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Judgment Sheet

IN THE LAHORE HIGH COURT
MULTAN BENCH MULTAN
JUDICIAL DEPARTMENT

Case No. W. P. No. 3851 of 2017.

Mehar Pervaiz Akhtar. **Versus** Director General Excise and Taxation Lahore etc.

JUDGMENT

Date of hearing:	24.05.2017.
Petitioner by:	M/s Ch. Shafat Ali and Mughees Aslam Malik, Advocates.
Respondents by:	M/s Umar Farooq Khan and Malik Muhammad Bashir Lakhesir, Assistant Advocates General, Punjab for respondents No. 1 to 4. Mian Muhammad Ashfaq Hussain, Advocate for respondent No.5/Pakistan Railways. Mr. Tariq Manzoor Sial, Advocate/Amicus Curiae. Qurban Ali Shahid, Excise & Taxation Officer, Vehari, Bashir Ahmad Kharal, Assistant Excise & Taxation Officer, Vehari, Rana Sakhawat Ali, Excise & Taxation Officer (Property Tax) Multan, and Munawar, Inspector Legal, Excise & Taxation Department.

Shahid Jamil Khan, J. Petitioner has assailed two notices for sealing (*Tala Bandi*) of his shops for non-payment of Tax levied under the Punjab Urban Immovable Property Tax Act, 1958 **("the Act")**, known as "**Property Tax**", along with a demand notice issued under Rule 15(4) of the Punjab Urban Immovable Property Tax Rules, 1958 **("the Rules")**.

2. The petitioner is in possession of the shops as lessee of Pakistan Railways (respondent No.5) since November 2005, under a lease agreement, for 10 years extendable from time to time. Exemption

from Property Tax is claimed, under Section 4(a) of the Act, as property, assertively, is owned by Federal Government through Pakistan Railways. An application to claim exemption was moved before respondent No.1, which has not been decided till filing of this petition.

3. Learned counsel for the petitioner; besides the claim of exemption, submitted that impugned demand was created without following due and mandatory process under the Act and Rules; petitioner was never associated in assessment proceedings, hence was deprived of the opportunity to raise claim of exemption at first instance. Without prejudice to the claim of exemption, he argued that the impugned demand is created arbitrarily without confronting the petitioner with proposed value of the property or calling for Return, hence the assessment and consequent demand is liable to be declared without lawful authority.

Learned counsel for Pakistan Railways did not deny the lease agreement between petitioner and Pakistan Railways, executed on behalf of President of Pakistan, however has referred to Clause (12) of the Lease Agreement to submit that all the taxes due on the properties are to be paid by the petitioner/taxpayer.

Malik Muhammad Bashir Lakhesir, Assistant Advocate General, Punjab, representing respondent No. 1 to 4, has referred to the definition of *"owner"* as defined in Section 2(e) of the Act to submit that lessee is defined as owner, therefore, is liable to pay the tax. Replying to the arguments on due process, learned AAG has apprised that a survey was conducted in the year 2013-14 of the area and valuation of the shops was determined, after inviting objections, under the Act and Rules. He explained that the survey was completed after due notice to the petitioner, including other taxpayers of the area, through publication in newspaper and affixation of pamphlets. It is apprised that after completion of survey, Form P.T.1 was prepared and on the basis of Form P.T.1, the Tax at the rates notified by the

Government of the Punjab **("Government")** were applied to raise the demand. He concluded that Form P.T.1 was prepared, after giving opportunity of filing objections within 30 days.

Qurban Ali Shahid, Excise and Taxation Officer, Vehari **("ETO")** was asked to show from the record that petitioner was associated in the proceedings. In response; Survey Register of the area was produced, which did not bear signatures of the petitioner. Confronted with this fact on record, the ETO could only explain that all the taxpayers were informed through press publication and affixation of notices. It could not be established from record that petitioner was associated, at any stage, in the process of survey or assessment. He admitted that no notice, calling for Return, as required under Section 8(1) of the Act, was issued. It is also an admitted position that assessment order, as recorded in Form P.T.1, was never communicated to the petitioner enabling him to challenge it under the Act or Rules.

4. Heard, record perused.

5. To understand the scheme of levying, charging and recovery of Property Tax, provisions of the Act and Rules are examined in backdrop of the facts, *ibid*.

The Tax, under this Act, is levied in an Urban Area, notified by the Government under subsection (1) of Section 3. Proviso to the subsection empowers the Government to divide an Urban Area into two or more Rating Areas or to group several Urban Areas into one Rating Area. The Rating Area is defined under Section 2 (g), which means, "*urban area where tax is levied under the provisions of this Act*". Under subsection (2) to Section 3; the Tax is levied, charged and paid on Annual Value of a building or land, or both, in a Rating Area at five percent of the Annual Value of the property. The Annual Value is defined in Explanation to this subsection as "*aggregate annual value of all buildings and lands owned by same person in the rating area*". Subsection (4) tells that the Tax shall be due (recoverable)

from the owner of buildings and lands. The term *Owner*, defined in Section 2(e), includes "*a lessee in perpetuity*". Section 4 deals with Exemptions and its clause (a) grants exemption to the buildings and lands owned by Federal Government, except those which are leased in perpetuity.

To claim of the exemption, petitioner has to establish that the shops are owned by Federal Government and are not leased to him in perpetuity. The claim of exemption needs to be examined and determined by the Authorities, under the Act and Rules. Admittedly, petitioner was not associated in the survey or assessment, therefore, was deprived of an opportunity to claim the exemption; nor the claim of exemption has been rejected by assessing authority through any formal or legal order. It can unescapably concluded, as appearing from the produced record, that the survey, assessment and impugned notices, are made/issued without following mandatory procedure under the Act and Rules.

6. Though power to impose Tax is predominant and paramount attribute of the State, under Article 7 of the Constitution of Islamic Republic of Pakistan 1973 ("**the Constitution**"). Nevertheless; imposition and collection of Tax necessarily has an effect of depriving a citizen from his property, to which he is entitled under Article 23. Article 24 of the Constitution bestows a fundamental right that he shall not be deprived of his property which is saved under the law. August Supreme Court, in *M/s Mustafa Impex v. The Government of Pakistan* (**PLD 2016 SC 808**), while laying down principles regarding mandatory characteristics of rules imposing Tax or financial burden on a citizen has enshrined :-

> "51. The argument is sometimes advanced, in order to defeat the language of subordinate legislation, that it is merely directory and not mandatory. *It is necessary to emphasize the point that, in the normal course, there is no reason whatsoever why the language of rules should not be considered to be mandatory unless it is ex facie discretionary.* The rules are framed to achieve a certain objective and to achieve this within the channels relating to the devolution and flow of statutory authority. *In the absence of*

> *compelling reasons to the contrary all rules are, and should be considered to be mandatory and binding.* The burden of proof lies on anyone asserting that the rules in question are directory and not mandatory. He must establish that there is a sound and powerful reason why they should not be considered mandatory and binding. This principle applies with redoubled force, for and in relation to two sets of rules; firstly, constitutionally mandated rules i.e. the Rules of Business, and secondly, rules framed under fiscal enactments. Constitutionally mandated rules are closely intertwined with the concept of good governance for and in the public interest. Allowing a departure therefrom would be detrimental to open and transparent forms of governance. If a government department admits that although it has violated explicit provisions of the rules, its violation should be condoned by treating the breach as non-actionable merely on the ground of its supposedly being directory, then surely serious questions arise in relation to the good faith of the department. ***In each and every case the presumption of law would be that the rules are mandatory and should be observed and followed.*** If, and only if, a compelling public interest is established as a reason for non-compliance with the rules i.e. other than inadvertence, or negligence, or incompetence then, and only then, can the court consider whether or not to condone the breach in the observance of the rules. ***These considerations are fortified and amplified for, and in relation to, fiscal enactments.*** **The reason is twofold; *firstly*** Article 77 of the Constitution only enables the levy of tax under law and, ***secondly***, *the levy of a tax inevitably implies a restriction of a citizen's right to property.* ***Payments of tax amount to a corresponding deprivation of property and, since the right to property is a fundamental right, this can only be done by means of strict compliance with the law.*** It follows that the breach of Rule 16 is fatal to the case of the Government. Although this is sufficient to dispose of the case it is necessary that we should also clarify the constitutional position, for which it is necessary to revert to the concept of Federal Government."
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> (emphasis supplied)

Due process is an inviolable fundamental right of every citizen after introduction of Article 10A in the Constitution, which has a connotation wider than right of '*fair trial*' and '*to be dealt in accordance with law*', as guaranteed in the Article 4. Non association of any citizen in assessment proceedings, for charging of a Tax levied under the Act and mandatory Rules, not only amounts to denial of fair trial and dealing him against the law, but is a sheer violation of due process. Due process is meant to protect the citizen from arbitrary use of executive power; exercised without following exact course of law. Requisites of due process are required to be satisfied by the executive

to respect the legal rights of a citizen. Due process is meant to ensure Rule of Law and curb the pursuit of executive to rule by arbitrary exercise of power given under the law.

Raising Tax Demand without associating the taxpayer in assessment proceedings amounts to condemn unheard. '*Audi alteram partem'* is a necessary and fundamental requisite of due process, which has been guarded by superior courts in various judgments, even before insertion of Article 10A in the Constitution, to declare that it should be read in every statute.

Assessment of a Tax, levied under a valid statute, is meant to determine the Tax Liability subject to the condition stipulated in the law. The taxpayer, who falls within the mischief of charging provision, has a fundamental right to defend himself from the levy or it's charging as per the conditions under the statute. Any doubt in the charging provision has to be resolved in favour of the taxpayer because it deprives the taxpayer from its property, therefore, falls within the exception under Article 24 of the Constitution. For providing the opportunity to defend, issuance of show cause notice is mandatory, therefore, any assessment order without issuance and due service of the show cause notice is nullity. If a statue does not provide specifically for issuance of show cause notice, such procedure has to be prescribed by subordinate legislation under the statue. Conversely; obedience to the law is inviolable obligation of every citizen, hence it is his duty to pay the Tax imposed under the law. For payment of due Tax by the citizen, taxing statutes require the citizen to get himself registered with the tax departments and file Returns thereunder, declaring the information necessary for charging due Tax and determination of due Tax himself, followed by voluntary payment of Tax. In Federal taxing statute, such Returns are taken to be an assessment order, which can be called in question by the assessing officer, through show cause notice, if in his opinion the declaration of information is incorrect or determination of Tax is not in accordance

with the statute. On receipt of reply to show cause notice, the assessing officer is bound to provide opportunity of being heard and pass a reasoned assessment order as required under Section 24A of the General Clauses Act, 1897. Communication or service of such assessment order, as per law, is again a necessary requisite of due process, absence of which denies the right of appeal or revision under the law. Any demand of Tax or coercive measures for its recovery is illegal, being violative of the Articles 10A, 4 read with Articles 23 and 24 of the Constitution.

7. In the instant case mandatory procedure has not been followed for survey to determine value, assessment and consequent recovery notices.

The Property Tax is charged by the Excise and Taxation Department by appointing an assessing authority under Section 6 of the Act for a rating area. To tax a property in a rating area, annual value of the property is required to be ascertained under Section 5. Section 5-A also deals with ascertainment of annual value and gives power to the Government to notify valuation tables of the localities and fix the valuation for a rating area/locality, based on which Tax can be charged. Valuation list is required to be made under Section 7 as per the value ascertained under Section 5 or notified under Section 5-A. This list, under subsection (1) of Section 7, is to be made for five years, which can be reduced or extended by the Government. Subsection (1) of Section 8 requires the assessing authority to call for Returns from the taxpayers before preparing any valuation list and the draft valuation list has to be prepared after expiry of the period for calling the Returns. The information given in the Returns has to be incorporated in the draft valuation list. In case the Return is not filed by the taxpayer, the assessing authority can still make a draft list on the basis of ex-parte assessment before publishing the same in the manner as prescribed in the Rules. Before publishing draft valuation

list, objections are to be called under subsection (2) of Section 8 from the taxpayers.

Under Section 3, the assessing authority may divide the rating area into subdivisions or *mohallahs* and shall allot a unique number to each property in the subdivision, *mohallah* or street. After ascertaining the names of owners or occupiers, Returns are to be called on Form P.T.2. The assessing authority can also issue a public notice asking the taxpayer to make declaration on Form P.T.4. In addition to the information received through Returns, the assessing authority may also ascertain information regarding the property, under the remaining clauses, before preparing draft valuation list in Form P.T.5. After publication of the draft valuation list, as required under Rule 7, another opportunity is required to be given to the taxpayer for filing objections under Section 8(2) of the Act.

A detailed procedure for filing and disposing of the objections is provided under Rules, 8, 9 & 10. It is ensured under the Rules that objections, filed by the taxpayers, are not to be disposed of mechanically. An opportunity of being heard, at every stage of assessment, is provided under the Rules by prescribing a detailed procedure, to be followed by the assessing authority. If objections are found correct, then the valuation list can be amended under Section 9 of the Act, any time, after publication of the valuation list. Section 9 also deals with the situations of addition or decrease in value of the property between the period of publication of valuation list and creation of the new valuation list. The amendment or correction can also be made on the basis of clerical or arithmetical error in description of the property. After completing this procedure, the valuation so made is authenticated under Rule 11 which envisages preparation of Form P.T.1, which needs to be authenticated by the assessing authority before the first day of July or first day of January. The Form P.T.1, to be issued under Section 11, shall be revised upon

any amendment under Section 9 in the valuation list by the assessing authority.

8. From examination of the procedure, noted above, it can easily be concluded that Form P.T.1 is the assessment order containing all the assessed information regarding property to be taxed and duly authenticated by the assessing authority. Rule 11 is silent about communication of P.T.1 Form to the taxpayer. If Section 10 is examined, it provides a right of appeal and revision to a taxpayer. A person aggrieved by an order of appropriate authority upon which objections made before that authority under Sections 8, 9, 14 or 15, may file appeal against such order within thirty days. However, procedure for communication of the reasons for rejection of the objections is not provided under the Rules. Sub-rule (4) of Rule 10 only envisages that the reasons for the disposed of objections shall be recorded in register in Form P.T.7. Though the register, as well as, P.T.1 is open to inspection, yet order in this regard is never communicated to the taxpayer.

9. For the reasons discussed, *supra*, such a practice or procedure cannot allowed to be continued. Government is bound to revise the Rules accordingly and till such revision the respondents shall communicate the reasons for rejection of the objections in writing to the taxpayer and shall also communicate a copy of Form P.T.1 to the taxpayer on his address, enabling him to seek his right of appeal or revision and the limitation shall commence from the date of the communication.

10. Impugned notices are examined in light of submissions and the law. Notice of sealing of property does not refer to any provision of law, whereas accompanied demand notice is on Form P.T.10 issued under Rule 15(4) of the Rules.

Sections 14, 15 & 16 deal with the recovery of Tax not paid voluntarily. Under Section 14 the tenant of property can directly be asked by the prescribed authority to pay rent to the authority or to

proceed against the tenant of property. Section 15 deals with penalty for default in payment of Tax, besides imposing late payment surcharge under Section 12(3). Under subsection (1) of Section 15, if taxpayer fails to pay Tax after being served for recovery of Tax, the prescribed authority may issue notice for imposition of penalty but not more than the amount so unpaid. Its subsection (2) requires that the prescribed authority shall satisfy itself that non-payment of penalty was willful. Needless to say that willful default can be determined only after providing opportunity of being heard.

Section 16 deals with recovery of unpaid dues. The Tax/late payment surcharge and penalty can be recovered by Collector or a person authorized by him, by issuing a warrant in prescribed form or in a form signed by the Collector. The warrant is to be addressed to Excise and Taxation Officer for commencing recovery proceedings. Such recovery can be made by distress or sale of the movable property belonging to the defaulting taxpayer or by attachment and sale of the immovable property belonging to him. Under subsection (2) such an amount can also be recovered as arrears of land revenue, for which a detailed procedure is provided under the Land Revenue Act, 1967. Subsection (3) of Section 16 imposes first charge upon the building to be taxed.

Under Rule 15, the assessing authority is required to maintain for each rating area, a Tax Demand and receipt register in Form P.T.8. The demand notice, as contemplated under Rule 15(1), is required to be prepared under Rule 15(2) in Form P.T.9. The demand notice, under sub-rule (4) is to be accompanied by a challan in Form P.T.10, which envisages its issuance if arrangements from door to door collection or payment, at the office of assessing authority, is not made. Such a Form is also required to be issued, if so demanded by the taxpayer. The mode of volunteer payment by the taxpayer is provided under sub-rule (5) of Rule 15.

Rule 16 deals with imposition and collection of penalty. A show cause notice is required under sub-rule (1) in Form P.T.11 before imposition of penalty. After imposition of penalty a demand notice, in Form P.T.12, is required to be served on the taxpayer under Rule 16(3). Rule 17 deals with recovery from tenants and Rule 18 deals with recovery of Tax through tax collecting staff. However, it is apprised that no Notification for appointment of tax collecting staff is made, therefore, all taxes are recovered through banks.

Rule 19 deals with recovery of the Tax and penalty as arrears of land revenue. The assessing authority is required to issue a certificate in Form P.T.16 of the unpaid amount of Tax, surcharge and penalty, upon which proceedings are to be adopted under Land Revenue Act, 1967. For the purposes of Sections 14 and 15, the assessing authority is declared as prescribed authority under Rule 25. Rule 29 deals only for issuance of warrant under Section 16(1) in Form P.T.20. The Collector or authorized person shall issue a warrant in prescribed Form P.T.20 for recovery through distress or sale of movable property or attachment and sale of immovable property. Form P.T. 20 being relevant is reproduced hereunder:-

"To

……

……

Whereas……was served with a notice of demand under the West Pakistan Urban Immovable Property Tax Act, 1958, and whereas he has not paid the sum of Rs……as property tax and Rs……as penalty within the time specified in the said notice; these are to command you to attach the movable/immovable property of the said……and unless the said……pay to you the said sum of Rs……together with Rs……..as the cost of recovery within……days of the attachment of said movable/immovable property you should put it to sale to recover the aforesaid amounts out of its sale proceeds.

You are further commanded to return this warrant on or before the……day of……..with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

Given under the seal of the Collector (Deputy Director, Excise and Taxation), this day of……19 .

Seal

Collector
(Deputy Director, Excise and Taxation)."

Admittedly, no such warrant by any authority was issued in this case. It is admitted by respondents' side that for recovery of any tax, by adopting coercive measures, procedure is not followed.

11. This Court, after examining the procedure provided in the Act read with Rules, has reached to the conclusion that the rights of petitioner, as provided in above noted articles/provisions, have been violated. The respondent authorities are not adhering to any law or prescribed procedure, starting from valuation of properties till recovery of Tax. The ETO could not show that Returns are being called from the taxpayers, either in the instant or any other case. It was specifically asked, during proceeding, to show from record the notices for calling Returns before or during preparation of valuation list for 2013-14, the answer was in negative. It clearly shows that the valuation lists are being prepared arbitrarily without following due process. This Court is not satisfied with the reply of ETO that taxpayer has to collect Return Forms from the office, whereas assessing authority is bound under the law to number each property before calling for Return. The taxpayer can also be provided with a copy of Return and notice along with Form P.T.4 prescribed for calling Returns.

During arguments, it is apprised by Inspector Legal, appearing from respondents' side that data of the rating area has been computerized and now computer generated demand notices are being issued in six districts of the Province of Punjab. When asked to show that corresponding amendment is brought in the Rules, he was unable to reply satisfactorily. It is also noticed that the prescribed Return (Form P.T. 4) does not carry any specific column where the taxpayer can claim that his property is exempt from taxation. The Government is expected to bring necessary changes in the Rules to ensure conformity of the Rules with fundamental rights guaranteed under the

Constitution. Therefore, the Secretary Law and Parliamentary Affairs, Punjab is directed to look into the matter and propose necessary amendments to the law makers or concerned authorities, not later than ninety (90) days from receipt of this judgment.

Till such amendments; concerned ETOs shall be bound to serve Form P.T.1, and other discussed Forms, on the taxpayer before raising demand, enabling him to file appeal or revision against the assessment. Learned Division Bench of this Court has given guidelines in *Muhammad Khalid Qureshi v. Province of Punjab through Secretary, Excise and Taxation Department, Lahore and another* **(2017 PTD 805)**, relevant part of which is reproduced hereunder:-

> "36. It is well settled that all statutory authorities or bodies derive their powers from statutes which created them and from the rules and regulations framed thereunder. Any action taken or exercise of powers by a statutory authority or body, which is in derogation of the statute/rules, can be assailed and declared as ultra vires…."

12. For the foregoing reasons, impugned notices for sealing of property, the valuation list and assessment completed without following mandatory provisions/procedure are declared without lawful authority and nullity in the eye of law.

However, the assessing authority is at liberty to call for Return from the petitioner and after following mandatory provisions of law amend the valuation list by invoking provisions of Section 9 of the Act of 1958 read with Rule 9 of the Rules of 1958. While amending valuation list, claim of exemption by the petitioner shall also be considered and decided in accordance with law.

This petition stands ***disposed of*** accordingly.

(Shahid Jamil Khan)
Judge

APPROVED FOR REPORTING.

A.W. Judge