to appeal has also been provided to SOE when the matter is not decided by ADRC within the stipulated period.

8. After going through the above provisions and gathering the intent of the Federal Government, to us, it clearly reflects that an internal mechanism has been evolved for the quick disposal of tax disputes between SOEs and FBR. The reason being that at the end of the day, in any such disputes, it is, in fact, the Federal Government who is the ultimate loser, by way of litigation costs besides delay in settlement of such disputes from the courts of law. The Petitioner before us is owned by the Government and is being asked to pay a certain amount of tax by FBR which is also under the Revenue Division of the Federal Government and ultimately, even if the Petitioner is required to pay any tax; the cost of such payment of tax is to be borne by the Federal Government. It is just like withdrawing money from one pocket and putting it into the other, and in this entire exercise, it is the litigation cost and delay which must be borne by the Federal Government additionally. Resultantly, it is the Federal Government alone which is the loser and besides incurring costs, the time consumed by the courts in deciding such matters could be reserved and allocated to disputes of private parties before the Court. So in all fairness, we are of the considered view that in terms of Section 134A of the Ordinance, duly amended by the Finance Amendment Act, 2024, the Petitioner is mandatorily required to approach FBR for resolution of its dispute coupled with the fact that the Petitioner claims that its case has been supported by the Ministry of Law and Justice Division.

11. It may further be observed that though courts are the creature of law and constitution, whereas, Article 199 of the Constitution also confers ample jurisdiction upon the High Courts; but such jurisdiction otherwise, is to be exercised by way of discretion and circumspection, and while doing so, Court must look into the locus standi of the parties coming to the Court. We are mindful of the fact that the Petitioner before us may be an aggrieved person for any other issue, but insofar as the present facts and circumstances are concerned, we are of the view that for such purposes, it is not so, until and unless the ADR mechanism provided under Section 134A of the Ordinance, OR the mechanism as provided for Resolution of Dispute under Rule 8(2) of the 1973 Rules are exhausted. Till such time we do not see the Petitioner as an aggrieved person being a Federal Government authority for impugning the

action of another authority created and vesting in the same Federal Government. It is not even a case of any Federal Government against a Provincial Government which may have created an exception.

12. Lastly, we are constrained to observe that the Courts are already burdened with excessive litigation as against its total strength and the number of judges, including the infrastructure. Hence, any further unnecessary burden has to be avoided and must be nipped in the bud at the very outset. In this, the Government has to act fairly, sensibly and with a helping hand as the majority of litigation in the High Courts is under Article 199 of the Constitution which is either against the Provincial or the Federal Government. Presently, the Courts are acting robustly to induce out of court settlement as and when possible, to the fullest extent. It is a change in mindset and needs support from all litigants, including the Government. In fact, the Government has already taken a step forward by amending Section 134A of the Ordinance in question, and this is to be appreciated as a timely step forward; but at the same time, it has failed to guide and persuade its Divisions and Authorities to go for such route of settling its disputes with the Tax Departments. If the Petitioner's Counsel, under instructions, had agreed to referral of this matter to ADR under the aforesaid provision of law, this would have definitely saved precious time of this Court in writing this opinion. By fostering a pro-settlement bias, courts can contribute to a more harmonious and efficient dispute resolution landscape, where parties are empowered to resolve conflicts collaboratively and constructively⁵. Encouraging mediation aligns with the broader goals of justice systems worldwide: to resolve disputes in a manner that is fair, efficient, and conducive to the long-term well-being of all involved parties⁶. The Supreme Court has recently adopted a pro-mediation approach, and in Province of Punjab⁷ while quoting Justice Sandra Day O'Connor, it is observed that "The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.⁸". The Supreme Court has further stated that we wish to underline that courts must encourage out of court settlements through Alternate Dispute Resolution ("ADR"), in particular mediation. The essence of mediation lies in its voluntary and confidential process, where a neutral third party, the mediator, assists disputants in reaching a consensus. Unlike in litigation, where the outcome is often a zero-sum game, mediation thrives on the principle of win-win solutions, preserving relationships and allowing for creative resolutions that legal parameters might not accommodate....."

4. We are surprised to note that despite such judgment in field, the Inland Revenue Department has continued with the recovery exercise as if there is, either no amendment in law; or for that matter, it does not apply to them. Such conduct on the part of the

⁵ Per Mansoor Ali Shah, J, Province of Punjab v Haroon Construction Company⁶ 2024 SCP 123 (SC Citation)

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⁷ Per Mansoor Ali Shah, J, Province of Punjab v Haroon Construction Company⁷ 2024 SCP 123 (SC Citation)

⁸ Justice Sandra Day O'Connor, Speech at the Minnesota Conference for Women in the Law, April 1985

concerned officers can only be termed as “lack of knowledge”, or one may call it “incompetency and unwillingness” on their part to follow the law. On 26.08.2024, Member (IR-Operations) from FBR was in attendance along with concerned Commissioner(s) and the Court was informed that in this case after issuance of notice and passing of a restraining order, an ADR Committee has been constituted, whereas the rules for implementation of the provisions of law are under considerations and are being finalized.

5. Today, learned Asst. Attorney General along with counsel for the department has placed on record a statement, wherein, a letter dated 02.09.2024 issued by the office of Member, Inland Revenue Operations has been annexed directing all the Chief Commissioners and other officials of the Inland Revenue Department to withdraw recovery notices in cases of SOEs issued under Sales Tax Act, 1990, Income Tax Ordinance, 2001 and Federal Excise Act, 2005. It would be advantageous to refer to said letter, which perhaps has resolved this issue which is continuously coming up before this Court. The said letter reads as under: -

“By Fax

**Government of Pakistan
Revenue Division
Federal Board of Revenue
Inland Revenue**

No.1(102)SA-M(IR-Ops)/2024/183757-R Islamabad, the 3rd September, 2024

To,

**All Chief Commissioners-IR,
LTOs/MTO/CTOs/RTOs**

Subject: **WITHDRAWAL OF RECOVERY NOTICES IN THE CASES OF STATE-OWNED ENTERPRISES (SOES) ISSUED UNDER THE SALES TAX ACT, 1990, THE INCOME TAX ORDINANCE, 2001 AND THE FEDERAL EXCISE ACT,2005.**

I am directed to refer to the subject cited above.

2. As per amendments in Section 134A(1) of the Income Tax Ordinance, 2001. Section 47A(1) of the Sales Tax Act, 1990 and Section 38(1) of the Federal Excise Act, 2005, it is mandatory for State Owned Enterprises (SOEs) to apply to the Board for the constitution of Alternate Dispute Resolution Committee (ADRC) for the resolution of any dispute. SOES are under obligation to withdraw any and all pending litigation and cases pertaining to the dispute immediately and mention the details thereof in the undertaking referred to in clause (b).

2. In view of the above stated legal provisions and to avoid any further litigation against the department, I am further directed to withdraw all recovery notices issued to SOEs under the aforementioned tax laws as there is no other legal remedy available to them except applying for constitution of alternative dispute resolution committee (ADRCs).

3. List of the cases of SOEs, in which proceedings have been concluded, may also be furnished to the Board by 10.09.2024 on the following format:

S#	Name of SOE	Tax Year/Period	Tax Type	Assessment Order No. & Date	Outstanding Demand (Rs.in Million)	Pending Before
(1)	(2)	(3)	(4)	(5)	(6)	(7)

Sd/-
(Naila Ashraf Khan)
S.A. to Member (IR-Operations)"

6. From perusal of the aforesaid letter dated 03.09.2024, it reflects that finally it has been realised by the Inland Revenue Department that certain amendments have been carried out in the Income Tax Ordinance, 2001 as well as other Federal Fiscal Laws; whereby, SOE's are required to apply to the Board for the constitution of Alternate Dispute Resolution Committee (ADRC) for the resolution of any dispute and are under obligation to withdraw any and all pending litigation. It has been further directed to withdraw all recovery notices issued to SOEs under the aforementioned tax laws as there is no other legal remedy available to them except applying for constitution of alternative dispute resolution committee (ADRCs). At the same time SRO 1290(I)/2024 dated 24.8.2024 has also been issued, whereby some draft rules have been framed for enforcement of Section 134A ibid and have been published / notified for information of all concerned as required under Section 237(3) ibid for calling

objections and suggestions. The letter and the SRO are taken on record and the efforts on the part of the concerned officer i.e. Member (IR-Operations) is appreciated. However, it is further directed that all field formations shall abide by the directions of FBR as well as judgment passed by this Court in the case of **Civil Aviation Authority (Supra)**, failing which, as and when an appropriate case is brought before this Court on a similar issue, appropriate proceedings will be initiated against the delinquent official(s) under the relevant Service Laws, including notice(s) under Contempt of Court Ordinance, 2003.

7. Both Petitions stand dispose of in the above terms. Let copy of this order be issued to all the Respondents for strict compliance, and to the learned Attorney General for Pakistan; Chairman FBR and Member Inland Revenue (Operations) for information.

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Farhan/PS