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| | <p>Hassan Kamran Bashir, Muhammad Ayyaz Butt, Hafiz Saif-ur-Rehman, Ch. Muhammad Ali, Kamran Khalil, S.M. Masud, Ch. Saeed Ashraf, Khawaja Adnan Ahmed, Muhammad Amin Goraya, Shakeel-ur-Rehman Khan, Omer Farooq Khan, Shahid Umar Khan, Shezada Muhammad Zeeshan Mirza, Junaid Qayyum, Umar Ahmed Khan, Muhammad Shahid Baig, Iftikhar Ullah Malik, Mirza Nasr Hussain Shahid Baig, Syed Ali Zafar, Asad Manzoor Butt, Ch. Muhammad Ali, Kashif Khurshid, Muhammad Yousuf Khan, Rai Abid Ali Kharal, Muhammad Aamir Qadir, Qari Habib-ur-Rehman Zubairi, Javed Iqbal Sheikh, Muhammad Saeed Ch., Muhammad Sohail Naeem, Hasnain Naveed Raja, Ikram-ul-Haq Sheikh, Muhammad Saad Khan, Saood Nasrullah Cheema, Iqbal Khursheed Mughal, Saleem Akram Ch., Muhammad Riaz Anjum, Advocates.</p> |
| Respondents by: | <p>M/s Naveed Inayat Malik and Ch. Muhammad Ishaque, Deputy Attorney Generals for Pakistan.</p> <p>M/s Salman Akram Raja, Malik Ahsan Mehmood, Ch. Zafar Iqbal, Dr. Rana Muhammad Shamim, Mian Qamar-ud-Din Ahmed, Sarfraz Ahmad Cheema, Ch. Imtiaz Elahi, Izhar-ul-Haque, Asjad Saeed, Ch. Faisal Nawaz, Muhammad Yahya Johar, Sultan Mahmood, Muhammad Asif Hashmi, Sajjad H. Rizvi, Muhammad Amir Malik, Ehsan-ur-Rehman, Nadeem Mahmood Mian, Mrs. Kausar Parveen, Tahir Zia Mahar, Nadeem Mahmood Mian, Shahid Masood Manzoor Bhatti, Mian Yusuf Umar, Muhammad Khalid Ch., Khawar Ikram Bhatti, Advocates.</p> |
| Research by: | <p>M/s Sher Hassan Pervaiz, Nadeem Ahmad Sohail Cheema, Qaisar Abbas and Mohsin Mumtaz, Research Associates, Lahore High Court Research Centre.</p> |

Syed Mansoor Ali Shah, J:-

“If prosecution degenerates into persecution, this Court cannot sit as a helpless spectator¹”

Tax crimes are white collar crimes that impose civil, as well as, criminal penalties for evasion of tax, etc. Even though the two sets of penalties are distinct and independent with separate objectives and consequences, yet this distinction is at times forgotten, resulting in over-criminalization². The constitutionality and legality of such distortion under the unique architecture of Sales Tax Act, 1990 (“Act”) marks the high point of this case.

Facts

2. Criminal prosecution under sections 37A and 37B of the Act for the offence of *tax fraud* was initiated, against 134 persons alongwith “other beneficiary being sales tax registered persons of the tax fraud³” and “other persons due to whose criminal negligence/connivance, the tax fraud occurred /was committed.” Additional Director, Intelligence & Investigation, FBR, Regional Office, Lahore being the complainant documented this in the shape of First Information Report (FIR 4/2011) dated 26-3-2011. The said document reveals that on receipt of *credible information* that a cartel of fraudsters was involved in the issuance of fake sales tax invoicies for the purposes of generating illegal/inadmissible input tax adjustments criminal prosecution was initiated against some

¹ *Parmeet v. Dinesh* (169 ITR 5) (at 7) also see *The Law and Practice of Income Tax* by Kanga & Palkivala. Vol-II, 10th edition, Lexis Nexis p. 2921

² Overcriminalization describes the trend to use the criminal law rather than the civil law to solve every problem, to punish every mistake, and to compel compliance with regulatory objectives. Criminal law should be used only if a person intentionally flouts the law or engages in conduct that is morally blameworthy or dangerous.

(<http://www.heritage.org/issues/legal/overcriminalization>)

³ Allegedly covering the petitioner.

persons, which further led to unearthing of a mega scam of sales tax evasion of Rs 7.5 billion involving 144 dummy suppliers who issued fake sales tax invoices. This gang of fraudsters issued fake invoices to various registered persons (including the petitioner) who claimed input tax on the basis of the same causing a huge loss to the exchequer. It has, therefore, been alleged that petitioners have committed the offence of *tax fraud* and are liable to arrest and criminal prosecution. Similar allegations have been levelled in other FIRs in the connected matters.

Arguments

3. Learned counsel for the petitioners have mainly argued that the criminal prosecution under Section 37A of the Act can only be initiated after the tax liability of the taxpayer has been duly assessed under the Act, as provided under Section 11 of the Act. While referring to the list of offences under Section 33 of the Act, learned counsel for the petitioners have laid emphasis on the term “*shall be further liable*” appearing in the column of penalties to underline its chronological significance. They submitted that only after the determination of the tax liability (i.e., civil liability) can the criminal prosecution be initiated. They further argued that under Section 37A (4), the Commissioner at any stage can compound the offence if the taxpayer pays the amount of tax due alongwith default surcharge and penalty as is determined under the provisions of this Act, hence the facility of compounding the offence is available only after the assessemnt of tax under the Act.

4. Pursuing the same line of reasoning, they submitted that the fines available under section 33 of the Act are dependent on the amount of “tax involved” hence no sentence can be awarded unless the tax is first determined, which is not the prerogative of the Special Judge, especially, when civil adjudication system for tax

assessment is specifically provided for under the Act. In the present case and in many other cases it is additionally pointed out that the learned Appellate Tribunal Inland Revenue under the civil adjudicatory system has held that the petitioner has not committed any *tax fraud* and is not liable for any additional tax liability or penalties, still criminal prosecution has been initiated against the petitioner. Reference is made to Order of the ATIR, Lahore dated 5-6-2012 passed in STA No. 478/LB/2012. It was also argued that the Additional Director, Intelligence and Investigation, FBR does not have the jurisdiction to initiate criminal prosecution under the act as the said Directorate exercises no jurisdiction under the Act.

5. Learned counsel for the respondents, on the other hand, have submitted that it is settled principle of law that civil and criminal proceedings are neither interrelated nor mutually exclusive, hence, the department enjoys the choice to opt for either of the two enforcement mechanisms. Criminal prosecution can be triggered if *material evidence* is available and the concerned officer has reason to believe that the taxpayer has committed *tax fraud* or *any offence warranting prosecution*. The term “*shall be further liable*” appearing in the list of penalties under Section 33 of the Act does not have a chronological significance but in fact provides for two different sets of penalties; one on the civil side and the other on the criminal side and both of them are independent of each other.

6. Learned counsel for the respondent department frankly volunteered to submit that recourse to recovery of tax under the civil regime of the Act has not proven effective over the years and, therefore, criminal prosecution is the preferred choice of the department in cases where there is *material evidence* attracting section 37A. He further contends that compoundability of the offence is on the basis of the amount of tax due according to the calculation of the respondent department rather than on the basis of

the amount determined through adjudicatory process under the Act. He submitted that tax assessment through civil adjudication under the Act has no bearing on the initiation of criminal proceedings against the petitioner.

Opinion of the Court

7. It is settled law that a singular act can trigger both civil and criminal proceedings simulatenously. Proceedings against a *civil wrong* or a *public wrong* (offence) are independent and not mutually exclusive. Both set of proceedings have their own procedures, standards and consequences. The famous eighteenth century English jurist William Blackstone summarizes the distinction between civil and criminal law by observing that “private wrongs are an infringement...of the civil rights which belong to individuals...public wrongs, or crimes...are a breach and violation of the public rights and duties, due to the whole community...in its social aggregate capacity.”⁴ “There are a number of wrongs which are both crimes and civil wrongs...The offender may be prosecuted and punished or he may be tried in a civil court and ordered to pay compensation..This overlap of the criminal and civil law means, in effect, that a man may be tried twice for what is substantially the same wrong.”⁵ Blackstone illustrates this difference by pointing out that the society has little interest in whether he sues a neighbour or emerges victorious in a land dispute. On the other hand, society has a substantial investment in the arrest, prosecution, and conviction of individuals responsible for espionage, murder or robbery.⁶

⁴ William Blackstone, *Commentaries on the laws of England*, Volume 4 pp.4 &5.

⁵ An Outline of English Law by H.K. Black and D.J. Latham Brown, *London Methuen & Co. Ltd.* – p.9.

⁶ *Essential Criminal Law* by Mathew Lippman, SAGE. p.2

8. The standard of evidence to determine civil liability is preponderance of evidence, while a criminal conviction, as it carries loss of liberty is based on the higher standard of guilt i.e., beyond reasonable doubt. Primarily, civil law protects the interest of the individual while criminal law protects the interest of the society. “The main purposes of criminal law are to redress criminal behaviour and to maintain social order. Each country administers its own types of punishment based on the nature of the crime. The goals of punishment are retribution, deterrence, incapacitation, rehabilitation, and restitution.”⁷

9. In 1939 sociologist Edwin H. Sutherland published his pioneering study regarding WHITE COLLAR CRIMES. He defined White Collar Crime to be an offense committed by a person of respectability and high social status in the course of his occupation. The financial cost of white collar crimes is several times greater than the economic consequences of common crimes. Tax is a fiscal tool to regulate the monetary policy of the State, hence, the primary focus of a tax law is the levy and collection of tax. However, as a white collar crime, tax evasion, etc has also been criminalized with the collateral effect of retribution and deterrence, in addition to achieving the fiscal incentives of the State. Under the new regime of white collar crimes or tax crimes, even civil wrongs have been categorised as an *offence*, attracting both civil and criminal penalties. While assessment of tax liability is characteristically a civil proceeding, tax evasion or tax fraud, etc. can also be a tax crime and attract both civil, as well as, criminal penalties. Under civil proceedings the tax is assessed and recovered as a compensation alongwith monetary penalties, while under criminal prosecution, tax evader is punished with

⁷ *Legal Systems of the World*, A political, Social and Cultural Encyclopedia, Volume-I, edited by Herbert M. Kritzer, p.378.

imprisonment or fine or both. Civil and criminal proceedings have different objectives and achieve different ends.

10. Jurisprudence evolved over the years shows that while criminal and civil proceedings can co-exist and proceed side by side, in cases where the subject matter of both the proceedings is so closely interrelated, so that the outcome of the civil proceedings can have a material bearing on the criminal proceedings, a safer course to adopt is to stay the criminal proceedings till the finalisation of the civil matter. Reliance is placed on Akhlaq Hussain Kayani v. Zafar Iqbal Kiyani and others (2010 SCMR 1835) and Muhammad Akbar v. The State, etc. (PLD 1968 SC 281).

11. Tax crimes can lead to criminal prosecution leading to conviction and punishment (i.e., imprisonment or fine or both) and yet simulatenously, for the same tax crime, civil proceedings for assessment of tax and its subsequent recovery can be initiated. The role and character of an adjudicator in assessing the tax liability and of a special judge in convicting the tax evader are distinct and entail different sets of procedures and evidentiary standards (as discussed above). These roles cannot be swaped. Hence, a Special Judge while convicting the taxpayer for an offence cannot assess the amount of tax due and similarly an Officer of Inland Revenue carrying out assessment of tax cannot convict the taxpayer. Civil adjudicatory process for assessment of tax has been laid down in the Act and entrusted to the officers of the Inland Revenue followed by a complete appellate redressal system, in the shape of a departmental appeal followed by an appeal before the Appellate Tribunal Inland Revenue and then a Tax Reference before the High Court. The recovery mechanism under section 48 of the Act comes into operation once tax is assessed and penalties imposed go unpaid. Tax assesssment system based on adjudication has a

central role in any tax law and precedes collection and recovery of tax.

12. With these jurisprudentially delineated contours of civil criminal proceedings, we examine the construct and architecture of criminalization under the Sales Tax Act, 1990. Admittedly, sales tax is a value-added tax, grounded in unsupervised self-assessment scheme. The taxpayer assesses his tax and deposits it alongwith the sales tax return. The scope of the Act was brought out clearly in the budget speech of the Minister of State for Finance, for the year 1990-1991 when the tax was first introduced:

75. Under the proposed sales tax system the tax payer will be allowed the facility of deferred payment of sales tax. Instead of paying the tax before the goods are cleared from the factory premises, the tax payer under the proposed system will himself determine his tax liability in respect of sales made during the course of a month and pay the tax due by the 20th of the following month. He has also been allowed the facility to deduct the tax which he has paid on his business purchases from the tax due on his sales and thus the proposed system provides for automatic adjustment of input tax. In short the proposed sales tax system is based on self assessment procedures.⁸(*emphasis supplied*)

13. The tax regulators monitor this self-assessment system through neutral and impartial tool of *audit* under section 72B. There is no other mechanism under the Act to lift the veil of self-assessment, protecting the monthly tax return filed by the tax payer. Once the case of a taxpayer is selected for audit under section 72B, the return is closely scrutinized and on completion of audit if any of the grounds under section 11 are attracted, an *assessment order* is passed against the tax payer, adjudicating the actual tax liability alongwith penalties under section 33 and default

⁸ Budget Speech by Mr. Ehsan Ul Haq Piracha, Minister of State for Finance. 7-6-1990. [PTCL 1990 Jour.88 (at 108)]

surcharge under section 34 of the Act. The taxpayer is not a defaulter unless “tax due” is first assessed and determined under the provisions of the Act. Section 25(5) provides that *before, during and after* the audit proceedings the taxpayer has the option to deposit the tax alongwith default surcharge and penalties to avoid further proceedings. Recovery and collection of tax, therefore, remains the central focus of the Act.

14. *Inquiry or investigation* can be initiated on the basis of “information or sufficient material” received by the Commissioner against a taxpayer under proviso to section 25(2) of the Act. It is axiomatic that any such *inquiry or investigation* must lead to further proceedings against the taxpayer in case of any adverse finding against the taxpayer. The Act is, however, surprisingly silent regarding the nature of further proceedings to be adopted after the said *inquiry or investigation* is completed. We have tried to rationalize this disconnect later in the judgment.

15. At this juncture, the department was of the view that other than the mechanism of *audit* under section 72B, the taxpayer can also be selected out of the pool of self-assessed taxpayers and criminally prosecuted under section 37A of the Act, if the officer concerned has *reason to believe* that there is *material evidence* that the tax payer has committed the offense of *tax fraud* or any other *offence warranting prosecution* under the Act.

16. Can section 37A of the Act be employed to select or pick a taxpayer out of the pool of self-assessed taxpayers to undergo criminal prosecution without first carrying out an objective selection process of audit followed by assessment of tax under section 11 of the Act? The answer to the above question is YES, on the assumption, that criminal prosecution, generally, has no nexus with assessment of tax liability and cannot be equated with

cases selected in audit. While self-assessment scheme guards the sanctity of self-assessed sales tax returns it affords no protection to a criminal act committed by the tax payer. Audit is a tool that strategically monitors the regime of sales tax under the Act and is primarily geared to decipher tax evasion from amongst the pool of taxpayers. It is a departmental surveillance tool for sniffing out tax that has gone unpaid. Criminality behind any such tax evasion is a separate matter. In case both the proceedings (civil & criminal) are simultaneously initiated, the jurisprudence discussed above will regulate the criminal proceedings.

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 criminal prosecution 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? Perusal of section 33 is important which reads as under:

| | Offences | Penalties | Section of the Act to which offence has reference. |
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| | (1) | (2) | (3) |
| 5. | Any person who fails to deposit the amount of tax due or any part thereof in the time or manner laid down under | Such person shall pay a penalty of ten thousand rupees or five per cent of the amount of the tax involved, whichever is | 3, 6, 7 and 48. |

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| | <p>this Act or rules or orders made thereunder.</p> | <p>higher:</p> <p>Provided that, if the amount of tax or any part thereof is paid within fifteen days from the due date, the defaulter shall pay a penalty of five hundred rupees for each day of default:</p> <p>Provided further that no penalty shall be imposed when any miscalculation is made for the first time during a year:</p> <p>Provided further that if the amount of tax due is not paid even after the expiry of a period of sixty days of issuance of the notice for such payments by an officer of Inland Revenue not below the rank of Assistant Commissioner Inland Revenue, the defaulter 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 amount equal to <u>the amount of tax involved</u>, or with both.</p> | |
| <p>7.</p> | <p>Any person who is required to apply for registration under this Act fails to make an application for registration before making taxable supplies.</p> | <p>Such person shall pay a penalty of ten thousand rupees or five per cent of the amount of tax involved, whichever is higher:</p> <p>Provided that such person who is required to get himself registered under this Act, fails to get registered within sixty days of the commencement of taxable activity, he shall, further be liable, upon conviction by a Special Judge, to imprisonment</p> | <p>14</p> |

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| | | for a term which may extend to three years, or with fine which may extend to an amount equal to the <u>amount of tax involved</u> , or with both. | |
| 11. | Any person who,-- (a) Submits a false or forged document to any officer of Inland Revenue; or (b) Destroys, alters, mutilates or falsifies the records including a sales tax invoice; or (c) 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. | 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 years, or with fine which may extend to an amount equal to the <u>amount of tax involved</u> , or with both. | 2 (37) and General. |
| 12 | Any person who denies or obstructs the access of an authorized officer to the business premises, registered office or to any other place where records are kept, or otherwise refuses access to the stocks, accounts or records or fails to present the same when required under sections 25, 38, 38A or 40B. | 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 five years, or with fine which may extend to an amount equal to the <u>loss of tax involved</u> , or with both. | 25,38, 38A and 40B |
| 13 | Any person who commits, causes to commit or attempts to commit the tax fraud, or abets or connives in commissioning of tax fraud. | 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 | 2 (37) |

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| | | imprisonment for a term which may extend to five years, or with fine which may extend to an amount equal to the <u>loss of tax involved</u> , or with both. | |
| 14 | Where any person violates any embargo placed on removal of goods in connection with recovery of tax. | Such person shall pay a penalty of twenty five thousand rupees or ten per cent of the amount of the 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 one year, or with fine which may extend to amount equal to the <u>amount of tax involved</u> , or with both. | 48 |
| 18 | Where any officer of Inland Revenue authorized to act under this Act, acts or omits or attempts to act or omit in a manner causing loss to the sales tax revenue or otherwise abets or connives in any such act. | Such officer of Inland Revenue shall 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 amount equal to the <u>amount of tax involved</u> , or with both. | General. |
| 22 | Any person who, -- (a) Knowingly and without lawful authority gains access to or attempts to gain access to the computerized system; or (b) Unauthorizedly uses or discloses or publishes or otherwise disseminates information obtained from the computerized system; or (c) Falsifies any record or information | 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 the Special Judge, to imprisonment for a term which may extended to one year, or with fine which may extend to an amount equal to the <u>loss of tax involved</u> , or with both. | 50A. |

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| | stored in the computerized system; or (d) Knowingly or dishonestly damages or impairs the computerized system; or (e) Knowingly or dishonestly damages or impairs any duplicate tape or disc or other medium on which any information obtained from the computerized system is kept or stored; or (f) Unauthorizedly uses unique user identifier of any other registered user to authenticate a transmission of information to the computerized system; or (g) Fails to comply with or contravenes any of the conditions prescribed for security of unique user identifier. | | |
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18. Review of the penalties above, clearly shows that the measure of sentence is linked with the **“amount or loss of tax involved.”** Infact, 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.

20. Talking the offence of *tax fraud* under clause 13 of section 33 (above). Tax fraud has been defined in section 2(37) of the Act as:

“**tax fraud**” means knowingly, dishonestly or fraudulently and without any lawful excuse (burden of proof of which excuse shall be upon the accused)--

- (i) doing of any act or causing to do any act; or
- (ii) omitting to take any action or causing the omission to take any action, including the making of taxable supplies without getting registration under this Act; or
- (iii) falsifying or causing falsification the sales tax invoices in contravention of duties or obligations imposed under this Act or rules or instructions issued thereunder with the intention of understating the tax liability or underpaying the tax liability for two consecutive tax periods or overstating the entitlement to tax credit or tax refund to cause loss of tax.”

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.

21. Learned counsel for the department took pains to argue that the amount determined under section 37A (4) of the Act is the amount calculated by the department and is not the tax assessed under section 11 post adjudication. This argument is seriously misconceived. It is settled proposition of law that “*tax due*” means amount duly determined under the law through an independent process of adjudication. Further, language of section 37A (4) is unambiguous and is directly supportive in this regard. Reliance is placed on *Agricultural Development Bank of Pakistan*

v. Sanaullah Khan and others (PLD 1988 SC 67) and *Abdul Latif v. The Government of West Pakistan and others (PLD 1962 SC 384)* and *Agricultural Development Bank of Pakistan and another v. Abid Akhtar and others (2003 CLD 1620)*.

22. Collective reading of sections 11, 25(5), 33, 37A and 72B of the Act indicates that the criminalization under the Act is principally to effectuate recovery or is being largely used to effectuate recovery. Two clear pointers are: dependence of fine on the **“amount or loss of tax involved.”** and the window of compoundability available to the taxpayer who can pay the **“amount of tax due alongwith such default surcharge and penalty as determined under the provisions of this Act.”** If the purpose was simple retribution and deterrence, there was no need to load the fine with the *amount or loss of tax involved*. However, if the fine under criminal prosecution is to be loaded with the amount or loss of tax, such a criminal construct must be prefaced with the mandatory requirement of assessment of tax through civil adjudication provided under section 11 of the Act. This precondition is the minimum constitutional requirement to ensure fair trial and due process under Articles 4 and 10-A of the Constitution.

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.

24. Inability of the Special Judge to compound or award a sentence including a fine unless the *loss of tax or amount of tax* is first assessed, freezes the initiation of criminal proceedings till such time that the tax is duly assessed under the Act. Fair Trial under Article 10A of the constitution encompasses the whole trial including all the pre-trial steps like arrest, compoundability, etc. If at any stage of the trial, the taxpayer is deprived of the facility of settlement (compoundability) or there is a clog on the powers of the Special Judge in the matter of sentencing (choice of punishing with fine only) continuance of any such trial will offend article 10A of the Constitution. Where the civil adjudication system under the Act declares that there is no loss of tax caused by the taxpayer or no amount of tax is due from the taxpayers, initiation of criminal prosecution in such a case may offend Article 10A of the Constitution.

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.

27. The other issue is the choice of opting for criminal proceedings against a particular taxpayer and letting go of the other. This poses a problem and amounts to vesting unstructured and unregulated power in the hands of the department, once again threatening the sanctity of fair trial. Any such unguided and uncontrolled exercise of power will not withstand the constitutional test of fairness and equality under Article 25 of the Constitution. A more wholesome, transparent and standardized system needs to be evolved by the FBR to avoid this unconstitutionality.

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. In this background, criminal proceeding initiated against the petitioners, and documented as the First Information Report in this case and cases mentioned in Schedule-A is quashed as being unconstitutional, violative of fundamental rights, *ultra vires* the Act and hence illegal and without lawful authority. For the above reasons all these petitions are **allowed**. In the light of the above discussion, we see no need to answer the question regarding the jurisdiction or competence of the officer who initiated the criminal proceedings in these cases.

29. This judgment will decide the instant petition, as well as, connected writ petitions mentioned in Schedule "A" as all these cases raise common questions of law and facts.

(Mamoon Rashid Sheikh)
Judge

(Syed Mansoor Ali Shah)
Judge

*M. Tahir/Iqbal**

APPROVED FOR REPORTING.

SCHEDULE-A

| Sr. No. | Case Number |
|----------------|--------------------|
| 1. | W.P. No.9512/2012 |
| 2. | W.P. No.28231/2012 |
| 3. | W.P. No.7514/2012 |
| 4. | W.P. No.7648/2012 |
| 5. | W.P. No.7657/2012 |
| 6. | W.P. No.7658/2012 |
| 7. | W.P. No.8191/2012 |
| 8. | W.P. No.8226/2012 |
| 9. | W.P. No.8270/2012 |
| 10. | W.P. No.8271/2012 |
| 11. | W.P. No.8492/2012 |
| 12. | W.P. No.8493/2012 |
| 13. | W.P. No.8494/2012 |
| 14. | W.P. No.8786/2012 |
| 15. | W.P. No.8848/2012 |
| 16. | W.P. No.8994/2012 |
| 17. | W.P. No.9047 /2012 |
| 18. | W.P. No.9049/2012 |
| 19. | W.P. No.9113/2012 |
| 20. | W.P. No.9157/2012 |
| 21. | W.P. No.9500/2012 |
| 22. | W.P. No.9503/2012 |
| 23. | W.P. No.9504/2012 |
| 24. | W.P. No.9505/2012 |
| 25. | W.P. No.9506/2012 |
| 26. | W.P. No.9614/2012 |

| Sr. No. | Case Number |
|---------|--------------------|
| 27. | W.P. No.9615/2012 |
| 28. | W.P. No.9616/2012 |
| 29. | W.P. No.9872/2012 |
| 30. | W.P. No.9876/2012 |
| 31. | W.P. No.9920/2012 |
| 32. | W.P. No.10246/2012 |
| 33. | W.P. No.10926/2012 |
| 34. | W.P. No.11027/2012 |
| 35. | W.P. No.11268/2012 |
| 36. | W.P. No.11300/2012 |
| 37. | W.P. No.11455/2012 |
| 38. | W.P. No.11744/2012 |
| 39. | W.P. No.12461/2012 |
| 40. | W.P. No.12631/2012 |
| 41. | W.P. No.29471/2012 |
| 42. | W.P. No.29563/2012 |
| 43. | W.P. No.29603/2012 |
| 44. | W.P. No.29411/2012 |
| 45. | W.P. No.11020/2012 |
| 46. | W.P. No.13426/2012 |
| 47. | W.P. No.13577/2012 |
| 48. | W.P. No.13838/2012 |
| 49. | W.P. No.13991/2012 |
| 50. | W.P. No.14205/2012 |
| 51. | W.P. No.14538/2012 |
| 52. | W.P. No.14784/2012 |
| 53. | W.P. No.14874/2012 |
| 54. | W.P. No.15470/2012 |

| Sr. No. | Case Number |
|----------------|--------------------|
| 55. | W.P. No.15471/2012 |
| 56. | W.P. No.15800/2012 |
| 57. | W.P. No.16328/2012 |
| 58. | W.P. No.16329/2012 |
| 59. | W.P. No.17447/2012 |
| 60. | W.P. No.17589/2012 |
| 61. | W.P. No.17815/2012 |
| 62. | W.P. No.17918/2012 |
| 63. | W.P. No.18758/2012 |
| 64. | W.P. No.22231/2013 |
| 65. | W.P. No.19673/2012 |
| 66. | W.P. No.19674/2012 |
| 67. | W.P. No.20004/2012 |
| 68. | W.P. No.20092/2012 |
| 69. | W.P. No.20657/2012 |
| 70. | W.P. No.20658/2012 |
| 71. | W.P. No.20674/2012 |
| 72. | W.P. No.20922/2012 |
| 73. | W.P. No.21062/2012 |
| 74. | W.P. No.21897/2012 |
| 75. | W.P. No.22571/2012 |
| 76. | W.P. No.22572/2012 |
| 77. | W.P. No.24736/2012 |
| 78. | W.P. No.1686/2012 |
| 79. | W.P. No.417/2012 |
| 80. | W.P. No.418/2012 |
| 81. | W.P. No.1043/2012 |
| 82. | W.P. No.1082/2012 |

| Sr. No. | Case Number |
|---------|--------------------|
| 83. | W.P. No.5048/2012 |
| 84. | W.P. No.5049/2012 |
| 85. | W.P. No.5300/2012 |
| 86. | W.P. No.5333/2012 |
| 87. | W.P. No.5334/2012 |
| 88. | W.P. No.5381/2012 |
| 89. | W.P. No.5634/2012 |
| 90. | W.P. No.5885/2012 |
| 91. | W.P. No.6001/2012 |
| 92. | W.P. No.6391/2012 |
| 93. | W.P. No.6743/2012 |
| 94. | W.P. No.6794/2012 |
| 95. | W.P. No.6795/2012 |
| 96. | W.P. No.6878/2012 |
| 97. | W.P. No.7188/2012 |
| 98. | W.P. No.7670/2012 |
| 99. | W.P. No.7695/2012 |
| 100. | W.P. No.7877/2012 |
| 101. | W.P. No.7917/2012 |
| 102. | W.P. No.7918/2012 |
| 103. | W.P. No.27578/2012 |
| 104. | W.P. No.27803/2012 |
| 105. | W.P. No.11021/2012 |
| 106. | W.P. No.11030/2012 |
| 107. | W.P. No.11137/2012 |
| 108. | W.P. No.11138/2012 |
| 109. | W.P. No.11294/2012 |
| 110. | W.P. No.11296/2012 |

| Sr. No. | Case Number |
|----------------|--------------------|
| 111. | W.P. No.11297/2012 |
| 112. | W.P. No.11298/2012 |
| 113. | W.P. No.11519/2012 |
| 114. | W.P. No.11544/2012 |
| 115. | W.P. No.11555/2012 |
| 116. | W.P. No.11561/2012 |
| 117. | W.P. No.11745/2012 |
| 118. | W.P. No.11746/2012 |
| 119. | W.P. No.11921/2012 |
| 120. | W.P. No.11922/2012 |
| 121. | W.P. No.11923/2012 |
| 122. | W.P. No.11972/2012 |
| 123. | W.P. No.12104/2012 |
| 124. | W.P. No.12248/2012 |
| 125. | W.P. No.12384/2012 |
| 126. | W.P. No.12472/2012 |
| 127. | W.P. No.12493/2012 |
| 128. | W.P. No.12670/2012 |
| 129. | W.P. No.12997/2012 |
| 130. | W.P. No.13031/2012 |
| 131. | W.P. No.13805/2012 |
| 132. | W.P. No.13969/2012 |
| 133. | W.P. No.14136/2012 |
| 134. | W.P. No.15179/2012 |
| 135. | W.P. No.15281/2012 |
| 136. | W.P. No.8015/2012 |
| 137. | W.P. No.8190/2012 |
| 138. | W.P. No.8402/2012 |

| Sr. No. | Case Number |
|----------------|--------------------|
| 139. | W.P. No.8568/2012 |
| 140. | W.P. No.8740/2012 |
| 141. | W.P. No.9045/2012 |
| 142. | W.P. No.9048/2012 |
| 143. | W.P. No.9086/2012 |
| 144. | W.P. No.9087/2012 |
| 145. | W.P. No.9104/2012 |
| 146. | W.P. No.9107/2012 |
| 147. | W.P. No.9158/2012 |
| 148. | W.P. No.9166/2012 |
| 149. | W.P. No.9653/2012 |
| 150. | W.P. No.9654/2012 |
| 151. | W.P. No.9736/2012 |
| 152. | W.P. No.9255/2012 |
| 153. | W.P. No.9324/2012 |
| 154. | W.P. No.9364/2012 |
| 155. | W.P. No.9423/2012 |
| 156. | W.P. No.9486/2012 |
| 157. | W.P. No.9570/2012 |
| 158. | W.P. No.9651/2012 |
| 159. | W.P. No.9652/2012 |
| 160. | W.P. No.9742/2012 |
| 161. | W.P. No.9873/2012 |
| 162. | W.P. No.9936/2012 |
| 163. | W.P. No.10330/2012 |
| 164. | W.P. No.10331/2012 |
| 165. | W.P. No.10341/2012 |
| 166. | W.P. No.10456/2012 |

| Sr. No. | Case Number |
|----------------|--------------------|
| 167. | W.P. No.10498/2012 |
| 168. | W.P. No.10499/2012 |
| 169. | W.P. No.10598/2012 |
| 170. | W.P. No.10688/2012 |
| 171. | W.P. No.10698/2012 |
| 172. | W.P. No.10721/2012 |
| 173. | W.P. No.10838/2012 |
| 174. | W.P. No.10852/2012 |
| 175. | W.P. No.10935/2012 |
| 176. | W.P. No.15660/2012 |
| 177. | W.P. No.15791/2012 |
| 178. | W.P. No.16754/2012 |
| 179. | W.P. No.16810/2012 |
| 180. | W.P. No.16811/2012 |
| 181. | W.P. No.16812/2012 |
| 182. | W.P. No.16813/2012 |
| 183. | W.P. No.16997/2012 |
| 184. | W.P. No.16998/2012 |
| 185. | W.P. No.17106/2012 |
| 186. | W.P. No.17286/2012 |
| 187. | W.P. No.17332/2012 |
| 188. | W.P. No.17743/2012 |
| 189. | W.P. No.18029/2012 |
| 190. | W.P. No.18098/2012 |
| 191. | W.P. No.18221/2012 |
| 192. | W.P. No.20261/2012 |
| 193. | W.P. No.21671/2012 |
| 194. | W.P. No.22447/2012 |

| Sr. No. | Case Number |
|---------|--------------------|
| 195. | W.P. No.22594/2012 |
| 196. | W.P. No.22646/2012 |
| 197. | W.P. No.23402/2012 |
| 198. | W.P. No.25801/2012 |
| 199. | W.P. No.26814/2012 |
| 200. | W.P. No.26815/2012 |
| 201. | W.P. No.28142/2012 |
| 202. | W.P. No.26440/2012 |
| 203. | W.P. No.25622/2012 |
| 204. | W.P. No.25623/2012 |
| 205. | W.P. No.22075/2012 |
| 206. | W.P. No.28912/2012 |
| 207. | W.P. No.27352/2012 |
| 208. | W.P. No.8695/2011 |
| 209. | W.P. No.9041/2011 |
| 210. | W.P. No.9019/2011 |
| 211. | W.P. No.9020/2011 |
| 212. | W.P. No.8926/2011 |
| 213. | W.P. No.7802/2011 |
| 214. | W.P. No.8256/2011 |
| 215. | W.P. No.8257/2011 |
| 216. | W.P. No.8647/2011 |
| 217. | W.P. No.6848/2011 |
| 218. | W.P. No.8359/2011 |
| 219. | W.P. No.7406/2011 |
| 220. | W.P. No.7029/2011 |
| 221. | W.P. No.9118/2011 |
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| Sr. No. | Case Number |
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| 223. | W.P. No.9355/2011 |
| 224. | W.P. No.9219/2011 |
| 225. | W.P. No.9873/2011 |
| 226. | W.P. No.7895/2011 |
| 227. | W.P. No.11343/2011 |
| 228. | W.P. No.13657/2011 |
| 229. | W.P. No.8154/2011 |
| 230. | W.P. No.18058/2011 |
| 231. | W.P. No.19644/2011 |
| 232. | W.P. No.19862/2011 |
| 233. | W.P. No.19107/2011 |
| 234. | W.P. No.20160/2011 |
| 235. | W.P. No.20297/2011 |
| 236. | W.P. No.20298/2011 |
| 237. | W.P. No.12159/2011 |
| 238. | W.P. No.12160/2011 |
| 239. | W.P. No.12153/2011 |
| 240. | W.P. No.26855/2011 |
| 241. | W.P. No.2379/2012 |
| 242. | W.P. No.26856/2011 |
| 243. | W.P. No.12568/2011 |
| 244. | W.P. No.14436/2011 |
| 245. | W.P. No.27422/2011 |
| 246. | W.P. No.1302/2012 |
| 247. | W.P. No.15927/2011 |
| 248. | W.P. No.26489/2011 |
| 249. | W.P. No.29582/2011 |
| 250. | W.P. No.29653/2012 |

| Sr. No. | Case Number |
|---------|--------------------|
| 251. | W.P. No.29751/2012 |
| 252. | W.P. No.26857/2011 |
| 253. | W.P. No.23251/2010 |
| 254. | W.P. No.26554/2010 |
| 255. | W.P. No.26555/2010 |
| 256. | W.P. No.26568/2010 |
| 257. | W.P. No.26769/2010 |
| 258. | W.P. No.27266/2011 |
| 259. | W.P. No.27863/2011 |
| 260. | W.P. No.27864/2011 |
| 261. | W.P. No.27865/2011 |
| 262. | W.P. No.27866/2011 |
| 263. | W.P. No.29671/2011 |
| 264. | W.P. No.24686/2011 |
| 265. | W.P. No.4580/2011 |
| 266. | W.P. No.7686/2011 |
| 267. | W.P. No.9655/2011 |
| 268. | W.P. No.9656/2011 |
| 269. | W.P. No.11256/2011 |
| 270. | W.P. No.11359/2011 |
| 271. | W.P. No.11665/2012 |
| 272. | W.P. No.13721/2011 |
| 273. | W.P. No.22737/2011 |
| 274. | W.P. No.22738/2011 |
| 275. | W.P. No.1985/2012 |
| 276. | W.P. No.2726/2011 |
| 277. | W.P. No.3173/2012 |
| 278. | W.P. No.4439/2010 |

| Sr. No. | Case Number |
|----------------|--------------------------|
| 279. | W.P. No.4478 /2011 |
| 280. | Ctrl. Org. No.476-W/2010 |
| 281. | Ctrl. Org. No.458-W/2010 |
| 282. | W.P. No.21725/2011 |
| 283. | W.P. No.11666/2012 |
| 284. | W.P. No.10908/2011 |
| 285. | W.P. No.10674/2011 |
| 286. | W.P. No.4440/2011 |
| 287. | W.P. No.132/2013 |
| 288. | W.P. No.57/2013 |
| 289. | W.P. No.58/2013 |
| 290. | W.P. No.59/2013 |
| 291. | W.P. No.60/2013 |
| 292. | W.P. No.61/2013 |
| 293. | W.P. No.31741/2012 |
| 294. | W.P. No.109/2013 |
| 295. | W.P. No.110/2013 |
| 296. | W.P. No.111/2011 |
| 297. | W.P. No.367/2013 |
| 298. | W.P. No.368/2013 |
| 299. | W.P. No.887/2013 |
| 300. | W.P. No.888/2013 |
| 301. | W.P. No.1110/2013 |
| 302. | W.P. No.25182/2011 |
| 303. | W.P. No.711/2013 |
| 304. | W.P. No.2145/2013 |
| 305. | W.P. No.18521/2011 |
| 306. | W.P. No.19219/2012 |

| Sr. No. | Case Number |
|---------|--------------------|
| 307. | W.P. No.19218/2012 |
| 308. | W.P. No.1879/2013 |
| 309. | W.P. No.2526/2013 |
| 310. | W.P. No.5109/2013 |
| 311. | W.P. No.5138/2013 |
| 312. | W.P. No.5139/2013 |
| 313. | W.P. No.5450/2013 |
| 314. | W.P. No.5246/2013 |
| 315. | W.P. No.20452/2013 |
| 316. | W.P. No.21502/2013 |
| 317. | W.P. No.6547/2013 |
| 318. | W.P. No.7056/2013 |
| 319. | W.P. No.29753/2012 |
| 320. | W.P. No.27742/2012 |
| 321. | W.P. No.6412/2013 |
| 322. | W.P. No.7074/2013 |
| 323. | W.P. No.6572/2013 |
| 324. | W.P. No.21438/2013 |
| 325. | W.P. No.21439/2013 |
| 326. | W.P. No.21440/2013 |
| 327. | W.P. No.21441/2013 |
| 328. | W.P. No.21449/2013 |
| 329. | W.P. No.21770/2013 |
| 330. | W.P. No.17671/2013 |
| 331. | W.P. No.21884/2013 |
| 332. | W.P. No.22908/2013 |
| 333. | W.P. No.16622/2011 |
| 334. | W.P. No.18015/2011 |

| Sr. No. | Case Number |
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| 335. | W.P. No.9017/2011 |
| 336. | W.P. No.9018/2011 |
| 337. | W.P. No.16607/2011 |
| 338. | W.P. No.21611/2012 |
| 339. | W.P. No.21612/2012 |
| 340. | W.P. No.15251/2012 |

(Mamoon Rashid Sheikh)
Judge

(Syed Mansoor Ali Shah)
Judge

*M. Tahir/Iqbal**