

# THE HIGH COURT OF SINDH, KARACHI

## Suit No. 1872 of 2016

[Saleem Butt v. Pakistan through Secretary Revenue Division and others]

Plaintiff : Saleem Butt through M/s. Ahmed Hussain and Ms. Pooja Kalpana Advocates.

Defendant 1 : Pakistan, through Secretary Revenue Division and ex-officio Chairman Federal Board of Revenue, through Mr. Anwar Kamal, Assistant Attorney General.

Defendants 2, 4, 6, 7 : Nemo.

Defendant 3 : Director Intelligence and Investigation, Inland Revenue, Karachi, through Syed Mohsin Imam, Advocate.

Defendant 5 : Summit Bank through Muhammad Khalid Advocate.

Defendants 8-10 : Bank AL Habib Ltd. through Naveed Ali Advocate.

Dates of hearing : 20-01-2021, 22-01-2021, 12-02-2021, 26-02-2021 & 04-03-2021

Date of decision : 31-05-2021

## JUDGMENT

**Adnan Iqbal Chaudhry J.-** By this suit the Plaintiff has challenged notice dated 09-08-2016 read with notice dated 16-08-2016 issued under section 176 of the Income Tax Ordinance, 2001 by the Directorate of Intelligence & Investigation (Inland Revenue) (impugned notice), calling upon the Plaintiff to furnish information/documents to explain his income tax returns and wealth statements for different tax years. Subsequently, on 10-11-2016, the Commissioner Inland Revenue issued notice to the Plaintiff under section 177(1) of the Income Tax Ordinance, calling upon the Plaintiff to provide record for conducting audit in respect of tax year 2013. That notice is challenged by the Plaintiff in the connected Suit No. 2415/2016 which is being decided separately. In view of the

subsequent notice under section 177(1) of the Ordinance, the notice under section 176 of the Ordinance impugned in the instant Suit No. 1872/2016 remains relevant only for tax years other than 2013.

2. The impugned notice under section 176 of the Income Tax Ordinance averred as follows:

*“(i) This office has credible information that you have purchased residential plot bearing No.27 measuring 02 Kanal situated in Block-J, Phase-1, DHA, Lahore during tax year 2015 on which tax deducted u/s 236K of the Income Tax Ordinance, 2001 at Rs.168,000/- on 25.05.2016. However, scrutiny of record revealed that property is not appearing in wealth statement for the period ending 30.06.2015. You are required to explain this discrepancy along-with valid reasons and supporting evidence.*

*(ii) Scrutiny of wealth reconciliation statement filed along-with wealth statement for the period ending 30.06.2013 & 30.06.2015 revealed that you have disclosed capital gain on sale of plot(s) at Rs.10,141,000/- & Rs.81,000,000/- respectively. You are requested to file copies of sale deed/agreement in respect of purchased and sale of properties on which gain were arise.*

*(iii) In wealth statements for the period ending 30.06.2014 and 30.06.2015 you have disclosed addition of various properties, whereas you have failed to mention the complete description of the said properties. You are requested to file copies of sale deed/agreement in respect of properties addition during the year mentioned above.*

*(iv) Scrutiny of wealth statement for the period ending 30.06.2012, 30.06.2013, 30.06.2014 & 30.06.2015 you have shown investment in shares which does not match with the information obtained from NCCPL as under:  
.....*

*(v) Verification of information obtained from NCCPL revealed that you have earned gain on sale of shares in tax year 2013, 2014 & 2015. Details are as under:  
.....*

*However, scrutiny of your returns of income/wealth reconciliation statement for the said years revealed that no such is appearing. You are required to explain the above discrepancy along-with supporting evidence.”*

From its contents it is apparent the impugned notice is only under sub-section (1)(a) of section 176 of the Ordinance. By letter dated 15-08-2016, the Plaintiff sought time to give the explanation sought by the impugned notice; but then, on 23-08-2016 the Plaintiff proceeded to file the instant suit.

3. Though section 176 of the Income Tax Ordinance designates the Commissioner Inland Revenue to issue notice thereunder, the impugned notice was issued by an officer of the Directorate General, Intelligence & Investigation (Inland Revenue) [hereinafter 'DG I&I'] apparently in exercise of powers conferred by the FBR under SRO 115(I)/2015 issued under section 230 of the Ordinance. Sub-section (2)(b) of section 230 empowers the FBR to "confer the powers of authorities specified in section 207 upon the Directorate General and its officers". The authorities specified in section 207 include the Commissioner Inland Revenue. In that background, the prayer in the suit was for a declaration that "*sections 208(2), 209(2) and 230(2) of the Income Ordinance, 2001, so also SRO 115(I)/2015 dated 9.2.2015 and the impugned letters dated 9.8.2016 and dated 18.8.2016 and similar letters to other Defendant Banks and entire proceedings to be malafide, completely without jurisdiction, unconstitutional, illegal, void ab-initio and of no legal effect, while annulling the same.*" A consequential relief for injunction was also sought. The plaint manifests that the suit was brought on the apprehension that the impugned notice under section 176 of the Ordinance was a precursor to amendment of assessment under section 122 of the Ordinance.

4. The banks arrayed as defendants were only *proforma* parties. Out of the authorities arrayed as defendants, written statement was filed only by the Defendant No. 3, Director DG I&I. By order dated 12-10-2020, the other defendants were debarred from written statement and the matter was posted also for settlement of issues. Since the suit involved legal issues only, the counsel were put on notice by order dated 05-11-2020 to make submissions for determining the suit at the preliminary stage pursuant to Order XV Rule 3 CPC.

5. With the assistance of learned counsel, following legal issues emerged for determination of the suit:

- (i) Whether sub-section (2) of section 230 of the Income Tax Ordinance, 2001 is excessive delegation of legislative power and *ultra vires* the Constitution of Pakistan ?

If the above issue is decided in the negative, the following then arise :

- (ii) Whether SRO 115(I)/2015 and the impugned notice under section 176 of the Ordinance issued by the DG I&I pursuant thereto, are without jurisdiction ?
- (iii) Whether the impugned notice under section 176 of the Ordinance militates against the scheme of deemed assessment under section 120 of the Ordinance, hence *ultra vires* the Ordinance ?
- (iv) Whether the impugned notice is *malafide* and/or discriminatory of the Plaintiff ?
- (v) What should the decree be ?

6. Since learned counsel stated that were ready to proceed forthwith, arguments were commenced by Mr. Ahmed Hussain, Advocate for the Plaintiff. However, later on Ms. Pooja Kalpana Advocate stepped in for the Plaintiff due to the illness of Mr. Ahmed Hussain. During the course of arguments it transpired that SRO 115(I)/2015, which was subject matter of this suit, had been struck down by a learned single judge of the Lahore High Court *vide* judgment dated 29-12-2020 in the case of *Nestle Pakistan Ltd. v. Federation of Pakistan* (W.P. No. 4361/2017), *albeit* an appeal by the tax department was pending before a Division Bench of the Lahore High Court. Learned counsel then made submissions also on that aspect of the matter.

*Issue No.(i): Whether sub-section (2) of section 230 of the Income Tax Ordinance, 2001 is excessive delegation of legislative power and ultra vires the Constitution of Pakistan ?*

7. Section 230 of the Income Tax Ordinance, 2001 reads as under:

**“230. Directorate General (Intelligence and Investigation), Inland Revenue.—** (1) The Directorate General (Intelligence and Investigation) Inland Revenue shall consist of a Director General and as many Directors, Additional Directors, Deputy Directors and Assistant Directors and such other officers as the Board, may by notification in the official Gazette, appoint.  
(2) The Board may, by notification in the official Gazette,—  
(a) specify the functions and jurisdiction of the Directorate General and its officers; and

(b) confer the powers of authorities specified in section 207 upon the Directorate General and its officers.”

Learned counsel for the Plaintiff submitted that the power given to the FBR by sub-section (2) of section 230 of the Ordinance to specify the functions and jurisdiction of the DG I&I, and to confer upon its officers the powers of income tax authorities, was without guidelines, an excessive delegation of legislative power which was open to arbitrary use, thus making the said provision contrary to the Fundamental Right enshrined in Article 25 of the Constitution of Pakistan. In support of that, learned counsel placed reliance on the cases of *Sakrand Sugar Mills Ltd. v. Federation of Pakistan* (PTCL 2014 CL. 154), *Pakistan Tobacco Company Ltd. v. Government of NWFP* (PLD 2002 SC 460), and *Jurists Foundation v. Federal Government* (PLD 2020 SC 1).

8. The question as to what extent and on what principles can legislative powers be delegated, was discussed by the Supreme Court in *Zaibtun Textile Mills Ltd. v. Central Board of Revenue* (PTCL 1983 CL 230). There, after noting that it had been observed in the case of *Muhammad Ismail & Co.* (PLD 1966 SC 388) that it was only ‘essential legislative power’ that is incapable of being delegated, *Zaibtun* ultimately held that:

“22. .... In the final analysis this being a question of the *vires* of the assertion of a constitutional power, has to be decided with reference to limitations placed by the Constitution on the scope of the power of the Legislature, either expressly or impliedly by necessary intendment .....

24. .... To my mind the relevance of the rule against delegation of legislative function is confined and based on the aforesaid constitutional position. But it may be emphasised once again that no specific test can be formulated and laid down for general application in every case which comes up for examination by the Courts in regard to the objection on the ground of impermissible delegation.....

Thus it will be futile to attempt to further narrow down the broad constitutional position mentioned above into the form of fixed and determined rule for ready application. Each case has to be determined in the context of its particular circumstances and considerations, in the background of the broad principles mentioned above”.

Ever since *Zaibtun*, it has been the consistent view of the Supreme Court that it is only the delegation of “essential legislative power” that can be called in question. The cases of *Pakistan Tobacco Company* and *Jurists Foundation* cited by learned counsel for the Plaintiff are no exception. The case of *Sakrand Sugar Mills* also relies on *Zaibtun*. However, the question as to what actually constitutes ‘essential legislative power’, is something which must, and has always been decided in the peculiar circumstances of each case, that being the ratio of *Zaibtun* as also discussed in *Sakrand*.

9. Short of stating that ‘essential legislative power’ cannot be delegated, learned counsel for the Plaintiff was unable to demonstrate how the specifying of functions and area-jurisdiction of the DG I&I and its officers, and permitting them to exercise specified powers, can be said to be an ‘essential’ legislative power. In fact, the powers conferred on the FBR under sub-section (2) of section 230 of the Ordinance are more of ‘administrative’ powers than ‘legislative’ powers, which also align with the powers of the FBR under section 4 of the Federal Board of Revenue Act, 2007. Therefore, reliance placed by learned counsel for the Plaintiff on the doctrine of excessive delegation is misconceived.

10. There is a more critical aspect of the matter. In *Lahore Development Authority v. Imrana Tiwana* (2015 SCMR 1739), while observing that the power to strike down or declare a legislative enactment void has to be exercised with the greatest care and caution, the Supreme Court summarized as follows the rules which must be applied before declaring laws to be unconstitutional<sup>1</sup> :

“I. There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;

II. Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;

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<sup>1</sup> Also reiterated in *Sui Southern Gas Company Ltd. v. Federation of Pakistan* (2018 SCMR 802).

III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;

IV. If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;

V. The Court will not decide a larger constitutional question than is necessary for the determination of the case;

VI. The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;

VII. The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;

VIII. The Court will not strike down statutes on principles of republican or democratic government unless those principles are placed beyond legislative encroachment by the Constitution."

*Imrana Tiwana* went on to reiterate :

"71. This Court has on several occasions held that where a statute is not ex-facie repugnant to Fundamental Rights but is capable of being so administered it cannot be struck down unless the party challenging it can prove that it has been actually so administered".

Therefore, it was never sufficient for the Plaintiff to argue that sub-section (2) of section 230 of the Income Tax Ordinance was unconstitutional for being excessive delegation of legislative power, and the Plaintiff had also to demonstrate that the use of powers under said provision had lead to an infringement of his Fundamental Right under Article 25 of the Constitution. Whether that has been done by the Plaintiff or not, is dealt with under Issue No. (iv) *infra*.

The upshot is that the challenge to the *vires* of sub-section (2) of section 230 of the Income Tax Ordinance on the ground of excessive delegation, cannot succeed. Issue No.(i) is answered in the negative.

*Issue No.(ii): Whether SRO 115(I)/2015 and the impugned notice under section 176 of the Ordinance issued by the DG I&I pursuant thereto, are without jurisdiction ?*

11. To reiterate, the impugned notice under section 176 of the Income Tax Ordinance was issued by the DG I&I in exercise of powers conferred by the FBR *vide* SRO 115, which in turn was issued

by the FBR in exercise of powers under sub-section (2) of section 230 of the Ordinance. Apart from challenging the *vires* of sub-section (2) of section 230 of the Ordinance, which point has been decided against the Plaintiff as above, learned counsel for the Plaintiff submitted that SRO 115, along with the impugned notice, should be struck down for want of jurisdiction as done by the Lahore High Court in *Nestle Pakistan Ltd. v. Federation of Pakistan* (W.P. No. 4361/2017).

12. To examine the point of jurisdiction raised to challenge SRO 115, the discussion must start with the case of *Wasim Ahmad v. Federation of Pakistan* (2014 PTD 1733) decided on 20-03-2011. There, a Division Bench of this Court held that on a combined reading of sections 30, 30A and 30E of the Sales Tax Act, 1990 the FBR was empowered to confer jurisdiction on the officers of the DG I&I to perform functions of Officer of Inland Revenue, but only after having declared the officer of DG I&I “to be” an Officer of Inland Revenue, both of which could be done by the FBR by a common notification. The premise of such finding was apparently on the language of section 30(1) of the Sales Tax Act which provided that the FBR may appoint in relation to any area, person or class of persons, “to be” an officer under that provision. The SRO under challenge was declared *ultra vires* the Sales Tax Act because it had merely empowered the officers of DG I&I to ‘exercise’ certain powers of Officer of Inland Revenue but had not declared them ‘to be’ Officers of Inland Revenue. To comply with the judgment in *Wasim Ahmed*, the FBR issued SRO 116(I)/2015 under sections 30A and 30E of the Sales Tax Act, 1990 appointing officers of the DG I&I to be Officers of Inland Revenue, and conferring upon them powers and jurisdiction to act as such in respect of certain sections of the Sales Tax Act. At the same time the FBR also issued SRO 115(I)/2015 under section 230 of the Income Tax Ordinance, conferring upon the officers of DG I&I powers and jurisdiction of certain income tax authorities mentioned under section 207 of the Ordinance in respect of certain sections of the Ordinance.



13. The above mentioned SRO 116 issued under the Sales Tax Act was then challenged before the Lahore High Court in *F.M. Textile Mills v. Federal Board of Revenue* (2017 PTD 1875), decided on 06-07-2017. After looking at the appointment letters of the officers of the DG I&I, the Lahore High Court observed that all such appointments were made by the FBR by transferring existing Officers of Inland Revenue to the DG I&I, whereas the scheme of section 30A of the Sales Tax Act read with the Federal Board of Revenue Act, 2007 was that appointments to the DG I&I had to be independent of the Officers of Inland Revenue as that to a separate and different cadre; and thus recourse to SRO 116 to confer powers of Officer of Inland Revenue on persons who were already Officers of Inland Revenue, was a contradiction in terms; that in such circumstances the officers appointed to the DG I&I were in fact "Officer of Inland Revenue with any other designation" within the meaning of section 30(1)(j) of the Sales Tax Act, who had to be sub-ordinate to the Commissioner Inland Revenue, whereas SRO 116 proposed otherwise. Additionally, it was held that the powers and functions of the DG I&I had to be delineated separate from the powers and functions of Officer of Inland Revenue; and that when officers of the DG I&I were appointed as Officer of Inland Revenue by SRO 116, such officers ceased to be officers of DG I&I. For said reasons it was held that SRO 116 was *ultra vires* the powers of the FBR and without lawful authority.

It is to be noted that at the time *F.M. Textile* was decided, section 30A of the Sales Tax Act read only as under:

**"30A. Directorate General (Intelligence and Investigation), Inland Revenue.-** The Directorate General (Intelligence and Investigation) Inland Revenue shall consist of a Director General and as many Directors, Additional Directors, Deputy Directors and Assistant Directors and such other officers as the Board may, by notification in the official Gazette, appoint."

14. It appears that to address the judgment in *F.M. Textile*, the legislature brought the following amendments *vide* Finance Act, 2018, assented on 22-05-2018:

- (i) In the Sales Tax Act, section 30A was amended to add sub-section (2) thereto to expressly empower the FBR to confer

upon the DG I&I and its officers the powers of authorities specified in section 30 i.e, the powers of Officer of Inland Revenue;

- (ii) In the Sales Tax Act, the validation clause of section 74A was amended to validate all actions taken pursuant to section 30A prior to the Finance Act, 2018, i.e. SRO 116 and actions taken by the DG I&I thereunder;
- (iii) In the Income Tax Ordinance also, sub-section (2) was added to the validation clause of section 241 to validate all actions taken pursuant to section 230, i.e. SRO 115 and actions taken by the DG I&I thereunder.

15. SRO 115(I)/2015, issued under section 230 of the Income Tax Ordinance, was separately challenged in *Nestle Pakistan Ltd. v. Federation of Pakistan* (W.P. No. 4361/2017). The judgment therein is by the same learned judge who had penned *F.M. Textile* to declare SRO 116 *ultra vires* the Sales Tax Act. In *Nestle*, it has been held that SRO 115 issued under the Income Tax Ordinance, much like SRO 116 issued under the Sales Tax Act, did not delineate the powers and functions of the DG I&I and thus meets the same fate as of SRO 116. Resultantly, SRO 115 was declared to be without lawful authority with the direction to the FBR to specify functions and jurisdiction of the DG I&I before conferring powers to it under section 230 of the Income Tax Ordinance.

16. As noted, the case of *Nestle* relies on the case of *F.M. Textile*. The premise of *F.M. Textile* is two-fold. Firstly, the FBR's act of transferring an Officer of Inland Revenue to the DG I&I, and then re-conferring upon him by SRO 116 the powers of an Officer of Inland Revenue, was found to be anomalous. Secondly, the DG I&I was viewed as a separate cadre within the FBR; and hence it was held that an officer transferred from one cadre to other could not function under both; and that the failure of the FBR to delineate the functions of the DG I&I from Officer of Inland Revenue before issuing SRO 116 was contrary to the scheme of sections 30, 30A and 30E of the Sales

Tax Act read with the Federal Board of Revenue Act, 2007. With the greatest admiration for the author judge, and taking the premise of *F.M. Textile* as submissions advanced by learned counsel for the Plaintiff in this suit, I am not convinced. It appears that the first premise of *F.M. Textile* is on a subjective analysis of the appointments made to the DG I&I, viz. that all such appointments were by way of transfer of persons who were already serving the FBR as Officer of Inland Revenue. In other words, if an employee of the FBR other than an Officer of Inland Revenue were to be subsequently transferred to the DG I&I, or if a fresh induction was made directly for the DG I&I, the said premise would not hold. As regards the second premise of *F.M. Textile*, that seems to detract from the finding in *Wasim Ahmed (supra)* that the FBR was empowered to confer jurisdiction on officers of DG I&I to perform functions of Officer of Inland Revenue after having declared them 'to be' an Officer of Inland Revenue. Since *Wasim Ahmed* is by a Division Bench of this Court, the same is binding on this Bench.

I note here, that the finding in *Wasim Ahmed* with regards to declaring officers of DG I&I 'to be' Officers of Inland Revenue under the Sales Tax Act, 1990 does not seem to attract to the Income Tax Ordinance, 2001 where the requirement of section 30(1) of the Sales Tax Act that an officer of DG I&I should be declared 'to be' an Officer of Inland Revenue, is not present in sections 207 and 230 of the Income Tax Ordinance.

17. At the time *F.M. Textile* was decided, the provision of section 230 of the Income Tax Ordinance, 2001 under which SRO 115 was issued to confer powers on the DG I&I, was distinguishable from sections 30A and 30E of the Sales Tax Act, 1990 under which SRO 116 was issued. The erstwhile section 30A of the Sales Tax Act did not expressly empower the FBR to confer powers of Officer of Inland Revenue on the DG I&I. On the other hand, sub-section (2) of section 230 of the Income Tax Ordinance, reproduced in para 7 above, expressly empowered the FBR to confer powers of income tax authorities on the DG I&I. Though that difference between the provisions of section 230 of the Income Tax Ordinance and the

erstwhile section 30A of the Sales Tax Act is noticed in *Nestle*, it goes on to hold with regards to sub-section (2) of section 230 that :

“7. .... Certainly, it does not make sense to confer the powers of Commissioner and Chief Commissioners and other officers of Inland Revenue on the officers of Directorate as that would be tantamount to setting up a parallel hierarchy of officers to exercise the same powers already conferred upon a regular cadre of officers of Inland Revenue.”

The above observation in *Nestle* is the precise submission advanced by learned counsel for the Plaintiff to assert that SRO 115 and the impugned notice thereunder are without jurisdiction. In my humble view, as long as sub-section (2) of section 230 of the Income Tax Ordinance is intact, the powers of income tax authorities conferred thereby on the officers of the DG I&I *vide* SRO 115, cannot be dislodged on the premise that it is tantamount to setting up a parallel hierarchy of officers within the FBR.

18. In view of the above, I do not find myself in agreement with submissions of learned counsel based on the case of *Nestle*, and I am inclined to take a different view on the matter. Needless to state that in view of Article 201 of the Constitution of Pakistan, the judgments in *F.M. Textile* and *Nestle* delivered by the High Court of another Province do not bind this High Court. As regards the repercussion of the striking-down of a Federal law (SRO 115) by the High Court of one Province in the exercise of its writ jurisdiction, the territorial limits of that was lucidly explained by Justice Mansoor Ali Shah as Chief Justice of the Lahore High Court in *Hassan Shahjehan v. FPSC* (PLD 2017 Lah 665) as under:

“11. Constitutional terms like “High Court for each Province” “within the territorial jurisdiction of the Court” and “all courts subordinate to it” construct a High Court, which has a provincial character. The term “within the territorial jurisdiction of the Court” ubiquitously recurs throughout Article 199 emphasizing the territorial limitation on the jurisdiction of a High Court. The term “All courts subordinate to it” repeated in Articles 201, 202 and 203 place the Provincial High Court atop a provincial pyramidal hierarchy of courts. Constitutional architecture of a Provincial High Court provides that while it enjoys judicial power to examine all laws or actions of the federal, provincial and local governments or authorities, it can only do so if

the cause of action arises or the respondent government or authority is located or if the impugned act or order affects a person *within the territorial jurisdiction of this Court* i.e., within the Province. As a corollary, the relief granted or the writ issued by the High Court also remains *within the territorial jurisdiction of this Court and can only benefit or affect a person within the territorial jurisdiction of the Court*. The relief cannot go beyond the Provincial boundary and affect any other Province or Area or its people. So for example, if a federal law or federal notification is struck down by Lahore High Court, it is struck down for the Province of Punjab or in other words the federal law or the federal notification is no more applicable to the Province of Punjab but otherwise remains valid for all the other Provinces or Areas. Unless of course the Federation or the federal authority complying with the judgment of the Lahore High Court, make necessary amends or withdraw the law or the notification. Which of course would then be open to challenge by the other Provinces or Areas or their people, if they so decide. The other eventuality is that the Federation or the federal authority may or may not enforce the said law or notification in other Provinces, as a matter of administrative decision and instead challenge the judgment of the Lahore High Court before the apex Court of the country. These are the operational repercussions and effects of a judgment, setting aside a federal law or federal notification or decision. However, on a purely constitutional and legal plane, the federal law or federal notification remains in existence for the rest of the country but for the Province of Punjab. This is further fortified by the fact that in case the same federal law or federal notification is challenged in any other Province or Area, the High Court concerned is not bound by the decision of the Lahore High Court and can declare the same federal law or federal notification to be valid law (Reference Article 201 of the Constitution). Therefore, under our Constitution, while our High Courts can judicially examine and strike down a federal law or federal notification, in fact, the said federal law or notification is made non-applicable to the extent of the Province unless the matter is finally decided by the Supreme Court of Pakistan or else if the Federation or the federal authority decide to withdraw or amend the law on their own, in compliance of the judgment.”

To the above I might add that where Federal law struck-down by the High Court of one Province is not struck-down or is held valid by the High Court of another Province, and in the meantime the legislature or the federal authority concerned complies with the judgment of the first High Court and makes necessary amends or withdraws the law, the effect of that amendment or withdrawal in the other Province would be that of ‘repeal’, the consequences of which are then set out in section 6 of the General Clauses Act, 1897. The necessity of stating so is to cater to the fact that after SRO 116 and

SRO 115 were struck down in *F.M. Textile* and *Nestle* respectively, the FBR has issued superseding notifications by way of SRO 1301(I)/2018 and SRO 272(I)/2021 respectively under sections 30A and 30E of the Sales Tax Act, 1990 and section 230 of the Income Tax Ordinance, 2001 which specify the functions of the DG I&I along with the powers and jurisdiction conferred on its officers. Since the latter SROs are not subject matter of this suit, I do not proceed to examine them.

19. Coming back to SRO 115 that was issued under section 230 of the Income Tax Ordinance, the relevant extract of that is as under:

“S.R.O. 115 (I)/2015.- In exercise of the powers conferred by section 230 of the Income Tax Ordinance, 2001 (XLIX of 2001), read with section 208 and sub-section (1) of section 209 thereof, and in supersession of its Notification No. S.R.O. 351(I)/2014, dated the 07<sup>th</sup> May, 2014, the Federal Board of Revenue is pleased to confer upon the officers of the Directorate General (Intelligence and Investigation), Inland Revenue specified in column (2) of the Table below, the powers of the authorities specified in column (3) of the said Table, to exercise powers and perform functions under the provisions of the said Ordinance as specified in column (4) thereof, and having jurisdiction as specified in column (5) of that Table, namely:-

**TABLE**

S. No.	Designation of Officer	Designation of officer of Inland Revenue	Powers and Functions conferred	Jurisdiction
(1)	(2)	(3)	(4)	(5)
1.	Director General I&I (Inland Revenue)	Chief Commissioner/ Commissioner	I. Sections 174, 175, 176, 177 (other than power to initiate audit), 178, 179, 180, 181, 182, Part III, Part XI of Chapter X, Sections 205 and 221.  II. To investigate Suspicious Transactions Reports (STRs) or other assets of persons or classes of persons impounded by any department or agency of the Federal or Provincial government and prepare / transmit reports to respective RTOs or LTUs for the purpose of application of Section 111 and for taking appropriate action under the Ordinance.	Persons or classes of persons carrying on business or residing in areas, within the territorial jurisdiction of Pakistan.
2.	Director, I&I (IR), HQs, Islamabad.	Commissioner	I. Sections 174, 175, 176, 177, 178, 179, 180, 181, 182, Part III, Part XI of Chapter X, Sections 205 and 221.  II. To investigate Suspicious Transactions Reports (STRs) or other assets of persons or classes of persons impounded by any department or agency of the Federal or Provincial government and prepare / transmit reports to respective RTOs or LTUs for the purpose of application of Section	Any person or classes of persons specially assigned by the Director General.

			111 and for taking appropriate action under the Ordinance.	
...	.....	.....	.....	.....
15.	Additional Director-I, I&I Inland Revenue, Karachi	Commissioner	Sections 174, 175, 176, 177 (other than power to select a case for audit), 178, 179, 180, 181, 182, Part III, Part XI of Chapter X, Sections 205 and 221.	I. All persons or classes of persons falling within the jurisdiction of Regional Tax Office Karachi.  II. All persons or classes of person not otherwise specified, if the person resides within the jurisdiction of the offices mentioned at (I) above.
16.	Additional Director-II, I&I Inland Revenue, Karachi	Commissioner	Sections 174, 175, 176, 177 (other than power to select a case for audit), 178, 179, 180, 181, 182, Part III, Part XI of Chapter X, Sections 205 and 221.	I. All persons or classes of persons falling within the jurisdiction of Regional Tax Offices II and III Karachi.  II. All persons or classes of person not otherwise specified, if the person resides within the jurisdiction of the offices mentioned at (I) above.
17.	Additional Director-III, I&I Inland Revenue, Karachi	Commissioner	Sections 174, 175, 176, 177 (other than power to select a case for audit), 178, 179, 180, 181, 182, Part III, Part XI of Chapter X, Sections 205 and 221.	I. All persons or classes of persons falling within the jurisdiction of Large Taxpayers Unit Karachi.  II. All persons or classes of person not otherwise specified, if the person resides within the jurisdiction of the offices mentioned at (I) above.
26.	I. Deputy/ Assistant Director-I, I&I Inland Revenue, Karachi II. Deputy/ Assistant Director-II, I&I Inland Revenue, Karachi	Commissioner	Sections 174, 175, 176, 177 (other than power to select a case for audit), 178, 179, 180, 181, 182, Part III, Part XI of Chapter X, Sections 205 and 221.	Assigned functions in respect of the persons and classes of persons as specified at S.No. 15 above.
27.	I. Deputy/ Assistant Director-III, I&I Inland Revenue, Karachi II. Deputy/ Assistant Director-IV, I&I Inland Revenue, Karachi	Commissioner	Sections 174, 175, 176, 177 (other than power to select a case for audit), 178, 179, 180, 181, 182, Part III, Part XI of Chapter X, Sections 205 and 221.	Assigned functions in respect of the persons and classes of persons as specified at S.No. 16 above.
28.	I. Deputy/ Assistant Director-V, I&I Inland Revenue, Karachi II. Deputy/ Assistant Director-VI, I&I Inland Revenue, Karachi	Commissioner	Sections 174, 175, 176, 177 (other than power to select a case for audit), 178, 179, 180, 181, 182, Part III, Part XI of Chapter X, Sections 205 and 221.	Assigned functions in respect of the persons and classes of persons as specified at S.No. 17 above.
...	.....	.....	.....	.....

20. Given that the challenge in this suit to the jurisdiction of the DG I&I emanates from a notice issued under section 176(1) of the Income Tax Ordinance, it will suffice to examine SRO 115 only for that power. As already observed, sub-section (2)(b) of section 230 of the Ordinance unambiguously empowers the FBR to “confer the powers

of authorities specified in section 207” upon the DG I&I and its officers. Therefore, there is no room for intendment, and it is not sufficient to argue that the same powers as that of authorities listed under section 207 cannot be conferred on the DG I&I and its officers. As regards the requirement of sub-section (2)(a) of section 230, viz., to specify the functions and jurisdiction of the DG I&I and its officers, in my view that too was fulfilled simultaneously by SRO 115 by stipulating the specific provision of section 176 of the Ordinance along with subject-matter and territorial jurisdiction, and nothing more was required to be stated to enable the concerned officer to perform said function. Such convergence of powers and functions has also been explained by the Honourable Supreme Court in *Commissioner Inland Revenue Zone-III, RTO-II Lahore v. Hamza Nasir Wire* (2020 PTD 1790) as under:

“The learned Judge has relied to a great extent on this distinction between functions and powers to quash the disputed show cause notices. There is no cavil with the proposition that to exercise the functions of an office a statutory functionary must possess the relevant powers. However, what was perhaps not highlighted to the learned Court was that the exercise of powers forms part of the performance of the functions of an office. Therefore, when functions of an office are allocated by a competent instrument, the powers appurtenant thereto under the law stand vested in the appointee for exercise thereof.”

In other words, SRO 115 was in sufficient compliance of sub-section (2) of section 230 of the Income Tax Ordinance. The instant challenge fails to appreciate that section 230 of the Income Tax Ordinance, 2001 and SRO 115 issued thereunder, are provisions in aid of assessment and recovery of tax, and thus relate to the machinery of tax assessment and recovery. It is settled law that unlike a charging provision, a machinery provision in a fiscal statute has to be construed liberally and in a manner that facilitates the realization of tax.<sup>2</sup> It was imperative to view said provisions from that vantage point.

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<sup>2</sup> *Friends Sons and Partnership Concern v. The Deputy Collector Central Excise & Sales Tax* (PLD 1989 Lahore 337); and *Commissioner of Income Tax v. Eli Lilly Pakistan (Pvt.) Ltd.* (2009 SCMR 1279).



21. Having concluded that SRO 115(I)/2015 was within the jurisdiction of the FBR, the impugned notice issued by the DG I&I pursuant thereto is not without jurisdiction. Issue No. (ii) is answered in the negative. However, since the FBR has issued the superseding SRO 272(I)/2021, the effect of this enunciation, as discussed in para 18 above, would be that in the Province of Sindh, SRO 115(I)/2015 would be taken to have been repealed with the consequence of section 6 of the General Clauses Act, 1897.

*Issue No. (iii): Whether the impugned notice under section 176 of the Ordinance militates against the scheme of deemed assessment under section 120 of the Ordinance, hence ultra vires the Ordinance ?*

22. Learned counsel for the Plaintiff had submitted that section 176 of the Income Tax Ordinance for calling record could not be invoked when no proceedings were pending against the Plaintiff under section 122 of the Ordinance for amendment of assessment, and thus the impugned notice militates against the concept of deemed assessment under section 120 of the Ordinance. Suffice to say that such misconception has by now been laid to rest by the Supreme Court in the case of *Commissioner Inland Revenue Zone-I, RTO, Rawalpindi v. Khan Filling CNG Station, Rawalpindi* (2017 SCMR 1414) as follows:

“Thus the Commissioner, Inland Revenue by virtue of and in exercise of the powers contained in sections 120(1A), 121, 122(1)(5A), **176** and 177 of the Ordinance can initiate the proceedings for investigating the income tax affairs of a person notwithstanding the fact that such return of income by virtue of section 120(1) of the Ordinance was taken as an assessment made and assessment order issued by the Commissioner, Inland Revenue. The deemed assessment order after its amendment with conscious application of mind loses its legal effect in terms of subsection (10) of section 177 of the Ordinance.”

Therefore, issue No. (iii) is answered in the negative.

*Issue No.(iv): Whether the impugned notice is malafide and/or discriminatory of the Plaintiff ?*

23. Learned counsel for the Plaintiff submitted that the impugned notice is *malafide in fact*; whereas learned counsel for the department

submitted that the allegation of *malafides* was baseless when it was not even alleged that the concerned officer of the DG I&I had any axe to grind against the Plaintiff.

It is settled law that a mere allegation of *malafides* is not enough to dislodge the presumption of correctness attached to official acts, and before the allegation of *malafides in fact* can be allowed to be proved, such *malafides* have to be pleaded with particulars.<sup>3</sup> Apart from a bald averment of *malafides*, the plaint does not give particulars. Rather, para 5 of the plaint states that “*If called upon, the Plaintiff shall give details, .....*”. Resultantly, the allegation of *malafides* requires no probe.

Learned counsel for the Plaintiff had then submitted that the impugned notice is discriminatory of the Plaintiff and offends his Fundamental Right of Article 25 of the Constitution. However, that submission would have been worthwhile had the impugned notice not assigned any reasons. The impugned notice, reproduced in para 2 above, clearly gives plausible reasons for asking for documents under section 176 of the Income Tax Ordinance. The impugned notice was never replied by the Plaintiff. The plaint also does not attack the grounds taken in the impugned notice, nor were such grounds addressed during the course of submissions. Therefore, the Plaintiff had never set-up a case for discrimination. Issue No.(iv) is also answered in the negative.

*Issue No. (v): What should the decree be?*

24. Having answered all issues against the Plaintiff, the suit is dismissed along with pending applications.

**JUDGE**

Karachi:  
Dated: 31-05-2021

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<sup>3</sup> Reiterated in *Justice Qazi Faez Isa v. The President of Pakistan* (PLD 2021 SC 1).