JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

Writ Petition No.2132-P/2015

JUDGMENT

Date of hearing.23.11.2017 (Announced on 30.1 2018)

Petitioners: (Chief Commissioner Inland Revenue, Regional Tax Office) by M/S Ghulam Shoaib Jally and Qaiser Abbas Bangash, Advocates.

Respondents: (M/S Cherat Cement Company Ltd, through its Chief Executive and two others) by M/S Khalid Mehmood Siddiqui and Asif .F Vardag, Advocates

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YAHYA AFRIDI, C.J.- Through this single judgment, we propose to dispose of two Writ Petitions, as they both have common questions of law and facts involved therein. The particulars of the writ petitions are:-

1. ***W.P No.2132-P/2015***
   (Chief Commissioner Inland Revenue, Regional Tax Office, Jamrud Road, Peshawar…Vs…M/S Cherat Cement Company Ltd, Through its Chief Executive and two others).

2. ***W.P No.2133-P/2015***
   (Chief Commissioner Inland Revenue, Regional Tax Office, Jamrud Road, Peshawar…Vs…M/S Lucky Cement Company Limited, Through its G.M and two others)

2. The Chief Commissioner Inland Revenue, Peshawar, the petitioner in both the petitions seeks a common relief in terms that:-

> ***1. That according to sub-section (2) of section 9 of the Ombudsman Ordinance, 2002, Federal Tax Ombudsman had no authority to entertain complaint filed by the respondent No.1.***
>
> ***2. That re-initiating proceedings in the complaint after departmental audit is totally without jurisdiction.***
>
> ***3. That the jurisdiction assumed by respondent No.2 on the complaint of respondent No.1 and recommendation and findings given and made in order dated 22.1.2013 are void, illegal without jurisdiction and have no legal effect and liable to be struck down.***
>
> ***4. That the order and judgment of respondent No.3 dated 30.10.2014 on the presentation of petition is even not sustainable in the law and liable to be declared void.***
>
> ***5. Any other appropriate remedy not specifically asked for may also be granted.***

3. The claim of the present petitioners has a chequered history. However, for determination of the present dispute between the parties, the relevant facts, in chronological order, are as under:-

15.02.2007

The genesis of the dispute in hand relates to the Federal Excise Duty recovered from M/S Lucky Cement Company Limited and M/S Cherat Cement Company Limited **("Respondent-Companies")** during the period 1996-1999, which was challenged in Constitutional jurisdiction of this Court vide W.P No.1147/1997 decided on 25.05.2001, and finally maintained by the Apex Court in decision dated 15.02.2007 reported as ***Lucky Cement's case (2007 PTD 1656)***.

06.07.2013

M/S Lucky Cement Ltd. invoked the jurisdiction of this Court in W.P.No.878/2008, seeking the refund of the adjudged excess Federal Excise Duty. The said petition was withdrawn and a complaint was filed on 06.07.2013, before the worthy Federal Tax Ombudsman under the enabling provisions of the *Establishment of the Office of the Federal Tax Ombudsman Ordinance, 2000* **("Ordinance of 2000")**.

21.11.2013

The Federal Tax Ombudsman made his recommendations on the complaint of the Respondent-Companies, in terms that:-

> ***"Recommendations:***
> ***11. FBR to***
> ***i. get the audit conducted through the audit firm, as agreed to by both the parties previously, for fair and unbiased resolution of the issue within one month;***
> ***ii. issue refund/compensation due, if warranted as per law, within three weeks thereafter; and***
> **iii.** ***report compliance within one week thereafter.***

30.10.2014

Federal Board of Revenue **("FBR"),** feeling aggrieved by the recommendations, rendered by the Federal Tax Ombudsman, impugned the same before the worthy President of Pakistan under Section 32 of the Ordinance of 2000, which was disposed of in terms that:-

> ***"After the above referred CED decision handed down in the subject matter between the parties hereto and in order to decide the refund claim of CED, it is just and proper that such an exercise should be undertaken by way of independent and reputable Chartered Accountant firm. Thus no plausible ground and reasons exist or have been made out by the Agency for interference with the above mentioned Findings and Recommendations of the learned F.T.O.***

The President has, therefore, been pleased to reject the Representation of the Agency and approve the recommendations of FTO with slight amendments as under:

i. Get the audit conducted through two reputed audit firms independently, to determine the amount of CED liable to be refunded, if any, as agreed to by both the parties previously for fair and unbiased resolution of the issue within three months. The fees/charges of the audit firms will be paid by M/S Cherat Cement.

ii. Refund/compensation may be issued strictly as per law and as due within one month thereafter.

iii. ***Report compliance within one week thereafter."***

4. Feeling dissatisfied, the petitioners have invoked the constitutional jurisdiction of this Court, seeking to annul the above decisions of the Federal Tax Ombudsman and the worthy President of Pakistan, passed under the enabling provisions of the Ordinance of 2000.

5. At the very outset of the proceedings, the worthy counsel, representing M/S Lucky Cement Ltd, raised *preliminary objections* on the maintainability of present petitions, in terms that:-

"This petition is not maintainable, as the petitioner <u>being an officer of the Federal Government cannot challenge the decision of the President of Pakistan, who is the "Head of State", represents the "unity of Republic" and in whose name is exercise all the executive authority of the Federal</u>

> ***Government. The officers of the Federal Government such as the petitioner, acting in their official capacity, as in the present case are subordinate to the President and bound by his decisions."***

6. In essence, the *preliminary objections* raised by the worthy counsel for Respondent-Companies was the challenge made to the *locus standi* of the worthy Chief Commissioner Inland Revenue, Peshawar to institute the present petition. The learned counsel for petitioners was unable to provide any written authorization for instituting the present petitions, as provided under sub-section (8) of Section 2 of the Ordinance XXXV of 2002.

7. Since the objection raised related to the Federal Government, the learned Additional Attorney General present in Court, in a different matter, was put to notice, to seek instructions;

> *as to whether the Federal Government, and in the present case, the Revenue Division, are aggrieved by the orders, impugned herein and if so, whether they have authorized to challenge the same or intend to do so.*

8. The worthy Additional Attorney General, finally filed a *concise statement* on behalf of the Secretary, Finance Division in terms that;

> ***"The matter apparently relates to Revenue Division which is a separate Division of Ministry of Finance, Revenue, Economic Affairs, Statistics and Privatization whereas, Finance Division has no role to play in this case.***
>
> ***PRAYER***
>
> ***It is, therefore, respectfully prayed that as Revenue Division has already taken up the case before the hon'ble Court thus, Finance Division may be excluded from forthcoming proceedings for being least concerned with the case.***
>
> ***On behalf of Secretary Finance Division, Government of Pakistan, Islamabad."***

9. As for the FBR, it has placed on file, letter dated 27.4.2015 endorsing the decision to file the instant petition in terms that;

> ***"I am further directed to say that the matter has been considered by the Board and the following decision has been made in this regard;***
>
> ***"The matter may be taken up into the Court of Law by RTO Peshawar on the related grounds, including the fact that initially it was mutually agreed in the hearing before FTO that audit shall be conducted by the department and the subsequent departure from this commitment is not justifiable."***
>
> ***It is, therefore, advised that in the light of the above decision you may proceed as per law."***

10. Now moving on to the *preliminary objections* raised by the worthy counsel for Respondent-Companies, which converged on the points; that the decision of the President of Pakistan, who being the Head of the State and representing the unity of the Republic, as provided under Article 41(1) of the Constitution of Islamic Republic of Pakistan, 1973 **("Constitution"),** could not be assailed by an Officer of the Government; and that FBR, a department of the Revenue Division of the Federal Government, challenging the decision of the worthy President of Pakistan, under Sub-Article-1 of the Aricle-248 of the Constitution, could only do so against the Federation, which according to the worthy counsel for the Respondent-Companies would mean Federation suing the Federation; further that the petitioner could only approach the Court under the enabling provisions of the Rules of Business, 1973, whereas the petitioners in the instant case had not been included as an O*fficer* to sign petitions on behalf of the Federal Government; and that requisite consultation with the Law, Justice and Parliamentary Affairs Division for filing the present petitions was not obtained; and moreover in view of

the written orders of the Cabinet Division, Government of Pakistan dated 20.8.2015, directing all Divisions, Departments, Statutory Corporations and Institutions established and controlled by the Federal Government to strictly comply with the decisions rendered by the worthy President of Pakistan; and that the letter dated 1.9.2015 issued by the FBR directing all Chief Commissioners of Inland Revenue to follow the instructions contained in Order dated 20.8.2015 issued by the Cabinet Division, the decision of the Cabinet duly endorsed by FBR was clear in its intent for compliance of all decisions passed by the worthy President of Pakistan, and filing of the instant petitions was in violation thereof. In support of his submission, the worthy counsel made reliance on **AD Silva's case** ***(PLD 1953 PC 58), Syed Sharifuddin Pirzada's case (PLD 1973 Karachi 132), Muhammad Idris's case (1986 MLD 1794), Rana Fazal-e-Haq's case (PLD 2003 Lahore 726), Barrister Sardr Muhammad's case (PLD 2013 Lahore 343), Ghazanfar Abbas Shah's case (2015 SCMR 1585), Province of West Pakistan's case (PLD 1964 SC 21), and Al-Khair Traders's case (2015 PTD 2114).***

11. In rebuttal to the above submissions rendered by the worthy counsel for the Respondent-Companies, the worthy counsel for the petitioners submitted that the Chief Commissioner being the head of Regional Tax Office Inland Revenue, Peshawar, was responsible for collection of taxes within his territorial limits, which included the affairs of the Respondent-Companies. It was further contended that letter dated 27.04.2015 issued by FBR authorized the worthy Chief Commissioner to move the instant petitions. Regarding the impugned decision passed by the worthy President of Pakistan, it was emphasized that the same was not an *administrative order*, but an *appellate order*, deciding a dispute between two parties, and hence the same was subject to Judicial Review by this Court in its Constitutional jurisdiction. It was further responded that there was no question of Federation suing Federation, as the issue in hand related to a dispute decided by the office of the President being an *appellate authority* under the Ordinance of 2000, and not as head of the State under the Constitution. Thus, the decision of the worthy President under

the Ordinance of 2000 was justiceable. Regarding the applicability of Rules of Business, 1974, the worthy counsel argued that as the impugned decision was a judicial order and not an *executive* or an *administrative* order, Rule-7 *ibid* was not relevant to the issue in hand. As for Rule-27-A of the second Schedule *ibid*, it was contended that once the Advocate was selected by the Law, Justice and Parliamentary Affairs Division from the panel of Advocates maintained by FBR, he could be engaged by FBR for filing any petition. Thus, the worthy counsel urged this Constitutional Court to entertain the present petitions and decide the same on merit and not on the issue of maintainability. In support, the worthy counsel made reliance on ***1999 SCMR 2189, 2006 PTD 181, 2006 SCMR 382, PLD 2005 SC 686, PLD 2003 Lahore 371, 1998 MLD 1219, and 1999 MLD 3112.***

12. In order to decide the *preliminary objections* raised by the Respondent-Companies, we have to appreciate that,

firstly, the petitioner, holding the post of Chief Commissioner, Inland Revenue, Peshawar, is the

departmental head of the Revenue Collecting Organ of the Federation in Khyber Pakhtunkhwa;

secondly, the petitioner in his official position, as the departmental head has sought permission of the *FBR* to seek remedy against the impugned decisions of the worthy President of the Islamic Republic of Pakistan before this Constitutional Court;

and ***finally,*** the impugned decision of the worthy President is not an *administrative or executive order* but, in fact, a *quasi judicial decision* made by him as an *appellate authority* under the Ordinance of 2000.

13. The principle settled by the Apex Court in ***"Muhammad Tariq Pirzada's case (1999 SCMR 2189),*** which was followed in ***"Akhlaq Cloth House's case (2008 PTD 965), Prof. Dr. Anwar's case (2006 SCMR 382), M/S Siddique Sons' case (2006 PTD 181) and Raza Facto Tractor's case (2015 PTD 438***) clearly laid down that:-

i. a decision of the worthy President passed as an *appellate authority* under Ordinance of 2000 is a *quasi judicial order* and not an *executive* or *administrative* order passed by the worthy President under the Constitution;

ii. that the said decision of the worthy President of Pakistan has to fulfill all legal attributes of a lawful order;

iii. and that the said *quasi judicial order* of the President being justiceable is subject to judicial review.

14. Even otherwise, this Court appreciates the firm stand taken by the present petitioner, who, despite repeated directions from various official quarters, stood his stance. The steps taken by the present petitioner, being head of the Revenue Collecting Department of the Federation in Khyber Pakhtunkhwa, are highly commendable, and should in fact be appreciated.

15. Accordingly, this Court finds the Chief Commissioner, Inland Revenue, Peshawar to be an *aggrieved person,* being the head of the Revenue Collecting Organ of the Federation in the Khyber Pakhtunkhwa, to agitate matters relating to revenue collection within his jurisdiction. And the petitions so filed by him, in his official capacity, before the Constitutional Court are maintainable and subject to Judicial Review.

16. Now to the main controversy between the parties. The worthy counsel for the petitioner tried vehemently to draw the attention of the Court to the

scope of Federal Excise Duty under the law, and insisted that the burden of Federal Excise Duty paid by the Respondent-Companies had, in fact, passed on ultimately to the consumers. When the worthy counsel for the petitioner was confronted to the extent of the jurisdiction contours of this Constitutional Court, which could not sit in *appeal over* findings recorded in the decision already made by Competent Courts upto the Apex Courts or reopen the controversy already adjudged by the highest Judicial forum, he then restricted his submissions to the mode and manner, in which audit had been ordered by the worthy Federal Tax Ombudsman and the worthy President in the impugned decisions.

17. What is crucial to note is that the scope of judicial review vested in this Court under Article 199 of the Constitution, that too in the peculiar circumstances of the present cases, as already discussed, is rather limited to the extent that:-

> "***Whether Federal Excise applicable law barred the appointment of one or more firms of Chartered Accountants nominated by the FBR to carry out a single point audit as directed in the impugned decisions of the worthy Tax Ombudsman and the worthy President".***

18. Before we proceed to dilate upon the mode and manner of audit, as ordered in the impugned decisions, what is important to note is that the Revenue has on crucial occasions agreed to appointment of private Chartered Accountant Firms to carry out the said audit. In this regard, internal correspondence of the Revenue is very relevant. Some of the crucial letters require attention, the particulars of which are:-

GOVERNMENT OF PAKISTAN
REVENUE DIVISION
FEDRAL BOARD OF REVENUE

C.No.1(6)FED/2009/93570-R Islamabad the 18th June, 2010

The Chief Commissioner,
Regional Tax Office,
Peshawar.

Subject: REFUND OF EXCISE DUTY PURSUANT TO THE ORDERS OF HONOURABLE HIGH COURT IN WRIT PETITION NO. 1144/97 UP-HELD BY THE HONOURABLE SUPREME COURT OF PAKISTAN IN C.A NO.1388/02

2. In order to afford a fair chance to the applicants and to comply with the judgment of the Apex Court, the Board has decided to get the requirement prescribed under Section 3D of the Central Excise Act, 1944 (as it existed then), verified/audited through third party. In this respect, following panel of the reputed audit firms has been selected:-

i. A.F. Ferguson & Co.
ii. KPMG Taseer Hadi & Co.
iii. M.Yousaf Adil Saleem & Co. (Deloitte)
iv. Ernst & Young Ford Rhodes Sidat Hyder & Co.
v. Anjum Asim Shahid Rahman (Grant Thornton).

Sd/-
(Fahad Ali Chaudhary)
Second Secretary (STM)

GOVERNMENT OF PAKISTAN
REVENUE DIVISION
FEDRAL BOARD OF REVENUE

C.No.1(2) STM/2004 Islamabad the 3rd November, 2010

The Chief Commissioner,
Regional Tax Office,
Peshawar.

Subject: REFUND OF EXCISE DUTY PURSUANT TO THE ORDERS OF HONOURABLE HIGH COURT IN WRIT PETITION NO. 1144/97 UP-HELD BY THE HONOURABLE SUPREME COURT OF PAKISTAN IN C.A NO.1388/02

I am directed to refer to Board's letter of even number dated 18.06.2010 and Chief Commissioner, RTO, Peshawar's letter C.No.F.E/ST(Refund)/10/07/782 dated 30.09.2010 on the subject cited above, and to say that the requirements prescribed under Section 3D of the Central Excises Act, 1944 (as it esisted then) may be verified/audited through M/s Anjum Asim Shah Rahman (Grant Thornion).

2. RTO, Peshawar shall draw up the terms of reference for the said audit firm explaining the specific requirements and that it shall be required to finalize its recommendations within three months.

3. Cos of audit and the fee of audit firm shall be borne by M/s Lucky Cement Limited.

Sd/-
(Fahad Ali Chaudhary)
Second Secretary (STM)

GOVERNMENT OF PAKISTAN
REVENUE DIVISION
FEDRAL BOARD OF REVENUE

Subject: W.P. NO. NO. 878/2008 BY M/S LUCKY CEMENT CO. LTD. SUBJUDICE IN THE HON'BLE PESHAWAR HIGH COURT, PESHAWAR APPROPRIATE ACTION REGARDING.

2. It is requested that RTO, Peshawar may please be asked to apprise the Court that the decision of the Board to conduct this single point audit through reputable audit firm, to determine whether the incidence of tax has been passed on or not, was taken in consensus with M/s Lucky Cement, The Court may also be informed that the refund claims shall be decided, on its merits, once this audit is completed.

Sd/-
(Fahad Ali Chaudhary)
Second Secretary (STM)

The Secretary (Legal), Federal Board of Revenue, Islamabad
FBR's U.O No. 1(6)FED/2009/8562-R Islamabad the 18th June, 2010

GOVERNMENT OF PAKISTAN
REVENUE DIVISION
FEDRAL BOARD OF REVENUE

C.No.1(6)FED/2009/98401-R Islamabad the 12th July, 2012

The Chief Commissioner,
Regional Tax Office,
Peshawar.

Subject: REFUND OF EXCISE DUTY PURSUANT TO THE ORDERS OF HON'BLE HIGH COURT IN WRIT PETITION NO.1144/97 UP-HELD BY THE HON'BLE SUPRME COURT OF PAKISTAN IN C.A 1388/02

I am directed to refer to M/s Lucky Cement Limited's letter No.LCK/FN-1857/11 dated 25.04.2011 on the subject cited above, and to say that, in suppression of all previous instructions on the subject matter, the requirements prescribed under Section 3D of the Central Excises Act, 1944 (as it existed then) may be verified/audited through M/s Anjum Asim Shahid Rehman (Grant Thornton) as per letter of engagement and terms of reference forwarded to the Board vide RTO, Peshawar's letter C.No.FE/ST (Refund)/10/07/1999 dated 23.11.2010.

2. The audit firm shall be required to furnish its report to the concerned adjudicating authority at RTO, Peshawar for consideration and adjudication of the case as per law.

3. Cost of audit and the fee of audit firm shall be borne by M/s Lucky Cement Limited.

Sd/-
(Fahad Ali Chaudhary)
Secretary (ST-L&P)

19. When the worthy counsel for the petitioner was further confronted with the above correspondence, he responded by asserting that, the special audit under the Act of 2005, mandated the same to be headed by a Chairman, who should be an Officer of the Inland Revenue. In rebuttal, the worthy counsel for the Respondent-Companies resisted the same, and insisted that there was no

legal requirement for the said audit to be carried by an Officer of Inland Revenue.

20. In order to resolve this controversy, let us trace the history of the legal provisions relating to *audit* in Federal Excise Laws of our jurisdiction.

Stage-I (1944-2005)

Federal Excise Act, 1944

There is no express bar on appointment of firms of Chartered Accountants approved by the FBR for carrying out *special audit*.

Stage-II (2005-2015)

Federal Excise Act, 2005.

Section 46 relating to *audit*, when originally enacted provided that:-

> ***46. Departmental Audit.—(1) The Officer of Inland Revenue authorized by the Board by designation may, once in a year, after giving advance notice in writing, conduct audit of the records and documents of any person registered under this Act.***
>
> ***(2)……..….***
>
> ***(3)……..……***
>
> ***(4) The Board may appoint a Chartered Accountant or a Cost and Management Accountant or a firm of such accountants to conduct audit of a person liable to pay duties under this Act in such manner and subject to such conditions it may specify.***

> ***(5) The audit of the registered person shall generally be a composite audit covering all duties and taxes to which his business or activity is liable under the laws administered by the Board."***

<u>Stage-III</u> (2015-till date)

<u>Finance Act, 2015</u>

Amendments were introduced in Section 46 of the Federal Excise Act, 2005 vide Finance Act, 2015. The crucial point to note at this stage is that the provisions so inserted were **<u>not</u>** expressly given retrospective effect.

Sub-section (4) was substituted, and it now reads:-

> ***"(1) The Board may appoint as many special audit panels as may be necessary, comprising two or more members from the following-***
>
> ***(a) an officer or officers of Inland Revenue;***
>
> ***(b) a firm of chartered accountants as defined under the Chartered Accountants Ordinance, 1961 (X of 1961);***
>
> ***(c) a firm of cost and management accountants as defined under the Cost and Management Accountants Act, 1966 (XIV of 1966); or***
>
> ***(d) any other person as directed by the Board,***
>
> ***To conduct audit of a registered person or persons, including audit of refund claims and forensic audit and the scope of such audit shall be determined by the***

> ***Board or the Commissioner Inland Revenue on a case-to-case basis. In addition, the Board may, where it considers appropriate, also get such audit conducted jointly with similar audits being conducted by provincial administrations of sale tax on services.***

After sub-section (4), substituted as aforesaid, the following new sub-sections (5) to (8) were inserted. The same now read:-

> ***"(5) <u>Each special audit panel shall be headed by a chairman who shall be an officer of Inland Revenue;</u>***
>
> ***(6) If any one member of the special audit panel other than the chairman, is absent from conducting an audit, the proceedings of the audit may continue and the audit conducted by the special audit panel shall not be invalid or be called in question merely on the ground of such absence.***
>
> ***(7) The Board may prescribe rules in respect of constitution, procedure and working of special audit panel.***
>
> ***(8) Every member of the special audit panel shall have the powers of officers of Inland Revenue under sections 23 and 45 and sub-sections (1) to (3) of section 46.".***
>
> *(emphasis provided)*

21. On going through the above provisions regarding *audit*, as provided under the *Federal Excise Laws*, it is noted that under the Act

of 2005, as it was originally enacted, there were clear provisions for appointment of duly registered *Chartered Accountants* as members of the audit to be carried out under the said enactment. And further that there was **no** express requirement of the audit team to be headed by worthy Officer of the Inland Revenue. In fact, sub-section (5) of Section 46 of the *ibid*, mandating that the *audit* panel to be headed by Chairman, who shall be an Officer of Inland Revenue was, in fact, inserted vide Finance Act, 2015**,** which was much after the passing of the impugned decisions.

22. Thus, what emerges is that, not only at the time of disputed period (1996-1999) under audit, but also when the impugned decisions were passed, there was no legal bar on appointment of *Chartered Accountants* duly registered under the enabling laws. And the law at that stage in time did **not** mandate for any Chairman of the audit panel to be an Officer of Inland Revenue. This being the legal position, the impugned decisions of the Federal Tax Ombudsman and the worthy President were, thus, *intra vires*.

23. When the worthy counsel for the Revenue was confronted with the above factual and legal

position, he contended that the mandate for the audit to be headed by an Officer of Inland Revenue was a *procedural change* introduced vide Finance Act, 2015 in the mode and manner of carrying audit, and thus was to apply retrospectively to the cases of Respondent-Companies.

24. Ordinarily, any amendment introduced in law would have prospective effect, unless the amendment expressly provides for it to have retrospective effect. The issue relating to retrospectivity of amendment in procedural law has been well settled by Lord Blackburn in the celebrated case of *Gardner v Lucas*, wherein he opined:-

> ***"it is perfectly settled that if legislature intended to frame a new procedure that, instead of proceeding in this form or that, you should proceed in another and a different way, clearly then bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."***

25. The principle enunciated in the above case has been consistently followed. In this regard, *Maxwell* in *Interpretation of Statutes (Tenth Edition)* also

reaffirmed the principle of interpreting changes in procedural laws in terms that:-

> ***"a new procedure would be presumably inapplicable, where its application would prejudice rights established under the old, or would involve a breach of faith between the parties."***

26. What is crucial to note is that, if an amendment introduced deals purely with the procedure in an *action*, and does not affect the *rights* of the parties, the new procedure shall apply to all such pending and future proceedings. No party has a vested right to a particular procedure or to a particular forum. However, in the instant case, the issue is not purely *procedural*; but it affects the substantive *rights* that had not only accrued but matured into *vested rights* in favour of the Respondent-Companies, as *special audit* had been ordered by the worthy Federal Tax Ombudsman and the worthy President. In such circumstances, any *procedural change*, if it is detrimental to the rights of the Respondent-Companies, cannot be retrospectively applied to their cases. This issue has been very aptly dealt with by the Sindh High Court in ***Shah Nawaz's case (2011 PTD 1558)*** in terms that:-

> ***"The Department's case, in other words, is that a taxpayer can be***

selected for the audit of any tax year under section 177 in terms of how the section stands on the day on which the selection is made. We are unable to subscribe to this view. Since the taxpayer has acquired a vested right with regard to how he can be selected for the audit of any given tax year, he can only be selected for audit consistently with the vested right. The problem however, still remains of reconciling any difference or divergence between section 177 as it stands as a vested right in relation to a given tax year on the one hand, and, on the other, as it stands on any day thereafter on which the taxpayer is actually selected for audit. In order to resolve this issue, it will be necessary to examine in some detail the various 'stages' through which the section has evolved.

18. Applying the foregoing principles to the matter at hand, the "former position" of section 177 (i.e., on 1-7-2008) is as it stood in Stage II, whereas the "subsequent position" of the section (i.e., on 11-12-2009) is as it stood at Stage III, as amended by the Finance (Amendment) Ordinance, 2009. It is clear that the subsequent position in broader than the former position. Therefore, section 177 as it stood on 11-12-2009 could only be applied in relation the tax year 2008 after being aligned with its position on 1-7-2008. The power to select "classes of persons" for audit did not exist on 1-7-2008. Therefore, this power, even if could be held to have existed on 11-12-2009 , could not be applied in relation to the tax year 2008 since that would retrospectively and detrimentally affect the vested rights of the taxpayers in relation to that tax year. For the reasons already stated, this is

> ***impermissible, and it therefore follows that F.B.R had no statutory power under section 177 on 11-12-2009 to select taxpayers for audit by computer ballot for the audit of the tax year 2008".***
>
> *(emphasis provided)*

Accordingly, for the reasons stated hereinabove, this Court declares and holds;-

I. That Chief Commissioner, Inland Revenue, Peshawar to be an *aggrieved person,* being the head of the Revenue Collecting Organ of the Federation, to agitate matters relating to revenue collection within his jurisdiction. And the petitions so filed by him, in his official capacity, before the Constitutional Court are maintainable and subject to Judicial Review.

II. That the decision of the worthy President passed as an *appellate authority* under Ordinance of 2000 is a *quasi judicial order* and not an *executive* or *administrative* order passed by the worthy President under the Constitution, which requires to fulfill legal attributes of a lawful order.

III. That the *quasi judicial order* of the worthy President passed under the Ordinance of 2000, being justiceable, is subject to judicial review.

IV. That during the disputed period (1996-1999) under audit, and when the impugned decisions were passed,

i. there was no legal bar on appointment of *Chartered Accountants* duly registered under the enabling laws;

ii. there was no legal requirement for the *special audit* to be headed by a Chairman, who had to be an Officer of Inland Revenue.

V. That the insertion of sub-section (5) in Section 46 of the Federal Excise Act, 2005 vide Finance Act, 2015 would have prospective effect, and cannot be retrospectively applied to the cases of Respondent-Companies.

VI. That the impugned decisions of the Federal Tax Ombudsman and the worthy President were, thus, *intra vires*.

Both these writ petitions are dismissed, in the above terms.

Announced.

Dated.30.01.2018

CHIEF JUSTICE

J U D G E

Noor Shah, PS
(DB) Hon`ble Mr.Justice Yahya Afridi, Chief Justice
Hon`ble Mr.Justice Syed Afsar Shah, Judge