JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P No.37358 of 2016

F M Textile Mills & others

Versus

Federal Board of Revenue & others

J U D G M E N T

Date of Hearing.	08-06-2017
PETITIONERS BY:	M/s Imtiaz Rasheed Siddiqui, Shahryar Kasuri, Muhammad Hamza, Raza Imtiaz, Omer Tariq Shamim, Jamshed Alam, Qadeer Kalyar, Khurram Shahbaz Butt, Advocates.
RESPONDENTS BY:	Mr. Nasar Ahmad D.A.G. Barrister M. Umer Riaz, Ch. Imtiaz Elahi, Kausar Parveen, Sarfraz Ahmad Cheema, Shahid Usman, Saqib Haroon Chishti, Shahid Sarwar Chahil and Atif Ali Bukhari, Advocates.

Shahid Karim, J:-

Introduction:

This judgment shall also decide connected constitutional petitions W.P No.29474 of 2015, W.P No.28698 of 2015, W.P No.16866 of 2015, W.P No. 30331 of 2017 and W.P No.21988 of 2017. A summary of the facts of each petition will be given in the later part of the judgment as the facts will have to be necessarily connected to the resolution of the issues of law which arise in these petitions. These petitions are woven into a unified fabric by the challenge in these petitions to SRO 116(I)/2015 issued by the Federal Board of Revenue (**FBR**) on 9.2.2015 (**SRO 116**) in exercise of the powers conferred by sections 30, 30A and 30E of the Sales Tax Act, 1990 (**"the Act, 1990"**). It is the case of the counsels

for the petitioners that SRO 116 is outwith the authority of FBR and must be struck down. As a consequence, the prayer is for the proceedings set in motion on the basis of SRO 116 to be quashed as being without lawful authority and of no legal effect.

The Issues:

2. The challenge to SRO 116 has its genesis in two separate but related arguments:

i. *Whether the provisions of section 30 read with section 30A of the Sales Tax Act, 1990 (**Act, 1990**) require the setting up and formation of a Directorate General (Intelligence & Investigation) [Inland Revenue] (**D.G I & I**)IR prior to the declaration of those officers as officers of Inland Revenue and the conferment of powers under the Act, 1990 in terms of section 30E.*

ii. *Whether the powers conferred on the officers of D.G I & I under SRO 116 can validly be conferred as such powers are beyond the remit of the authority of officers appointed to D.G (I & I)IR ?*

3. It is not necessary to reproduce, *in extenso*, the entire SRO 116. However, in order to comprehend and lay the foundation for the discussion that follows, some portion of SRO 116 will have to be reproduced which will be sufficient to give an insight in the character of SRO 116. SRO 116 is to the following effect:-

GOVERNMENT OF PAKISTAN
REVENUE DIVISION
FEDERAL BOARD OF REVENUE

****

Islamabad, the 9th February, 2015

NOTIFICATION
(SALES TAX)

S.R.O. 116(I)/2015.– In exercise of the powers conferred by sections 30,30A and 30E of the Sales Tax Act, 1990, and in supersession of all existing Notifications issued in this behalf, the Federal Board of Revenue is pleased to appoint the officers of the Directorate General Intelligence and Investigation, Inland Revenue, specified in column (2) of the Table below, to be the officers of Inland Revenue and exercise such powers and perform functions of officers of Inland Revenue as mentioned in column (3) of the said Table, under the provisions of the said Act specified in column (4) thereof, and having jurisdiction over persons specified in column (5) of that Table, namely:–

TABLE

S. No.	Designation of Officer of Intelligence and Investigation (IR)	Designation of Officer of Inland Revenue	Powers and Functions conferred	Jurisdiction
(1)	(2)	(3)	(4)	(5)
1.	Director General Intelligence Investigation (IR)	Chief Commissioner (Inland Revenue)	Sections 21(4), 25(1), 25(2) 25A, 25AA, 31, 32, 33, 37, 37A, 37B, 37I, 38, 38A, 38B, 40, 46, 47 and 57	Persons or classes of persons carrying on business in areas or residing, within the territorial jurisdiction of Pakistan.
2.	Director, Intelligence & Investigation (IR), Headquarter, Islamabad	Commissioner (Inland Revenue)	Sections 21(4), 25(1), 25(2) 25A, 25AA, 31, 32, 33, 37, 37A, 37B, 37I, 38, 38A, 38B, 40, 46, 47 and 57	Persons or classes of persons carrying on business in areas or residing, within the territorial jurisdiction of Pakistan as authorized by Director General Intelligence & Investigation (IR)
3.	Director, Intelligence & Investigation (IR), Islamabad	Commissioner (Inland Revenue)	Sections 21(4), 25(1), 25(2) 25A, 25AA, 31, 33, 37, 37A, 37B, 37I, 38, 38A, 38B, 40, 46, 47 and 57	I. All cases assigned to Large Taxpayers Unit, Islamabad & All persons or classes of persons carrying on business, falling within the territorial jurisdiction of the Regional Tax Offices Rawalpindi and Regional Tax Office Islamabad II. All persons or classes of persons not otherwise specified if the person resides in areas mentioned at (I) above.
4.	Director, Intelligence & Investigation (IR), Karachi.	Commissioner (Inland Revenue)	Sections 21(4), 25(1), 25(2) 25A, 25AA, 31, 33, 37, 37A, 37B, 37I, 38, 38A, 38B, 40, 46, 47 and 57	I. All cases assigned to Large Taxpayers Unit, Islamabad & All persons or classes of persons carrying on business, falling within the territorial jurisdiction of the Regional Tax Offices Karachi, Regional Tax Offices, II & III Karachi II. All persons or classes of persons not otherwise specified if the person resides in areas mentioned at (I) above
5.	Director, Intelligence & Investigation (IR), Lahore	Commissioner (Inland Revenue)	Sections 21(4), 25(1), 25(2) 25A, 25AA, 31, 33, 37, 37A, 37B, 37I, 38, 38A, 38B, 40, 46, 47 and 57	I. All cases assigned to Large Taxpayers Unit, Lahore & All persons or classes of persons carrying on business, falling within the territorial jurisdiction of the Regional Tax Offices Lahore, Regional Tax Offices, II, Lahore, Regional Tax Offices, Sialkot and Gujranwala. II. All persons or classes of persons not otherwise specified if the person resides in areas mentioned at (I) above

SHC Judgment:

4. SRO 116 has its provenance in a judgment of the Sindh High Court, Karachi reported as *Wasim Ahmad v. Federation of Pakistan* (**2014 PTD 1733**). The challenge, amongst others, in that judgment was to SRO 775(I)/2011

and the following extract of the judgment while holding the said notification to be *ultra vires* would be relevant:-

> *"21. The foregoing discussion takes us to 30-6-2011. The changes made by the Finance Act, 2011 must now be considered, as well as the other two notifications to which we were referred, S.R.O. 775/2011 and S.R.O. 776/2011. The Finance Act made no changes to section 3A of the Customs Act. That section therefore, as before, continued to refer to the DG (I&I)-FBR. In section 30A of the Sales Tax Act however, the acronym "CBR" was substituted with the words "Inland Revenue". Thus, section 30A now referred to DG (I&I)-IR. In our view, learned counsel for the petitioners correctly contended that this now referred to a wholly different Directorate General. In other words, there were now two separate Directorates General in existence: DG (I&I)-FBR and DG (I&I)-IR. While this is clear from a bare reading of the two sections, it is also confirmed, inter alia, by a visit to the website of the FBR; accessed 13-3-2014). There, the two Directorates-General are listed and referred to separately. Each has its own webpage and is headed by a different officer. The "core functions" listed for the DG (I&I)-IR are distinct from the "charter of functions" that the DG (I&I)-FBR is to perform. (It may however be noted that the "charter of functions" of the latter includes the function "to investigate cases of Sales Tax and Federal Excise made out by the Directorate General prior to 30th June, 2011"-the very point in issue in these petitions.)*
>
> *22. S.R.O. 775/2011 and S.R.O. 776/2011 were issued on 19-8-2011 by the FBR in this changed statutory framework (for text, see Annex II). S.R.O. 775/2011 was issued with reference to sections 30 and 31, of which the latter is not relevant for present purposes. As noted above, this notification purported to appoint the officers of the DG (I&I)-FBR "to be" officers of Inland Revenue retroactively to 1-7-2011, and to exercise the powers in respect of the sections set out in the notification, though only in relation to cases already initiated as on 30-6-2011 till the finalization of the proceedings. Tellingly, in S.R.O. 775/2011 FBR did not invoke the powers conferred by section 30E. This was so for good reason. Section 30E only empowered the FBR to determine the jurisdiction, etc. of the Directorates General specified in the "preceding sections", and none of those now referred to the DG (I&I)- FBR/CBR. The question is whether the FBR could, in the changed statutory framework, still appoint the officers of the DG (I&I)-FBR "to be" officers of Inland Revenue by directly invoking section 30? In our view, the answer must be in the negative. The FBR had no such power. To recapitulate our conclusions with regard to the "person"*

who could be appointed an officer of Inland Revenue under section 30: such person could either be (a) an individual (either named directly or by reference to or virtue of his appointment as an officer of Inland Revenue under any other fiscal statute), or (b) a designated officer of any of the Directorates General referred to in sections 30A to 30DD. No other "person" could or can, in our view, be appointed as an officer of Inland Revenue. Since the officers of the DG (I&I)-FBR no longer fell in any of these categories post-Finance Act, 2011, it necessarily followed that their appointment as such by directly invoking section 30 was invalid. S.R.O. 775/2011 was therefore ultra vires the Sales Tax Act, being beyond the powers of the FBR."

"25. It will be convenient to pause here and summarize the conclusions arrived at so far. In our view:--

(a) S.R.O. 48/2008 was validly issued and effective accordingly.

(b) S.R.O. 56/2010 was invalid, but its invalidity merely meant that S.R.O. 48/2008 continued to hold the field. It remained effective.

(c) S.R.O. 775/2011 is ultra vires the Sales Tax Act.

(d) S.R.O. 776/2011 was invalid, but its invalidity merely meant that, as before, S.R.O. 48/2008 continued to hold the field. It remained effective.

(e) Notwithstanding the changes in sections 30 and 30A, S.R.O. 48/2008 continued to remain effective for all purposes since on a proper interpretation of the various provisions referred to above, (i) the reference therein to officers of Sales Tax subsequently became a reference to officers of Inland Revenue, and (ii) the reference to the DG (I&I)-FBR subsequently became a reference to the DG (I&I)-IR.

(f) Notwithstanding (e) above, it would be appropriate if FBR, in supersession of previous notifications, issues a fresh notification under sections 30 and 30E that complies with both the required conditions, i.e., declares the officers of the DG (I&I)-IR "to be" officers of Inland Revenue (section 30) and establishes their jurisdiction, etc. in relation to specified provisions (section 30E)."

5. Thus, the Sindh High Court directed the FBR to issue a fresh notification in terms of Section 30 and 30E to comply with the requirements of a pre-condition, that is, to

declare the officers of D.G (I & I)-IR to be the officers of Inland Revenue and thereby to establish their jurisdiction in terms of section 30E. The FBR says that SRO 116 has been issued in compliance of the judgment of Sindh High Court and cannot be doubted for its efficacy and sufficiency in law. Without dissecting the merits of the judgment rendered by the Sindh High Court, it does not preclude this Court from entering upon the controversy regarding the legality of SRO 116 and as to whether it comports with the provisions of the Act, 1990. Any direction issued by the Sindh High Court did not at all clothe the FBR with the authority to issue a notification which lacked proper legal basis.

Discussion:

6. The controversy revolves around the true interpretation of sections 30, 30A and 30E of the Act, 1990. For facility, these provisions are being reproduced as under:-

> *"30. Appointment of Authorities.– (1) For the purposes of this Act, the Board may, appoint in relation to any area, person or class of persons, any person to be –*
>
> *(a) a Chief Commissioner Inland Revenue;*
>
> *(b) a Commissioner Inland Revenue ;*
>
> *(c) a Commissioner Inland Revenue (Appeals);*
>
> *(d) an Additional Commissioner Inland Revenue ;*
>
> *(e) a Deputy Commissioner of Inland Revenue;*
>
> *(f) an Assistant Commissioner of Inland Revenue;*
>
> *(g) an Inland Revenue Officer;*

(h) a Superintendent Inland Revenue;

(i) an Inland Revenue Auditor Officer

(ia) an Inspector Inland Revenue; and

(j) an officer of Inland Revenue with any other designation.

(2) The Chief Commissioner Inland Revenue and Commissioner Inland Revenue (Appeals) shall be sub-ordinate to the Board and Commissioner Inland Revenue shall be sub-ordinate to the Chief Commissioner Inland Revenue.

(3) Additional Commissioner Inland Revenue, Deputy Commissioners Inland Revenue, Assistant Commissioner Inland Revenue, Superintendent Inland Revenue, Inland Revenue Audit Officer, Inland Revenue Officer, Inspector Inland Revenue, and officer of Inland Revenue with any other designation shall be sub-ordinate to the Commissioner Inland Revenue and shall perform their functions in respect of such persons or classes of persons or such areas as the Commissioners, to whom they are subordinate, may direct.

(4) Deputy Commissioner Inland Revenue, Assistant Commissioner Inland Revenue, Superintendent Inland Revenue, Inland Revenue Audit Officer, Inland Revenue Officer Inspector Inland Revenue Officer an officer of Inland Revenue with any other designation shall be sub-ordinate to the Additional Commissioner Inland Revenue.

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.

30E. Powers and Functions of Directorate, etc.– The Board may, by notification in the official Gazette, specify the functions, jurisdiction and powers of the Directorates General as specified in the preceding sections and their officers by notification in the official Gazette.

7. There is another provision which will have an important bearing on the question which arises in these petitions. It is the definition of ‘officer of Inland Revenue’

as given in section 2(18) of the Act, 1990, which reads as under:-

> *"2 (18) "Officer of Inland Revenue" means an officer appointed under section 30;"*

8. The true construction to be put on the tenor of SRO 116 must begin with the consideration of the definition of an officer of Inland Revenue as given in section 2(18) and brought forth above. An officer of Inland Revenue simply means an officer appointed under Section 30 of the Act, 1990. Therefore, the term 'an officer of Inland Revenue' is a term having a precise connotation and refers exclusively to officers appointed under Section 30. The use of the word 'means' would lend it a restrictive meaning and no other officer can be included within the definition of an officer of Inland Revenue. This fact will assume significance while juxtaposing with the term 'employees' used in Federal Board of Revenue Act, 2007 (**Act, 2007**) to which we shall revert at a later stage. Therefore, not every employee shall be an officer of Inland Revenue, while an officer of Inland Revenue shall also be an employee of FBR. Section 30 gives the power to the FBR to appoint any person to be an officer of Inland Revenue as defined in that provision in relation to any area, person or class of persons. The various categories of officers of Inland Revenue have been delineated in section 30. Section 30A, on the other hand, prescribes that D.G (I & I) shall consists of a Director General and as many

Directors etc. as the FBR by notification in the official gazette appoint. The learned counsel for the petitioners invite this Court to hold that the appointment to D.G (I & I) of any officer has to be separately done and that officer shall be appointed to a separate cadre designated as D.G (I & I) and who may thereafter be conferred the powers of officers of Inland Revenue by appointing them as such under Section 30 of the Act, 1990. This submission of the learned counsel is nuanced and will have to be considered by a holistic reading of the provisions of the Act, 1990 as also the Act, 2007. This stance is controverted by the FBR by reference to notifications by which officers were appointed to D.G (I & I). Ideally perhaps, the course suggested by the petitioners' counsel ought to be the preferred course adopted by FBR. We will revert to this aspect presently.

9. From a reading of SRO 116, the ineluctable inference is that prior to the issuance of SRO 116, the FBR had, in fact, appointed certain officers to the D.G (I & I) who were then appointed as officers of Inland Revenue and conferred powers to be exercised as specified in column 4 of SRO 116. Therefore, SRO 116, in fact, presupposes the appointment of employees and officers to D.G (I & I). The documents of FBR, on the contrary, which have been brought on record do not comport with the meaning culled out from a reading of SRO 116. The

entire stance of the learned counsel for FBR during the arguments was that there was no requirements for the setting up of a separate D.G (I & I) or for specific officers to be appointed to the said Directorate General and it was enough that certain officers of the FBR were transferred and posted to the D.G (I & I). This stance is also borne out from the documents relied upon by the learned counsel for FBR and filed through C.M No.1484 of 2017. The first document is an office order dated 25.3.2011 by which the existing Director General Tax Base FBR was renamed as D.G, Directorate General (Intelligence & Investigation) Inland Revenue. The office order thereafter proceeded to enunciate the core functions of the Directorate of the Organizational Structure. Subsequent thereto, the FBR issued another office order which purports to have been issued with the approval of the Chairman FBR and the subject matter of the office order is the transfer of posts. It has been mentioned in the office order dated 7.12.2011 that the order has been sanctioned by the President of Pakistan and transfers certain posts of different cadres along with budget/ establishment charges with immediate effect. From its reading, the office order dated 7.12.2011 merely transfers certain officers from their posts held in different cadres to the D.G (I & I) of Islamabad, Lahore, Karachi and Faisalabad. Lastly, the notification dated 29.07.2016 (**"the Transfer Notification"**) has been relied

upon by the learned counsel which too has been issued by FBR and once again relates to the transfers/ posting of certain officers of Inland Revenue from their respective posting to, inter alia, D.G (I & I). Thus, the documents which have been relied upon by the counsel for the FBR show without any manner of doubt that the officers of Inland Revenue currently holding posts in the FBR have been transferred and posted to the D.G (I & I). Relying upon the documents and the case set up by the FBR, it follows ineluctably that existing officers of Inland Revenue were transferred to the D.G (I & I) and this runs counter to the contents of SRO 116 which conveys a different meaning from the stance set up by the FBR in these petitions. For, if the posting to the D.G (I & I) was made in respect of employees who were already officers of Inland Revenue, there was no need to declare those officers as officers of Inland Revenue once again through SRO 116 as the entire exercise will be a contradiction in terms. An officer will need to be declared as officer of Inland Revenue only when he is not already such an officer in terms of section 30 of the Act, 1990 and if he was already such an officer, no need arises for him to be declared as such by the provisions of SRO 116. The notifications relating to the appointment and posting to D.G (I & I) and SRO 116 will have to be reconciled as in my opinion these are mutually contradictory. To reiterate,

the learned counsel for the petitioners contends that appointment under Section 30A has to be an appointment separately to the directorate consisting of D.G (I & I) and the FBR has shown no notification by which such a cadre has been created and officers posted. The contents of SRO 116 indeed support the argument advanced by the learned counsel for the petitioners, in that, it was otiose for the officers of D.G (I & I) to be named as officers of Inland Revenue if they were already such officers and were merely transferred to an attached department of FBR, viz. D.G (I & I). It is the case of FBR that D.G (I & I) is without doubt an attached department of FBR and does not require exclusive and separate appointment and posting to that department and any officer and employee of the FBR can be posted to the D.G (I & I). The complexity of the situation has given rise to the cause of action for these petitions. To lend actuality to the analysis, one will have to resort to the provisions of the Act, 2007 which will given an inkling into the functioning of the FBR and the powers of the Board set up under the Act, 2007.

10. Section 3 of the Act, 2007 establishes a Board to be called "the Federal Board of Revenue (**FBR**)". Some of the powers and functions of the Board are given in section 4(e), (i) & (k) which read as under:

> *"(e) to identify and select through Internal Job Posting process the employees for designated jobs".*

> *(i) to direct or advise, where necessary, investigation or inquiry into suspected duty tax evasion, tax and commercial fraud, money-laundering, financial crimes cases and to coordinate with the relevant law enforcement agencies;*
>
> *(k) to implement the provisions of all the fiscal laws for the time being in force and to exercise all powers provided under the provisions of the fiscal laws and to take any action, make policy, issue rules or guidelines for the purpose to make the implementation of the fiscal laws clearer, transparent, effective and convenient;*

11. Section 5 relates to the human resource management and describes the powers of the Board in respect of its employees. The following powers are relevant for our purposes:-

> *(c) power to lay down qualifications and criteria for the posting of employees against specialized or available posts;*
>
> *(d) power to implement a transparent evaluation process to assess if the official is qualified for posting against a specialized or available post;*
>
> *(e) power to make assessment of integrity of the employees for the purpose of evaluation process or for the purpose of posting, promotion or transfer;*
>
> *"(f) power to transfer, select or post the official or employees against any post on the basis of transparent criteria of selection for internal job postings or transfers;*
>
> *(g) power to transfer any official to any post in any entity owned by the Board;*

12. A cumulative reading of these provisions would show that the powers and functions of the Board include the power to identify and select employees for designated jobs as also to direct or advise where necessary, investigation or inquiry into suspected duty tax evasion, tax and commercial fraud, money laundering, financial crime cases and to coordinate with the relevant law

enforcement agencies. The powers also include the power to transfer the officials or employees of the Board against any post or entity controlled by the Board. It is not the case of the petitioners that D.G (I & I) is not an entity controlled by the Board. If that be so, then the Board has the power to transfer any officer of Inland Revenue Service to any post in the entire FBR which includes the D.G (I & I). It goes without saying that section 5 of the Act, 2007 also confers power on the Board to select an official or employee against any post on the basis of transparent criteria of selection for internal job postings or transfers. That power of selection may also be exercised by the Board. However, the fact remains that the FBR in the instant case has in all cases transferred its officers of Inland Revenue to be the officers of D.G (I & I). Therefore, in essence, what the FBR did through SRO 116 combined with the Transfer Notification was to appoint "an officer of Inland Revenue with any other designation" [S.30(1)(j)]. By the transfer orders which have been produced before this Court through C.M No.1484 of 2017, the officers of Inland Revenue have been posted as officers of D.G (I & I) against the designation given in section 30A of the Act, 1990. However, it requires to be emphasized once again that any such officer will be "an officer of Inland Revenue with any other designation" within the meaning of section 30(1)(j) of the Act, 1990. Thus what

SRO 116 intends to achieve is to appoint officers of Inland Revenue to be transferred and posted as officers of D.G (I & I) and thereby confer powers which they shall exercise in terms of section 30E of the Act, 1990. At the heart of SRO 116 is the conferring of powers of officers of Inland Revenue on officers of D.G (I & I). The intention is certainly not to transfer them back as such officers to be appointed under Section 30 (although the effect is inevitably the same) and this can be culled out from the acts of these officers which are under challenge as those acts (like registration of FIRs etc.) have been performed in their capacity as officers of D.G (I & I) (and by using such designations) and not as officers of Inland Revenue specified in section 30. This bolsters the view that the combined effect of SRO 116 and the Transfer Notification is to appoint these officers as "officers of Inland Revenue with any other designation". It lies within the periphery of powers of the FBR to appoint any officers of Inland Revenue by transfer and post them to any attached department of the FBR and no cavil can be taken to it. The language of SRO 116 is not happily worded and perhaps was influenced by the judgment of the Sindh High Court referred to above but in my opinion when a transfer is made of an officer of Inland Revenue within the meaning of section 30 to any attached department of the FBR, no need arises for designating that officer as officer of Inland

Revenue once again. The effect is all too apparent: by the act of transfer, the officer is appointed to D.G (I & I) and assumes the powers and functions as such officer. That the FBR fell into a fallacy by taking recourse to SRO 116 (although the law mandates otherwise) shall become more apparent in the paragraphs that follow.

13. We shall now proceed to address the related issue which arises from the discussion in the preceding paragraphs. The issue stems directly out of the conclusion drawn hereinbove as also more importantly that the officer so appointed to the D.G (I & I) is an "officer of Inland Revenue with any other designation" within the meaning of section 30(1)(j) of the Act, 1990. The question is as to how the provisions of section 30 treat such an officer of Inland Revenue with any other designation. This has been brought forth in sub-section (3) of section 30 of the Act, 1990, which states that:-

> *"(3) Additional Commissioner Inland Revenue, Deputy Commissioners Inland Revenue, Assistant Commissioner Inland Revenue, Superintendent Inland Revenue, Senior Auditor Inland Revenue and Officer of Inland Revenue with any other designation shall be sub---ordinate to the Commissioner Inland Revenue."*

14. By the mandate of sub-section (3) above, an officer of Inland Revenue with any other designation "shall be sub-ordinate to the Commissioner Inland Revenue and shall perform their functions in respect of such persons or classes of persons or such areas as the Commissioner, to

whom they are sub-ordinate may direct". The construction to be put on sub-section (3) will necessarily impact the character and legality of SRO 116. In a nub, an officer of Inland Revenue with any other designation (which includes the officers appointed to D.G (I & I)) shall be sub-ordinate to the Commissioner Inland Revenue. Therefore, no officer above the rank of Commissioner Inland Revenue can be appointed as an officer of Inland Revenue with any other designation. If any such officer who is higher in rank to the Commissioner Inland Revenue is appointed to the D.G (I & I), this would not only be a contradiction of sub-section (3) of section 30 but will also adversely affect the hierarchal edifice contemplated by sub-sections (2), (3) and (4) of section 30 of the Act, 1990. It ineluctably follows that the FBR cannot confer on such an officer to exercise powers and perform functions of an officer of Inland Revenue higher in rank to the Commissioner Inland Revenue. It will at once be noticed that the FBR by virtue of SRO 116 has conferred on the designated officers of Intelligence and Investigation to exercise powers and functions of inter alia Chief Commissioner (Inland Revenue) as also Commissioner (Inland Revenue) which is indefensible from a reading of subsection (3) of section 30. Even if it be deemed that certain officers have been appointed by the FBR to D.G (I & I) and have been, by SRO 116, appointed as officers of Inland Revenue, they

will, at best, be covered by section 30 (1)(j) and referred to as "an officer of Inland Revenue with any other designation". That officer will always be required to perform his functions by remaining sub-ordinate to the Commissioner Inland Revenue and as the Commissioner may direct. To that extent, SRO 116 issued by FBR travels beyond the mandate conferred upon FBR by a combined reading of the provisions of the Act, 2007, section 30 and 30A of the Act, 1990. To recapitulate, no officer appointed to D.G (I & I) can be conferred with powers of Commissioner Inland Revenue and any officer higher than the Commissioner Inland Revenue. Only such powers can be conferred which will render such an officer to be sub-ordinate to the Commissioner Inland Revenue. That is the only way in which the SRO 116 can be reconciled and assimilated with the provisions of section 30 and 30A of the Act, 1990.

15. Thus it follows that since an officer of Inland Revenue by any other designation shall be subordinate to the Commissioner Inland Revenue, that officer cannot be conferred powers of Commissioner Inland Revenue as the said officer is, by law, to act as a subordinate to the Commissioner Inland Revenue and "shall perform their functions in respect of such persons or classes of persons or such areas as the Commissioner, to whom they are subordinate, may direct". An officer of DG(I&I) is to

perform such functions as are directed by the Commissioner Inland Revenue to be performed and it would be incredulous and fantastic to assume that that officer, while being subordinate to the Commissioner Inland Revenue, exercises powers and functions at par with the Commissioner Inland Revenue. This aspect is being considered in the context of the specification of jurisdiction and powers by FBR in SRO 116 by which, amongst others, the power under section 25 has also been conferred to be exercised by the delegatee of that power. A situation may arise where the Commissioner Inland Revenue may require an officer of DG (I&I) not to perform his functions in respect of a person or class of persons against whom the officer of DG(I&I) intends to proceed under section 25. This will have the unsavory effect of creating an anomalous situation and making redundant the powers conferred by SRO 116.

What in law should the FBR do?

16. The Board generally has employees defined in section 2(f) of the Act, 2007 to mean:-

> *"2 (f) "employees" means the persons in the employment and service of the Board and its offices, organizations and its departments;*

17. The employees are persons in the employment and service of the Board and its offices, organizations and attached departments. And by virtue of section 4(1)(e) read with section 5(1)(f), the Board has the power to

identify and select through Internal Job Posting process, the employees for designated jobs. Also, thereby, the power to transfer, select or post the official or employee against any posts vests in the Board. The ineluctable inference is that the Board can post or appoint any of its employees to one of its attached departments or to a designated job as for example, an officer of D.G (I & I) in this case. It is not at all necessary to take a circuitous route to appoint them as officers of Inland Revenue, as a first step, and then to confer them the powers of an officer of Inland Revenue. Rather, the Board may well take a straight path and is clothed with the authority to appoint any of its employees as an officer of D.G (I & I) and thereupon confer on that officer the functions, jurisdiction and power by resort to section 30E. The same scheme seems to have been followed by the Board while appointing officers of Inland Revenue under Section 30. That is, the Board proceeded to appoint some of its employees as officers of Inland Revenue so as to exercise the powers as such officers under the Act. Thus the appointment as an officer of Inland Revenue under Section 30 and as an officer of D.G (I & I) are two distinct postings designed to achieve a transparent evaluation process for posting against a specialized post (Section 5(1)(d) of the Act, 2007) and should not be confused one with the other. The entire emphasis is on “posting against specialized job”

and the preamble of Act, 2007, too, attests to this view. The preamble says that:-

> ***"WHEREAS*** *it is desirable to enhance the capacity of the tax system to collect due taxes through application of modern techniques, providing assistance to tax payers and creating a motivated, satisfied, dedicated and competent professional work force that is required to perform at an enhanced efficiency levels;*
>
> ***WHEREAS*** *the Federal Board of Revenue must pursue its objective and vision to be a modern, progressive, effective, autonomous and credible organization for providing quality services and promoting compliance with tax related laws, while being mindful of upholding values such as integrity, professionalism, teamwork, courtesy, fairness, transparency and responsiveness;*
>
> ***WHEREAS*** *it is expedient to regulate the matters relating to the fiscal and economic policies; administration, management; imposition, levy and collection of taxes and duties;*
>
> ***AND WHEREAS*** *it is necessary to re-organize the Board of Revenue to enhance the scope of activities and operations and to have appropriate autonomy and reconstituting Central Board of Revenue as the Federal Board of Revenue;"*

18. The whole purpose of the statutory enterprise will be lost if an officer is firstly appointed to D.G (I & I), then appointed as an officer of Inland Revenue (under Section 30) and thereafter conferred powers of an officer of Inland Revenue on him. It is fallacious to do so and makes a mockery of law. What is the basis of conferring powers of an officer of Inland Revenue (by appointing him as such) when the source of all powers and functions can be derived from section 30E independently and the powers so conferred must conform to the essential purpose of a Directorate.

19. The officers, mentioned in SRO 116 were officers of Inland Revenue originally and were transferred to D.G (I & I). They, by the act of transfer, became officers of D.G (I & I) and ceased to be officers of Inland Revenue as envisaged by section 30. It is ludicrous to, once again, appoint then as officer of Inland Revenue although sections 30A to 30E seem to comprise a distinct statutory scheme unto itself without, in any way, the need to establish a reference to section 30. The powers to be exercised by officers of Inland Revenue are given in section 31, which says that:-

> *"**31. Powers**.– An officer of Inland Revenue appointed under section 30 shall exercise such powers and discharge such duties as are conferred or imposed on him under this Act; and he shall also be competent to exercise all powers and discharge all duties conferred or imposed upon any officer subordinate to him:*
>
> *Provided that, notwithstanding anything contained in this Act or the rules, the Board may, by general or special order, impose such limitations or conditions on the exercise of such powers and discharge of such duties as it deems fit."*

20. The consequence that flows from SRO 116 is that officers of D.G (I & I) are appointed as officers of Inland Revenue under Section 30 and by assuming that charge having been posted as such by transfer, become officers of Inland Revenue and their appointment as officers of D.G (I & I) comes to an end. Thus no powers can be conferred on them under Section 30E and they can only exercise the powers vested by section 30 read with section 31. This line of argumentation leads to this conclusion only: that

SRO 116 merely transfers certain officers inter-departmentally, by the Board, who can only exercise the powers that the law confers upon them and cannot assume a conflation of powers both as officers of D.G (I & I) as well as officers of Inland Revenue. This is the convoluted result that SRO 116 achieves. There is no other meaning that can be culled out of a reading of SRO 116 other than that transfer of certain officers was made thereby, as the act of 'appointment' connotes posting to an office. The taxonomy of tabulated powers is all too apparent in the scheme of law to be ignored.

Section 30E:

21. Let us now proceed to analyse the true extent and scope of section 30E which concerns with the powers and functions of Directorates General specified in the preceding sections. Section 30E reads as under:

> *30E. Powers and Functions of Directorate, etc.– The Board may, by notification in the official Gazette, specify the functions, jurisdiction and powers of the Directorates General as specified in the preceding sections and their officers by notification in the official Gazette.*

22. The provision was inserted by Finance Act, 2005 and must be read in conjunction with sections 30A, 30B, 30C, 30D and section 30DD. These provisions establish, as departments of FBR, directorates general of different descriptions, which by their very nature, convey the areas of their respective jurisdiction and functions. In a way, there is compartmentalization of functions so that the

functions of one Directorate General should not overlap the others'. Besides DG(I&I), for example, the law sets up a Directorate General Internal Audit, Directorate General Training and Research, Directorate General of Valuation etc. The purpose of forming these Directorates General separately is clear and without equivocation viz. to assign them areas of specialized and exclusive nature so that one may not intrude upon the area of activity of the other. The essential attributes must be that the powers and functions to be specified by the FBR shall have a nexus with and relation to the nature of the Directorate General involved and is necessarily hedged in by the peculiar functionality as reflected in its name. Surely, the formation of distinct Directorates General for different fields in not merely a painting to be looked at, or a pauper's will, without more. It has a meaning and a purpose. It cannot be argued, by any stretch of imagination, that an officer of Directorate General Internal Audit can be required to perform the functions of an officer of Directorate General Training and Research. Or that officers of Directorate General Valuation should embark upon functions of Intelligence & Investigation. If the legislature intends them to be formed separately, then indubitably the legislature intended that the FBR, while exercising its powers under Section 30E cannot specify functions, jurisdiction and powers which do not chime well with the peculiar character of that

Directorate General. The notification under section 30E has to be reconfigured with the Directorates General and cannot travel beyond the periphery of powers of that Directorate General. It will have to be borne in mind that the FBR exercises delegated powers under section 30E and must exercise those powers rationally and having a close connection to the purpose of the delegation. It follows from this that only those powers can be conferred which have a nexus to the peculiar structure envisaged of the Directorate General in question. The Directorates General would run amok if the boundaries are crossed and lines are blurred in their functioning and exercise of powers. It would bear repetition, but can an officer of Directorate General Training and Research, by notification, be conferred powers of arrest under section 37-A of the Act, 1990? Simply put, the FBR will not be acting compatibly with the delegated powers under section 30E if it were to do so.

23. What is the purpose of Section 30E and the power that comes to reside in the hands of FBR? That purpose can only be gleaned by the use of purposive interpretation which is sometimes referred as the antonym of textualism. According to *Aharon Barak*, Justices of the United States Supreme Court are divided on the task of constitutional interpretation, and it is his view "*that purposive interpretation provides a proper solution to this*

interpretative dilemma". (See his Foreword to Harvard Law Review 2002). According to *Aharon Barak, "one should not give the constitution a meaning that its express or implied language cannot sustain…..A constitution is a unique legal document. It enshrines a special kind of norm and stands at the top of the normative pyramid……The key question is what is the proper system of interpretation in the context of a particular system of government, in the context of a particular society"? In his view, "purposive interpretation is that proper system. Purposive interpretation is based, of course, on the concept of purpose. Purpose is a normative concept that the law constructs".*

24. As was said by Lord Griffith in the famous case of *Pepper v Hart, (1993) 1 A11 ER 42, 50, (quoted in Gadoon Textile Mills v WAPDA 1997 SCMR 641, 829)*:

> *"The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach to give effect to the true purpose of legislation".*

25. Statutes should, said Lord Roskill in *Anderson v Ryan, (1985) 2 A11 ER 355, 359,*

> *"be given what has become known as a purposive construction, that is to say, the courts should when possible identify the mischief which existed before the passing of the statute and then if more than one construction is possible favour that which will eliminate the mischief so identified".*

26. In short, purposive interpretation rests on the straightforward premise that law is enacted to fulfill a purpose. I will here pause to recall the immutable principle of interpretation that the laws are presumed to be valid, the legislature does not commit a mistake and does not waste its words, too. The various provisions of the Act, 1990 delineate and lay down a compectus of powers and functions of the respective authorities which cannot be employed interchangeably.

27. The rule of contextual setting of a provision was emphasized by Lord Somervell in *Attorney-General v. Prince Ernest Augustus of Hanover [1957] A.C. 436 at 473* where he said:

> *"Is it unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and general scope of the Act constitute the background of the context. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on. It is, I hope, not disrespectful to regret that the subject was not left where Sir John Nicholl left it in 1826. 'The key to the opening of every law is the reason and spirit of the law—it is the " animus imponentis", the intention of the law-maker, expressed in the law itself taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statue: it is to be viewed in connexion with its whole context—meaning by this as well the title and preamble as the purview or enacting part of the statute' (Sir John Nicholl in Brett v. Brett).*
>
> *In the same case Viscount Simonds said:*
>
> > *"... words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only*

> *other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."*

28. As Justice Jackson put it in *SEC v. Joiner, 320 U.S. 344 (1943)*:

> *"However well these rules may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."*

29. In order to lend actuality to the analysis, it would be interesting to refer to some of the powers and functions conferred by SRO 116 and by way of illustration and exposition of the nature of those powers and the contradictions inherent therein, a reference to the powers conferred on Director General I & I (Inland Revenue) listed at serial No.1 of SRO 116 may be alluded to. By column 3, the powers of Chief Commissioner (Inland Revenue) have been conferred to be exercised by the Director General I & I (Inland Revenue). Column 4 in the Table given in SRO 116 delineates the powers and functions so conferred. The first power is that under section 21(4) which, for facility, is reproduced as follows:-

> *"(4) Notwithstanding anything contained in this Act, where the Board, the concerned Commissioner or any officer authorized by the Board in this behalf has reasons to believe that a registered person is engaged in issuing fake or flying invoices, claiming fraudulent input tax or refunds, does not physically exist or conduct actual business, or is committing any other fraudulent activity, the Board, concerned Commissioner or such Officer may after recording reasons in writing, block the*

> *refunds or input tax adjustments of such person and direct the concerned Commissioner having jurisdiction for further investigation and appropriate legal action."*

30. The entire section 21 relates to de-registration, blacklisting and suspension of registration of a registered person or such class of registered persons not required to be registered under the Act. The procedure for blacklisting such persons or suspension of the registration has to be in accordance with the procedure prescribed by the FBR. The enormous power given in sub-section (4) is conferred on the Board, the concerned Commissioner or any officer authorized by the Board in this behalf who may, in case there are reasons to believe that a registered persons is engaged in issuing fake or flying invoices, claiming fraudulent input tax or refunds etc., the Board, the concerned Commissioner or such officer may after recording reasons in writing, block the refunds or input tax adjustment of such person and direct the concerned Commissioner having jurisdiction for further investigation and appropriate legal action. Therefore, primarily the jurisdiction for blocking the refunds or input tax adjustment is conferred on the Board, the concerned Commissioner or such officer as authorized by the Board. It can be argued that the Director General I & I is included in the category of an officer authorized by the Board and SRO 116, in fact, does confer such a power. However, it is anomalous indeed that that officer should direct the

concerned Commissioner for further investigation and appropriate legal action. The jurisdiction has been vested in the Commissioner having jurisdiction for further investigation and appropriate legal action by the legislature and the same powers cannot be conferred by the FBR through a notification and particularly when, as held above, that officer is an officer below the rank of a Commissioner Inland Revenue and cannot, therefore, direct the concerned Commissioner for further investigation and appropriate legal action. It is otiose to confer such a power in the first place as the power has validly been conferred on the concerned Commissioner and upon further investigation, the concerned Commissioner can very well refer the matter to the D.G (I & I) for proceeding under the relevant provision in case a tax fraud has been committed or the registered person is committing a fraudulent activity. Such a power cannot be conferred through SRO 116 on an officer of D.G (I & I). Also for the additional reason that the power under Section 21(4) is to be exercised by either the Board, the concerned Commissioner or any officer authorized by the Board and is not a power peculiar to be exercised by the Chief Commissioner (Inland Revenue) and thus for this reason also such a power cannot be conferred on an officer of D.G (I & I). Yet the conundrum gets more complicated if we were to consider the precise nature of the powers conferred

under Section 21(4). For, the said provision deals with a panoply of powers. The first of these is conferred on the Board, the concerned Commissioner or an officer authorized by the Board, ***"to block the refunds or input tax adjustments of such person".*** The second power is exercised by the "concerned Commissioner having jurisdiction" for further investigation and appropriate legal action. These are distinct powers invested in distinct officers and SRO 116 fails to clarify which of the powers mentioned in section 21(4) have been prescribed to be conferred by it. The lack of specifity will be a recipe for abuse of discretion.

31. The next power that has been conferred on the Director General I & I (Inland Revenue) is the power under Section 25(1) and (2) of the Act, 1990. Section 25 reads as follows:

> ***"25. Access to record, documents, etc****.–(1) A person who is required to maintain any record or documents under this Act or any other law] shall, as and when required by Commissioner produce record or documents which are in his possession or control or in the possession or control of his agent; and where such record or documents have been kept on electronic data, he shall allow access to the officer of Inland Revenue authorized by the Commissioner] and use of any machine on which such data is kept.*
>
> *(2) The officer of Inland Revenue authorized by the Commissioner, on the basis of the record, obtained under sub-section (1), may, once in a year, conduct audit:*
>
> *Provided that in case the Commissioner has information or sufficient evidence showing that such registered person is involved in tax fraud or evasion of tax, he may authorize an officer of Inland Revenue, not below the rank of Assistant Commissioner, to conduct an inquiry or investigation under section 38:*

Provided further that nothing in this sub-section, shall bar the officer of Inland Revenue from conducting audit of the records of the registered person if the same were earlier audited by the office of the Auditor-General of Pakistan.

(3) After completion of audit under this section or any other provision of this Act, the officer of Inland Revenue may, after obtaining the registered person's explanation on all the issues raised in the audit shall pass an order under Section 11.

(4A) After completion of the audit under this section or any other provision of law, the officer of Inland Revenue may, if considered necessary, after obtaining the registered person's explanation on all the issues raised in the audit shall pass an order under Section 11 or section 36, as the case may be, imposing the correct amount of tax, charging default surcharge, imposing penalty and recovery of any amount erroneously refunded..

(5) Notwithstanding the penalties prescribed in section 33, if a registered person wishes to deposit the amount of tax short paid or amount of tax evaded along with default surcharge voluntarily, whenever it comes to his notice, before receipt of notice of audit, no penalty shall be recovered from him:

Provided if a registered person wishes to deposit the amount of tax short paid or amount of tax evaded along with default surcharge during the audit, or at any time before issuance of show cause notice, he may deposit the evaded amount of tax, default surcharge under section 34, and twenty five per cent of the penalty payable under section 33:

Provided further that if a registered person wishes to deposit the amount of tax short paid or amount of tax evaded along with default surcharge after issuance of show cause notice, he shall deposit the evaded amount of tax, default surcharge under section 34, and full amount of the penalty payable under section 33 and thereafter, the show cause notice, shall stand abated.

Explanation.– For the purpose of sections 25, 38, 38A, 38B and 45A and for removal of doubt, it is declared that the powers of the Board, Commissioner or officer of Inland Revenue under these sections are independent of the powers of the Board under section 72B and nothing contained in

> *section 72B restricts the powers of the Board, Commissioner or Officer of Inland revenue to have access to premises, stocks, accounts ,records, etc. under these sections or to conduct audit under these sections.*

32. The provision relates to access to record and documents and obliges a person who is required to maintain a document under the Act as and when required by the Commissioner to produce that record or documents which are in his possession or control. By sub-section (2), the officer of Inland Revenue authorized by the Commissioner on the basis of the record obtained under sub-section (1) may, once in a year, conduct audit. Thus at first blush, the power conferred by section 25 is, in essence, the power to conduct audit. It is a specialized and skilled assignment which cannot be undertaken by the Director General I & I or any other officer of D.G (I & I). Be that as it may, the provisions of sub-sections (1) and (2) read cumulatively merely confer a power to conduct audit and no more. The entire reliance of the learned counsel for the respondents as also the Deputy Attorney General was on the proviso to sub-section (2) which deals with the matters of tax fraud. The proviso comes into play when the Commissioner has information or sufficient evidence showing that such registered person is involved in tax fraud or evasion of tax, the Commissioner may authorize an officer of Inland Revenue to conduct an inquiry or investigation under Section 38. This is the scheme of the

law when a tax fraud is detected. The learned counsel for the respondents as also the learned D.A.G invited this Court to read the proviso independently without reference to sub-sections (1) and (2). This contention should receive a short shrift as the proviso on the basis of established rule is merely an exception to the main provision of which it is a part and has to be read in conjunction with the part of the Act to which the proviso has been made. However, I have no doubt that the proviso will be triggered only upon the conduct of audit by the officer of Inland Revenue authorized by the Commissioner and cannot be set in motion without such audit having been conducted and to precede any action under the proviso. It is the information or sufficient evidence based on the audit which could form the basis of an action in terms of the proviso and on the basis of which the Commissioner can conclude that a tax fraud has, in fact, been committed and so an inquiry or investigation under Section 38 is in order. This was the finding rendered by this Court in W.P No.24062 of 2016 and the following observations are relevant for our purposes:-

> *"13. The category of persons who may be required for any inquiry or investigation in a tax fraud committed by him as mentioned in section 38 is a category which is not free from doubt. The case of this category of persons is relatable to the provisions of section 25 of the Act, 1990. As adumbrated, the Commissioner may direct an investigation or inquiry to be held upon sufficient evidence showing that a registered*

> *person is involved in tax fraud or evasion of tax. This is the only provision perhaps in the Act, 1990 which relates to the involvement of a registered person in a tax fraud or evasion of tax. Such an opinion can be formed by the Commissioner upon the coming in his hands of any record or documents maintained by a registered person. Upon the formation of such an opinion the Commissioner may direct an inquiry or investigation under section 38 to be held. This is precisely the inquiry and investigation contemplated by section 38 while referring to it as one of the categories of persons in respect of whom a notice under section 38 may be served. Therefore, this is the only instance where the provisions of section 38 have a close nexus with the provisions of section 25 and both these provisions are to be read inextricably. In all other cases of categories of persons, section 38 is an independent self-executing provision and can be set in motion without recourse to section 25 of the Act, 1990. By way of elaboration, it may be stated that in case there are allegations of tax fraud or evasion of tax, the provisions of section 38 cannot be invoked unless an opinion has been formed under section 25 by the Commissioner concerned."*

33. Thus, the argument of the learned counsel for the respondents is indefensible that, in fact, SRO 116 confers the powers of the proviso to sub-section (2) of section 25 relating to tax fraud. In any case, SRO 116 confers the powers both under sub-sections (1) and (2) of section 25 and this fact alone should be sufficient to put paid to those arguments. Under no circumstances can the FBR by the terms of SRO 116 confer powers of audit on the officers of D.G (I & I) in complete disregard of the specialized nature of the job of conducting an audit. It is also not the case of FBR that the officers who have been conferred these

powers are skilled in the functions of carrying an audit. It can be seen that the legislature was careful in providing that the Commissioner can only require a person to produce record or documents which are in his possession or control and the conduct of audit will be done by an officer of Inland Revenue who is authorized by the Commissioner and this presupposes that that officer of Inland Revenue will be a skilled officer having the expertise and academic qualifications to carry out audit of records and documents. It could be reasonable to presume that such a power may be conferred on an officer of directorate general Internal Audit but by no stretch of imagination can the D.G (I & I) be given that power in complete oblivion of the specialized nature of these directorates. Thus, it clearly follows that the conferment of powers under Section 25 on the Director General I & I (Inland Revenue) is incompetent and without any rational basis.

34. I may now refer to section 25AA which is a provision dealing with the transactions between Associates and a power has been conferred on the Commissioner or an officer of Inland Revenue to determine the transfer price of taxable supplies between the persons as is necessary to reflect the fair market value of supplies in an arm's length transaction. Once again, the tenor of the provision is purely civil and it is not understandable as to why SRO

116 confers such a power on the Director General I & I (Inland Revenue) as the matter merely relates to determination of transfer price on taxable supplies and will at best lead to a civil liability of short payment of sales tax. The matter relates to transactions between persons who are associates and apparently has no nexus with the remit of the D.G (I & I).

35. Section 31 whose powers have also been conferred on the Director General I & I, is a general provision relating to powers and says that:-

> *"**31. Powers**.– An officer of Inland Revenue appointed under section 30 shall exercise such powers and discharge such duties as are conferred or imposed on him under this Act; and he shall also be competent to exercise all powers and discharge all duties conferred or imposed upon any officer subordinate to him:*
> *Provided that, notwithstanding anything contained in this Act or the rules, the Board may, by general or special order, impose such limitations or conditions on the exercise of such powers and discharge of such duties as it deems fit."*

36. As can be seen from a reading of section 31, it merely reiterates that an officer of Inland Revenue appointed under Section 30 shall exercise such powers and discharge such duties as are conferred or imposed on him under the Act as also he shall be competent to exercise all powers and discharge all duties conferred or imposed upon any officer sub-ordinate to him. Once again, it defies logic as to why this power has been conferred vide SRO 116 as there is no power in section 31 to be conferred in fact. Apart from this; the power under Section 31 has a reference to officers of Inland Revenue appointed under

Section 30 and by a broad sweep of the brush, and without being specific, an entire array of powers of "all the officers of Inland Revenue" have been conferred to been exercised by the Director General. Similar is the case with section 32 which relates to delegation of powers and prescribes that the Board or the Chief Commissioner with the approval of the Board may empower by name or designation an Additional Commissioner Inland Revenue or Deputy Commissioner Inland Revenue to exercise any of the powers of a Commissioner Inland Revenue. Firstly, the power vests in the Board or in the Chief Commissioner which requires the approval of the Board prior to making such an order. Therefore, by the mere conferment of power by the SRO 116, the intent and purpose of section 32 has been compromised. The Chief Commissioner can only make an order with the approval of the Board and this has to be done by empowering by name or a designation a particular Additional Commissioner Inland Revenue to exercise any of the powers of Commissioner Inland Revenue. Secondly, as adumbrated, an officer of D.G (I & I) cannot be the Chief Commissioner and thus it is futile to confer the powers under Section 32. In any case, the conferring of powers under Section 32 merely means that the Chief Commissioner may empower any Additional Commissioner Inland Revenue to exercise the powers of a Commissioner Inland Revenue. This begs the question,

whether D.G (I & I) can empower any Additional Commissioner Inland Revenue to exercise the powers of a Commissioner Inland Revenue under the Act? Can this be countenanced since the D.G (I & I) consists of Directors, Additional Directors, Deputy Directors and Assistant Directors and these are the designations which have been described in section 30A read with section 30(1)(j) of the Act and it cannot be imagined that through SRO 116 the D.G (I & I) has been empowered to confer the powers of a Commissioner Inland Revenue on any Additional Commissioner Inland Revenue that he deems fit. Such a result was not sought to be achieved by the conferment of powers under Section 32 and by doing so the FBR has utterly violated the true import of section 32 and has made a mockery of the delegation of powers conferred on the Board or the Chief Commissioner.

37. The most interesting aspect of SRO 116 is the delegation of the powers under Section 33 of the Act, 1990. Section 33 relates to offences and penalties and its recital reads as follows:-

> ***"33. Offences and penalties****.– Whoever commits any offence described in column (1) of the Table below shall, in addition to and not in derogation of any punishment to which he may be liable under any other law, be liable to the penalty mentioned against that offence in column (2) thereof."*

38. Therefore, section 33 delineates the offences described in column I of the Table given in the section and makes a person liable to the penalty mentioned against that

offence in column II. Primarily, therefore, the provision is about imposition of penalties. However, the nature of section 33 is to describe various offences and penalties for those offences by registered persons under various provisions of the Act, 1990. It is incredulous indeed to confer the powers under Section 33 on an officer of D.G (I & I) as no such power has been mentioned in section 33 to be exercised by any officer of Inland Revenue. The scheme of section 33 conveys merely to describe the offences and their penalties/ punishments for which proceedings are to be taken under different sections of the Act, 1990 to which that offence has a reference. Those sections have been mentioned in column III of the Table given in section 33. Therefore, for all intents and purposes, the proceedings have to be taken under provisions which are different from section 33 and only in respect of the penalties and punishments is the said provision to be made relatable to section 33. That is the entire scheme which permeates section 33. Therefore, there is absolutely no reason to hold an opinion that section 33, in fact, confers powers of any kind which may be exercised by an officer of Inland Revenue. By way of illustration, we can refer to entry II in column I of the Table which describes the offence where any person submits a false or forged document to an officer of Inland Revenue or destroys, alters, mutilates or falsifies the

records including a sales tax invoice or knowingly or fraudulently makes false statement, false declaration, false representation, false personification, gives any false information or issues or uses a document which is forged or false. The following penalty has been provided for the said offence:

> *"such person shall pay a penalty of twenty five thousand rupees or one hundred per cent of the amount of tax involved, whichever is higher. He shall, further be liable, upon conviction by a Special Judge, to imprisonment for a term which may extend to three yeas, or with fine which may extent to an amount equal to the amount of tax involved, or with both."*

39. Thus, the person who commits an offence under entry II of column 1 of the Table commits an offence under Section 2(37) of the Act, 1990. He shall firstly be liable to a civil liability of payment of twenty five thousand or one hundred *per cent* of the amount of tax involved which necessarily means that the amount of tax involved has firstly to be ascertained through an adjudication process. By the second limb of the penalty, he shall further be liable, upon conviction by a Special Judge, to imprisonment for a term which may extend to three years or with fine which may extend to an amount equal to the amount of tax involved or with both. The latter part of the penalty is the jurisdiction of the Special Judge and no such power can be conferred on an officer of Inland Revenue. At best, what the officer can do is to proceed under Section 37B (11) of the Act, 1990 to submit to the Special Judge a complaint in the same form and

manner in which the officer incharge of a police station submits a report before a court. This he shall do after completing the inquiry. This is the power which may be conferred on an officer of D.G (I & I) and the conferring of the power under Section 33 is without any legal basis. In fact, by doing so through SRO 116 the FBR has usurped the powers of the Special Judge and has conferred it on the officer of Inland Revenue. This cannot be done by any stretch of imagination. The rest of the Table given in section 33 follows the same pattern and confers powers of adjudication and imposition of penalty both in the civil law jurisdiction as well as criminal law jurisdiction but none of these powers can be related to or conferred upon an officer of D.G (I & I).

40. The remainder of the powers and functions conferred through SRO 116 seem to have a relation to the nature of the D.G (I & I) and does not require any discussion other than to bring home the proposition that indeed only those powers can be conferred on the officers of D.G (I & I) which have a close nexus to the nature and character of the said Directorate General and it is improper and irrational to confer powers which have no connection with the working and functionality of the D.G (I & I). SRO 116 to the extent of conferring of those powers and functions is *ultra vires* and without lawful authority.

41. To sum up, the Board has sufficient powers under the Act, 2007 to appoint, by posting or transfer, officers of D.G (I & I) and upon such appointment these officers shall perform functions which are peculiar to that Directorate. The powers and functions shall be specified by the Board through a notification issued under Section 30E of the Act, 1990 and those powers and functions will have a close nexus with the purpose which D.G (I & I) is designed to achieve. By appointment, once again, as officers of Inland Revenue (as has been done through SRO 116), the officers so appointed shall be deemed to have been transferred and thereby ceases to function as officers of D.G (I & I). Appointment made under Section 30 is independent of an appointment made under Section 30A and must remain so. But the fundamental principle is that officers should be posted to the Directorates independently with separate and distinct functions. SRO 116 fails to meet these foundational requirements and is thus held to be without lawful authority and of no legal effect.

First Information Reports and their illegality:

42. In W.P No.21988 of 2017, W.P No. 30331 of 2017, W.P No.29474 of 2015, W.P No.28698 of 2015 and W.P No.37358 of 2016, the registration of the First Information Report (FIR) has also been challenged. The primary reliance of the challenge to the registration of an FIR and the initiation of criminal prosecution under the provisions

of the Act, 1990 is on the basis of a judgment of a Division Bench of this Court *viz*. *Taj International (Pvt.) Ltd. etc. v. The Federal Board of Revenue, etc.* (**PTCL 2014 CL. 726**). In a nub, the Division Bench held that the registration of a criminal case was to be preceded by the determination of the tax liability as a civil liability and the amount of tax due ought to be fixed against a person so as to grant jurisdiction in the hands of the officer of Inland Revenue or any other officer authorized by law to set in motion proceedings of a criminal nature. The findings in *Taj International* were anchored on the construction of the words "*on the basis of material evidence has reason to believe*". Some of the extracts of *Taj International* are reproduced hereunder to give an inkling into the holding of the Division Bench in that case:-

> *"17. We now look at the unique construct of punishment (in particular the imposition of fine) under the Act. Perusal of section 33 of the Act reveals that criminal penalties are linked with the "tax loss" or "amount of tax involved." Therefore, instead of providing for imprisonment or fine (ordinarily a certain sum of money) or both as punishment, the "fine" under the Act requires the taxpayer to pay the "tax loss" or "amount of tax involved," thereby indirectly criminalizing, the recovery of "tax due." Is this over-criminalization? Is the 1 set in motion to punish the taxpayer (retribution) or is it to criminalize recovery of tax (as if in addition to recovery procedure under section 48 of the Act) or both?*
>
> *"18. Review of the penalties above, clearly shows that the measure of sentence is linked with the "amount or loss of tax involved." In fact, the above linkage, uses the tool of penalty as a mode of recovery of tax. Hence, criminalization under the Act goes beyond the pale of retribution and deterrence and appears to be principally focused on recovery of tax. The said linkage between "fine" and the "amount of tax due" is missing, if we examine the criminal provisions under the Income Tax Ordinance, 2001. Part XI of Chapter X of the said*

Ordinance provides for criminal prosecution under Sections 191 to 200, which simply provide for imposition of "fine" but does not link it with the "tax loss or amount of tax" (except for compounding the offence under section 202). In the case of Federal Excise Act, 2005, such a linkage is visible, however, it has been pointed out that no criminal proceedings have been initiated under the said law without prior assessment of tax. It, therefore, appears that criminalization under the Act is being treated differently when compared with other tax laws.

19. The background and the departmental justification to this over-criminalization has been frankly pointed out by the learned counsel for the respondent department. He submitted that the civil proceedings leading to assessment of tax and penalties followed by the recovery procedure under section 48 has not proved successful over the years. Hence, to fast track recovery, it had to be criminalized. Without commenting on the legality of this over criminalization, it is settled law that recovery of tax is possible only after the tax has been duly assessed and the amount of "tax due" determined under the Act. Recovery under civil law is initiated once tax has been assessed through the civil adjudicatory process provided under the Act. Tax assessment becomes doubly necessary, when recovery stands criminalized and entails criminal consequences. Other than the penalties hinged on "amount or loss of tax involved," criminalization of recovery of tax is also evident from section 37A(4) of the Act. This provision permits compoundability of the offence if the amount of tax due and penalties as determined under the Act are paid at any stage of the criminal proceedings. Criminal mode of recovery, reinforces the requirement of prior assessment of tax liability under the Act."

"In essence tax fraud is falsifying a tax invoice with the intention to understate the tax liability, or to underpay the tax liability or overstate the entitlement to tax credit or tax refund to cause loss of tax. Even if we assume that the Special Judge convicts the taxpayer, he cannot award the sentence, as "fine" is dependent on the "amount or loss of tax involved" and it is not within the competence or jurisdiction of the Special Judge to assess tax or determine the "amount or loss of tax involved" which is not part of the offence but of the sentence. Further, the facility of compoundability under section 37(A)(4) is not available to the taxpayer, unless the amount of tax due and penalties as determined under the Act."

"23. It has been vehemently stated at the bar, by almost all the petitioners, that the department forcibly hauls up taxpayers under the threat of arrest and criminal prosecution and releases them after extraction of money (shown as the amount of tax due under section 37A). In the absence of tax assessment under section 11 of the Act and without knowing the "amount or loss of tax

involved," neither compoundability is possible nor the award of sentence against the tax payer. Hence the process of hauling up taxpayers and effecting recovery of self-determined amount of sales tax by the officer of the Inland Revenue is brutally unconstitutional."

"25. As a conclusion, we once again reiterate that civil and criminal proceedings can run independently and simultaneously or otherwise. The purpose and objective of criminalizing tax fraud and tax evasion is retribution and deterrence which is achieved through punishment or fine or both. If the law, however, goes further and criminalises recovery of tax in addition to retribution and deterrence, then tax assessment has to take place first under the provisions of the Act. In this background the term "shall be further liable" re-appearing several times in section 33 of the Act holds a chronological significance i.e., that criminal prosecution follows adjudication and assessment of tax under section 11 of the Act.

26. Even if the criminal prosecution under the present scheme of the Act is initiated after assessment of tax under section 11 as discussed above, the constitutionality of hurriedly invoking section 37A on the basis of material evidence requires consideration. Material evidence must be credible and definite if it is to deprive a citizen of his constitutional protection and safeguards under Articles 4 (due process), 9 (human liberty), 10A (fair trial) and 14 (human dignity). Setting in motion of the criminal prosecution cannot be left in the hands of any officer of the Inland Revenue, especially when the said Officers are under an obligation to recover the tax and meet tax targets before the close of the financial year set by the FBR. The process of initiation of criminal prosecution must comply with the requirement of due process and fair trial. The material evidence collected under section 37A needs to be credible and can best pass the test of fair trial and due process if it is an outcome of an inquiry or investigation envisaged under the proviso to section 25(2) of the Act. The outcome of any such inquiry and investigation must be placed before an independent forum like the Directorate General (Intelligence and Investigation), Inland Revenue established under section 30A of the Act to first review the inquiry and investigation and the material evidence and then proceed under the law. Anything short of this process will not only lead to persecution of the tax payers, it will also make a mockery of the fundamental right of fair trial.

28. In view of the above, we hold that the pre-trial steps including arrest and detention cannot be given effect to unless the tax liability of the taxpayer is determined in accordance with section 11 of the Act."

43. This Court will not be required in these proceedings to determine afresh the legality of the registration of the criminal case and FIR against the petitioners in the constitutional petitions, referred to above, since this Court sitting as a Single Bench is bound by the findings rendered by the Division Bench of this Court and since in none of these cases has the department fulfilled the pre-conditions laid down in *Taj International* the registration of the FIRs is held to be without lawful authority and of no legal effect and consequently the FIRs and other criminal proceedings in these cases are directed to be quashed. In W.P No.30331 of 2017, an adjudication order was passed on 16.03.2016 which was subsequently set aside by the Appellate Tribunal Inland Revenue vide order dated 26.05.2017. Without waiting for a determination by the Appellate Tribunal, the FIR was registered on 8.5.2017. It is ironical that the FIR was registered just days before the passing of the order by the Appellate Tribunal and the act seriously and blatantly offended the judgment of this Court in *Taj International*. In the other petitions, referred to above, no adjudication proceedings took place prior to the registration of the FIR and thus the department and its officers fell foul of the ratio settled by the Division Bench of this Court in *Taj International*. The counsels for the respondents urged passionately that leave has been granted by the Supreme Court of Pakistan against the holding in

Taj International. This, alone, does not deter this Court from following the dictum in *Taj International* on the principle settled by respectable authority that a leave granting order does not bind this Court and a judgment rendered by this Court remains applicable and valid. The law laid down is a binding precedent until set aside. See for example, *University of Health Sciences and others v. Mumtaz Ahmad and another* (**2010 SCMR 767**), *Maj. Gen. (Retd.) Ghulam Jilani v. The Federal Government through the Secretary, Government of Pakistan, Interior Division, Islamabad* (**PLD 1975 Lah. 65**), *Trustee of Port of Karachi v. Muhammad Saleem* (**1994 SCMR 2213**) and *Khairullah v. Sultan Muhammad and another* (**1997 SMCR 906**).

44. In W.P No.16866 of 2015, besides a challenge to SRO 116, the issuance of the show cause notice by the Deputy Collector Inland Revenue, LTU, Lahore under Section 11 (3) of the ct, 1990 has also been called in question. Since SRO 116 has been held to be *ultra vires*, the challenge to that extent succeeds in this case as well. Also since the show cause notice is based on a contravention report, prepared by the D.G (I & I) exercising powers under SRO 776(I)/2011, the show cause notice too must be held to be without lawful authority since the very foundation of that notice has been knocked

out by a judgment of this Court passed in W.P No.17608 of 2014 vide order dated 26.12.2016.

Scheme of arrest and prosecution:

45. As adumbrated, this Court is not required to allude to the aspect of arrest and prosecution under the Act, 1990 and its unpalatable nuances as according to the counsels for petitioners, the issue stands settled, for now, by the dictum in *Taj International*. On that basis, the petitioners are entitled to relief. But the judgment in *Taj International* merely deals with one part of challenge to arrests and prosecution vesting in an officer of Inland Revenue by section 37A. There are other aspects which were neither argued nor determined in *Taj International* and which touch upon constitutional rights of dignity and freedom of trade and business. No arguments were addressed on those issues in these proceedings, too, and thus no occasion arises for this Court to enter that thicket. I shall, however, refer briefly to some of the unusual and at times, invidious character of the powers of officers of Inland Revenue in this regard. In all criminal prosecution the registration of a criminal case precedes an arrest of an accused. Although there are exceptions yet this is the usual mode by which the machinery of criminal justice is set in motion. An information is laid to the police relating to a cognizable offence and is reduced to writing. Under the Act, 1990, the arrest precedes the filing of a complaint with the

Special Judge under Section 37B (11) which has to be done "after completing the enquiry." The use of the term 'FIR' is clearly and plainly a misnomer since the Act, 1990 uses the term 'complaint'. Sub-section (6) of section 37B obliges the Sales Tax Officer to record the fact of arrest and to immediately proceed to inquire into the charge against such person. Also the 'FIR' has been registered under Section 37B in these cases yet there is no concept of registration of an FIR in the said provision. The entire scheme envisages the arrest of a person 'who has committed a tax fraud' and his production before a Judicial Magistrate. Thereafter, as explicated, a complaint will be filed with the Special Judge. The process followed by the Sales Tax Officer is alien to section 37B and is unsustainable. There are other fundamental issues which I shall leave to be decided in a future case. The only document that comes close to a so-called 'FIR' is a register required to be maintained by sub-section (10) of section 37B. But the correct appellation would then be to characterize the document as an 'extract from register maintained under Section 37B(10)". This is one of the matters on which rules ought to be framed by FBR to serve as a guide to the Sales Tax Officers/ Officers of Inland Revenue to follow in all matters of arrest and prosecution. We should, at all times, remain cognizant of the historical and potential abuses of the criminal prosecution and

therefore of the necessity of erecting elaborate procedural safeguards between the government and the individual. The provisions in question seriously affect the right to liberty of individual and his autonomy over freedom of movement, intellect and similar choices. It is thus imperative that no procedural impropriety should creep into the whole process. The history of liberty, so said Justice Frankfurter in *McNabb case (318 US 332)*:

> *"has largely been the history of the observance of procedural safeguards".*

46. As Justice Jackson said in *Shaughnuessy (345 US 206)*:

> *"Procedural fairness and regularity are of the indispensible essence of liberty. Some substantive restrictions can be endured if they are fairly and impartially applied."*

47. Chief Justice Earl Warren in the most famous case on Constitutional Criminal Procedure, namely, *Miranda v. Arizona (384 US 436)* said that:

> *"The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."*

48. These petitions are allowed in the following terms:

- *SRO 116 is hereby set aside as being ultra vires the powers of the FBR and is declared without lawful authority and is of no legal effect.*
- *The FIRs registered and the criminal prosecution set in motion in pursuance of SRO 116 are also set aside and quashed.*

- *The Federal Government is directed to frame rules with regard to the transfer and postings under the Act, 2007 of officers and employees of the FBR.*
- *The FBR is directed to frame rules with regard to the Directorates and their functioning. In particular, the FBR will enact rules for structuring the powers given in section 37A which is couched in a broad language and confers wide powers on officers of Inland Revenue.*
- *The FBR and its officers are directed to comply with the judgment in Taj International until it is set aside by the Supreme Court of Pakistan.*

(SHAHID KARIM)
JUDGE

Announced in open Court on 06.07.2017.

Approved for reporting.

JUDGE

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Rafaqat Ali`