ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Present:-
Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Abdul Mobin Lakho.

Tahir Ashraf Durrani & another	C.P. No.D-631 of 2010
Tahir Ashraf Durrani & another	C.P. No.D-632 of 2010
Tahir Ashraf Durrani & another	C.P. No.D-633 of 2010
Tahir Ashraf Durrani & another	C.P. No.D-634 of 2010
Muhammad Ameen	C.P. No.D-635 of 2010
Muhammad Ameen	C.P. No.D-636 of 2010
Syed Shanshah Hussain & others	C.P. No.D-2632 of 2010
Muhammad Ali Jaferi & others	C.P. No.D-3051 of 2012

Petitioners

Versus

Federal Investigation Agency & others **Respondents**.

Dates of hearing : 20.01.2022, 10.02.2022, and 21.02.2022.
Date of order : 11.03.2022.

Mr. Raj Ali Wahid, advocate for petitioner in CP No.D-2632/2010.
Mr. Ovais Ali Shah, advocate for petitioners in CP No.632/2010.
Mr. Nadeem Yaseen, Advocate for petitioner in CP No.D-3501/2012.
Mr. Irfan Ahmed, DAG.

O R D E R

Muhammad Iqbal Kalhoro, J:- Petitioners professing to be public servants working in Federal Board of Revenue (Customs) (**FBR**), and the Income Tax Department (Inland Revenue) on different posts are, in the main, aggrieved by assumption of jurisdiction by Federal Investigation Agency (**FIA**) in respect of FIRs No.03/2009, 14/2009, 15/2009, 20/2009, 03/2010 and 04/2010; and in the latter case FIR16/2011, all registered by FIA Crime Circle Karachi u/s 409, 419, 420, 468, 471, 109 PPC r/w section 5(2) Act-II of 1947; consequent notices u/s 160 CrPC; and cognizance of the offences taken by Special Court (Offences in respect of Banks), Karachi on the reports u/s 173 CrPC submitted in respect of those FIRs.

2. Their case, in a nutshell, is that the issue alleged in all the said FIRs pertains to spheres of sales tax and income tax and is regulated by the Sales Tax Act, 1990 **(1990 Act)**

and the Income Tax Ordinance, 2001 **(the Ordinance, 2001)**; that such matters require highly technical knowledge and expertise in the relevant area to decide; that a highly sophisticated software program called 'STARR' has been developed by FBR for dealing with and processing refund claims; under this system refund claims are processed on the basis of clearance which comprises several steps including gleaning information required for processing and sanctioning of refund claims as provided under the law; that u/s 51 of 1990 Act and u/s 227 of the Ordinance 2001, protection to the officers' actions and omissions in performing their duties or passing orders under the same laws from application of other laws is provided; that in terms of said provisions without a prior approval of the Board, no proceedings, civil or criminal, under any other law can be launched against the officials for anything done by them in official capacity under the said laws, rules, etc.; that in this case no such procedure was followed, hence entire proceedings are unsustainable and illegal; that the offences, if any, under 1990 Act or the Ordinance 2001 are outside the purview of FIA Act, 1974 and are not the scheduled offences; that neither 1990 Act nor the Ordinance 2001 are included in the schedule of FIA, Act, 1974, therefore, FIA has no authority to assume jurisdiction and investigate the matter.

3. Further, it is stated, FIA has no expertise to determine whether the petitioners, or for that matter any other officer of the sales tax or income tax department, had made assessment properly, and processed or dealt with any refund claim as such, and whether any objection raised by 'STARR' system was correctly considered and rejected by them or not; that learned Banking Court has jurisdiction to take cognizance of those offences which either fall within pale of provisions of the Offences in Respect of Banks (Special Courts) Ordinance, 1984 **(the Ordinance, 1984)** or under the Prevention of Corruption Act, 1947 **(the Act-II, 1947)**; that no offence under the aforesaid laws, having any connection with the business of Bank as defined under section 2 (d) of the Ordinance, 1984, has been committed by the petitioners nor a Bank has suffered any loss or initiated a complaint on that account to justify cognizance by the Banking Court; that any offence in respect of sales tax refund or income tax refund is to be

tried exclusively by the Special Judge, Custom & Taxation, which court in the case of employees of sales tax department is already seized with the trials in terms of FIRs No.01/2009 and No.02/2009 u/s 2(37),3,6,7,23 and 26 punishable u/s 33 of the 1990 Act registered by an officer of Collectorate of Sales Tax and Federal Excise (Enforcement), Karachi; that prosecution in respect of the same allegations through subject FIRs is unconstitutional and illegal, particularly when FIA for want of jurisdiction cannot investigate the matter; and thus jurisdiction assumed by the Banking Court to try these offences is illegal and void *ab initio*.

4. Learned defense counsel have argued the case at length reiterating the above facts and grounds, and for support have relied upon the case law reported in **2020 PLD Sindh 601, 2017 SCMR 1218, 2016 SCMR 447, 1993 SCMR 71, PLD 2002 Karachi 464, 2008 YLR 387, 2009 CLD 1422, SBLR 2019 Sindh 205, 1990 MLD 1161, 2012 YLR 353, PLD 2000 Karachi 181 & PLD 1999 Karachi 336.**

5. Learned DAG, *per contra,* has stated that petitioners with active collusion of bank officials opened fake bank accounts in the name of bogus companies for committing fraud in refund claims, and siphoned off millions of rupees from government treasury fraudulently to such accounts and withdrew the same. Such action not only comes within definition of a scheduled offence under the Ordinance, 1984 but can be traced in provisions of the Act-II, 1947 which are included in the schedule of FIA Act, 1974; since the offence, committed by misusing the bank, is related to the bank business, the FIA has the jurisdiction to take on investigation in the matter. He has relied upon the case law as reported in **2019 P Cr.LJ 594, PLD 2013 Sindh & 2011 YLR 1825.**

6. We have considered submissions and perused the record including the case law cited at bar. The question before us is whether FIA has jurisdiction to assume investigation in the matter in which fraud in tax refunds triggering diversion of amounts to accounts identified as fake, and its withdrawal by owners (petitioners included) of the companies found sham in enquiry with active connivance of the bank officials have been alleged. But, as stressed in defense, in this whole alleged trickery

the bank apparently remained immune from any loss, and has therefore not registered any complaint with FIA. No one can possibly have a cavil to what has been contended in defense, reproduced briefly in para no. 2 and 3, in regard to comprehensiveness of both the aforesaid laws- **1990 Act and the Ordinance, 2001**- to deal with issues and prosecute the offences stipulated thereunder. But the point is whether the offences alleged in the subject FIRs are embraced by these laws or not, and, most importantly, whether an offence of breach of trust or others as alleged, by an employee of tax department after recruiting bank officials (or any other) to facilitate him in this regard against a benefit are comprehended, and can be tried, under *ibid* laws. Section 33 of 1990 Act, relevant to determine this point in the cases of the sales tax refunds, has a list of 28 different offences with definitions, and penalties provided against each one separately, in the table form. None of them even remotely grasp sphere of allegations levelled against the petitioners in the FIRs. These offences mostly are meant to cater to a situation obtaining in the wake of willful non-filing or late filing of sales tax returns by a registered person, a mis-declaration and/or a failure to get registration, etc. under the said Act, to be met with fine only on conviction. The measure or degree of sentence is largely linked only with volume of amount or loss of tax thus incurred, and, in the main, is wielded as a tool to effect recovery thereof. Even the definition of tax fraud [u/s 2(37)] - punishable for fine or imprisonment up to 5 years or both under item 13 of section 33 of 1990 Act- is confined only to doing of any act or omission or causing such act or omission in making of taxable supplies without getting registration under the Act; or falsifying or causing falsification in the sales tax invoices.

7. The nature of offences and penalties, as is clear, are 1990, Act bound only and are intended to fit exclusively within its scope: **it is an Act to consolidate and amend the law relating to the levy of a tax on the sale, importation, exportation, production, manufacture or consumption of goods.** Therefore, they are fundamentally incapable of aligning or correlating with a construction or an action or a situation traversing beyond the scope and import of the said law**.** The charge against petitioners,

we may reiterate, is that they opened and operated several fake bank accounts in different banks with connivance of bank officials in which amounts of SBP/Customer, Federal Excise and Sales Tax Refund through cheques were deposited, running in billions (in some cases), and withdrawn in the name of fake and fictitious firms. This imputation palpably has neither a nexus nor a likeness with any of actions or situations, enumerated in section 33 of 1990, Act to attract scheme operating thereunder. As against it, the allegations in FIRs 01/2009 and 2/2009, cited in defense, are that sales tax refund of certain amounts were sanctioned in favour of particular claimants, not fake, to be deposited in assigned accounts but the accused by tampering with the account number and bank branch name on the cheques deposited the same in his own account and succeeded in getting amounts fraudulently.

8. The difference and distinction in actions and situations composing offences in the two sets of FIRs is easily perceivable; one, questioned here, is about opening fake bank accounts of sham firms by the officials of sales tax department and the bank officials venturing with them (but) for an illegal benefit causing loss to national exchequer in an organized way. The other pertains to isolated incidents of tampering with the cheque of tax refund of a genuine claimant(s) by the accused using office, and its deposit in his account deceitfully without *prima facie* involvement of bank officials. In the first case, the bank officials intentionally and purposely joining hands with tax officials for gaining illegal benefits and letting the latter operate, with their connivance, bank accounts of bogus companies is what constitutes indictment, and which is not defined seemingly anywhere in 1990, Act. And which not only *prima facie* constitutes a scheduled offence as defined u/s 2 (d) of the Ordinance, 1984, but also attracts the scheme of the Act-II, 1947. For erudition, it is explained that the *'scheduled offence'* under the *ibid* law means an offence specified in the First Schedule and alleged to have been committed in respect, or in connection with the business, of a bank. Notably, the first schedule includes, among others, offences mentioned in FIRs, besides any offence under the said Ordinance, and the Act-II, 1947.

9. The view that allegations in the subject FIRs constitute, among others, a scheduled offence under the Ordinance, 1984 is further fortified from reading of interpretation of expressions “in respect of”, “in connection with” and “business of a bank” by the Honorable Supreme Court in the case of **A.Habib Ahmed Vs. M.K.G. Scott Christian and five others (PLD 1992 SC 353).** It is laid down that “business of a bank” used in the definition would have to be given extended meaning on account of the use of two such open ended expressions which connote very wide meaning for the words “business” and the “Bank”. These are “in respect of” or “in connection with”. The scrutiny of the meanings of these words and expressions in the classical sources together with the modern usages and scope of banking business, leave absolutely no doubt that there will be left out of their ambit only extremely rare cases. They somehow or the other, are linked with the modern extended banking practices in trade business, industry and finance, domestic and other; besides the earlier known scope of their operation. Take, for example, the word “Business” as separate from the word “Bank”. Again take all that goes with the modern banking business and all that is included in the banking procedures. Not only this, banking activities both with regard to the depositors dealings as well as dealings in trading and other enterprises are their business.

10. The aforesaid explanation has completely cast off misgivings, if any, relating to extent expressions- **in respect of, in connection with,** and **business of a bank**- can be used for understanding the context, scheme or situation in which the Ordinance, 1984 is applicable. Hardly any case or transaction concerning banks, as is explained, is excluded from modern extended banking practices respecting trade, business, finance, etc. from the gamut of said expressions. It is clear, through this litmus test, it can be easily determined whether or not any offence in respect of the banks has been committed in the given facts and circumstances. In the instant case, the way the banks are alleged to have been misused for committing fraud with preplanning by tax officials together with bank officials to have illegal gains leaves little room to consider it as a contravention not amounting to an offence comprehended by the Ordinance, 1984 and the Act-II,

1947. Even otherwise, we are not impressed by the argument that the banks in the present case have not suffered any loss, and hence FIA has no jurisdiction to investigate the matter. Loss in regard to statistics of available equity or balance with the banks at that time they might be right might not have ensued but the loss of reputation and resulting suspicion translating into a discernable reduction in their (banks) business cannot be disputed. Then, the criteria to attract the scheme of the Ordinance 1984 in the cases relating to banks is not some loss (material or abstract) to the bank but it is when an offence is alleged to have been committed, in a broader sense as explained above, in respect, or in connection with the business of the bank, the scheme thereunder comes into play and roll out.

11. As regards to the case of employees of Income Tax Department (Inland Revenue) **(CP.No.D-3501/2012),** it is alleged that in investigation of FIR 30/2010, it was found, *inter alia,* that dormant and deceased persons' accounts in the bank were being misused by the bank officials in connivance with income tax officials for deposit and withdrawal of income tax refunds, in millions, fraudulently. In the investigation, pursuant to FIR 16/2011 lodged accordingly, the officers/petitioners, connected with issuance and deposit of such cheques in tampered accounts, were issued notices u/s 160 CrPC to explain their position. Their stance, in the main, not to find the notices worthy of a reply is: FIA officials are not apt to determine whether the income tax refunds were properly assessed, processed and issued by the competent and authorized officers; whether such assessment has been properly made or not; and that the Income Tax Ordinance, 2001, the Sales Tax Act 1990 and the Federal Exercise Duty Act, 2005 have been deliberately and consciously excluded from the purview of the FIA, Act 1974, so that FIA has no jurisdiction to investigate such matters. And that administration of income tax law, and the rules and directives issued thereunder is a complex matter which requires proper qualification and training to grasp and that the Officials of FIA completely lack the same.

12. We find, however, such assertions completely off the point and unrelated. No charge of making a

mistake, deliberate or otherwise, in assessing, processing and issuing tax refunds of genuine claimants has been alluded in the notices or FIR. Nor it is said that the assessment made is not proper or is in conflict with the record of the claims filed in this regard. Or that the tax refunds claims were sanctioned/approved by unauthorized or incompetent officers inadvertently to convince us to hold that dispensation embodied in other laws including FIA, Act, 1974 is not applicable to petitioners' alleged actions and omissions and they have immunity from prosecution under other laws. They were issued notices only after a discovery in investigation suggesting that they had issued and deposited refund cheques in the account of different bogus companies/individuals without there being any refund / assessment file and NTNs in their favour, instead of actual Payees accounts, with active collusion of the relevant bank officials- a charge totally different and distinct from indictment of committing misdemeanor in assessing, processing or issuing a tax refund, etc. amenable to the Income Ordinance, 2001.

13. Now, in order to reinforece above view, we look at Part XI of the Ordinance, 2001 that provides for offences and prosecutions from section 191 to section 200, which incorporate, at a minimum, some non-compliances with statutory obligations under the same law by a filer to be met, if proved, with some fine, and maximally prosecution for certain contraventions ranging largely from concealment of income, offshore assets, or failure to maintain record by a filer, making false or misleading statements, tax evasion, to unauthorized disclosure of information by a public servant, etc. to be visited, on conviction, with fine or/and with some imprisonment. None of the same can be compared with or is relatable to what has been alleged in the FIR in hand either substance wise or in terms of ramifications that they both are bound to yield, nor could a parallel between them be drawn at any level or degree to persuade us to concur with the case of the petitioners that they are not liable to be investigated by FIA respecting allegations.

14. A word on the contention that u/s 51 of 1990 Act and u/s 227 of the Ordinance, 2001, any suit or criminal

prosecution against the petitioners is barred unless a prior approval is granted in this respect by the Board. A perusal of these provisions indicates that the province under them relates to only official acts, orders or anything done in good faith by the officials performing duty under the said laws, rules, instructions, or directions made or issued thereunder. And purely in such context, it is provided that despite anything contained in any other law, no enquiry or investigation will be undertaken against them in respect of such actions, etc. without the prior approval of the Board. Here, the petitioners have not been charged for committing a contravention much the same embraced by the said laws, etc. that needed an approval in advance from the Board for an action against them under some other laws. They are alleged to have faked companies and directed tax return refunds to such companies' bogus accounts and the accounts of non-existent persons with a predetermined mind and the bank officials colluding with them in the spree. The whole episode seems to be full of flagrant *means rea* and an outcome of proclivity to commit *actus reus* with a plan base in approach and consequences. These acts and ensuing effects, nowhere defined or covered or comprehended by the Sales Tax Act, 1990 and the Income Tax Ordinance, 2001, are therefore not protected under aforesaid provisions nor can such construction even otherwise be construed running under other laws.

15. Learned defense counsel also cited in defense an order dated 18.3.2010 in Cr. Revision Application No.62 of 2009 and claimed that proceedings of a case arising out of similar facts pending before the Special Court (Offenses in Respect of Banks) have been quashed thereby. After a reading, with due respect, we have found it distinguishable. In that case, a disgruntled employee of FBR after termination from service had made certain disclosures in written complaint that accused had opened fake bank accounts to evade tax liability on *'towel manufacture'* and its export in connivance with some FBR officials. The complaint after investigation by FIA ended up on the file of learned Special Court which took cognizance of the offences challenged finally before this court and decided as above. Learned bench has noted in the order that the persons, on whose name the accounts were opened, in

their statements in investigation had admitted to have opened and operated the said accounts under directions of applicants and it was not the case of opening and operating a fake account by forging signature of the account holder, and that it was a simple case of tax evasion by operating a benami account. It was on such unique facts the decision was rendered. The facts of this case, as discussed above in detail, are quite dissimilar in that not only opening and operating fake bank accounts through forged and fabricated signature is what is alleged but facilitation extended by the bank officials by misusing bank service for this purpose is also a part of the indictment. We therefore are of the view that above case law is not helpful to the petitioners and, on the contrary, supports the view we have humbly formed in this case.

16. Before winding up discussion, we would like to say few words over the point, raised in defense, as to which law, when there is a conflict between two (special) laws, with overriding clauses but separated by time, in terms of procedure and/or punishment, or for that matter between a general law and a special law likewise, shall prevail in respect of a particular action constituting an offence under both the laws concurrently. Dealing with somewhat same issue in the case of **ZHV Securities (PVT.) LTD. and others Vs. Federation of Pakistan and others (2018 CLD 1338)**, a division bench of this court of which one of us (Muhammad Iqbal Kalhoro) was a member, has, relying upon the ratio laid down by the Honorable Supreme Court in the case of **Syed Mushahid Shah (2017 SCMR 1218)**, observed in para no.7 as under:

> "… There is no cavil to the proposition that when a special law and a general law deal with the same offence, the former shall prevail over the latter and the subject shall be dealt with under the special law. When there is a conflict or inconsistency between the two laws in respect of punishment and procedure for the same offence, the one granting greater punishment must yield in favour of law carrying a lessor punishment. However, if there is a conflict or inconsistency in respect of the same offence between two special laws having overriding clauses, the latter in time being the latest intention of the legislator shall prevail over the one prior in time but such presumption is not automatic and would be subject to determination of many other factors such as the object, purpose and policy of both the statutes and the legislature's intention as expressed by the language used therein. It is not irrelevant to emphasize here that the rule that the special law shall prevail over

> the general law is attracted ordinarily when the two laws i.e. a special law and a general law concurrently apply to and permit of parallel platforms for the adjudication of the same offences under both the laws. However, if the scope of a general law or for that matter any special law (prior in time) is wider than the special law (later in time) dealing with the same offences, the former would yield to the latter to the extent of acts and omissions which constitute an offence thereunder. If the special law (may be later in time) does not directly and specifically deal with or apply to a particular act which constitutes an offence under the general law or for that matter under any special law later (prior in time), no presumption of latter ceding in favour of former would be read. So legally it would be only when the two laws, be a general law Vs. a special law or a special law prior in time Vs. a special law latter in time with overriding clauses dealing with a particular act constituting an offense under both the laws, provide for distinct punishments and permit of different procedures, the presumption that the law harsher in punishment and procedure shall cede to the law less onerous would come into being.

The above expressions explain unambiguously, *inter alia,* that it is only when an action or a chain of actions is embraced by or included in two laws as an offence concurrently, and there is an inconsistency between them over procedure or punishment to be followed, the special law later in time shall prevail or (in the cases where there is) the law which is less harsh and onerous. However, this scheme is attracted when an action, etc. is comprehended by the two laws simultaneously as an offence and there is an inconsistency between them over procedure relating to investigation or forum for adjudication and punishment of the same after the trial. We have already held above, after discussing the point at length, that that alleged actions or omissions committed or situations created by the petitioners to commit them are not embraced by or included as an offence in the provisions of 1990 Act and the Ordinance, 2001 to attract the dispensation thereunder. Or even to afford a question to decide as to which law has preponderance over the other in the given facts and circumstances.

17. Lastly while flipping through different case law to find a view, if any, supporting our opinion on the issue, we have come across the case of **Naseem A. Sattar and others Vs. Federation of Pakistan and 3 others (PLD 2016 Sindh)** rendered in somewhat a similar context by this court. Writing for the court, the

undersigned (Muhammad Iqbal Kalhoro) has stated, relying upon the ratio laid down in 2006 SCMR 436, that:

> "the impugned FIR has been lodged u/s 406/420/468/471/109 PPC. The offences are cognizable in nature, and are scheduled offences according to provision of the Ordinance, 1984. A perusal of the First Schedule contained in section 2 (d) read with subsection (2) to section 6 of the Ordinance, 1984 provides that all (ibid) offences if are alleged to have been committed in respect, or in connection with the business of a Bank are cognizable and non-bailable. Section 6(2) lays down that for the purpose of this Ordinance, the provisions PPC, 1860 specified in the second schedule, subject to modifications therein whereby these penal provisions have been made more stringent, shall have effect, meaning thereby that if the offences are cognizable and non-bailable under PPC they shall be treated so for the purpose of this Ordinance. Under section 3, the special court is established and in terms of section 4 of the Ordinance, 1984 the scheduled offences shall be triable exclusively by a special court, notwithstanding anything contained in the code. The impugned FIR and subsequent cognizance taken by the special court, seen in above context do not appear to be illegal or coram non judice".

We could not help quoting above observations in aid of what has already been discussed in preceding paragraphs for arriving at a conclusion that the petitioners have no case on merit. Consequently, all the petitions are dismissed along with all pending applications.

Petitions are disposed of in above terms.

JUDGE

JUDGE

Rafiq/P.A.