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IN THE LAHORE HGIH COURTLAHORE

JUDICIAL DEPARTMENT.

JUDGMENT:

W.P. No.28180 of 2014.

Waheed Shahzad Butt

VERSUS

The Federation of Pakistan and another.

Date of hearing…30.11.2015.

Petitioner by: Mr. Waheed Shehzad Butt Advocate for petitioner.

Respondent by: Ch. Liaqat Ali Advocate for respondents.
Mr. Javed Athar Advocate for FBR.
Ms. Hina Hafeez Ullah, learned standing counsel.

Shams Mehmood Mirza, J:- This writ petition raises an interesting point regarding the availability of the power with the President to entertain and adjudicate upon representation filed against the decision of Federal Tax Ombudsman passed as an appellate authority in terms of section 21 of the Freedom of Information Ordinance, 2002 (the **FOI Ordinance**). The other issue for determination in this writ petition is whether the recommendations of Alternate Dispute Resolution Committee are excluded documents in terms of section 8 of the FOI Ordinance.

2. The petitioner by having recourse to the provisions of the FOI Ordinance applied to the Chairman, Federal Board of Revenue (the **Board**), respondent No.2, through letter dated 09.08.2012 seeking information and access to record pertaining to the recommendations issued by Alternate Dispute Resolution Committee (**ADRC**) constituted under section 134A of the Income Tax Ordinance, 2001 and section 47A of the Sales Tax Act, 1990 and the orders passed by the Board on the said recommendations. As the Board declined to pass the decision on the information sought for, the petitioner lodged a complaint with the Federal Tax Ombudsman (the **Tax Ombudsman**)

under section 19 of the FOI Ordinance. The Tax Ombudsman vide order dated 10.01.2013 directed the Board to provide information/record requested for to the petitioner with a period of 21 days. The Board filed a representation before the President of Pakistan through the Ministry of law on 14.02.2013 under section 32 of the Federal Tax Ombudsman, 2000. The President partially accepted the representation on 14.10.2014 by holding that the record relating to the recommendations of the ADRC will not be provided to the petitioner. The order of Tax Ombudsman was accordingly modified by the President on the following terms.

> The upshot of the above discussion is that the subject representation of Agency has been allowed **only to the extent of non providing the record relating to recommendation of the respective committees** constituted in terms of the above mentioned provision of the tax status. In these circumstances the impugned decision of the learned F.T.O. is modified in the following manner:
>
> (i) **FBR is ordered to provide the requester with the information but excluding therefrom the record of recommendations of the said committee, in the format given by him, within 21 days from the date of receipt of this order and requester/complainant should also specify the description of court(s) case in which the information requested is required;**
>
> (ii) **It is further clarified that requester/complainant does not need to file a fresh application and that an additional application will form part of the original application of August 09, 2012 wherein case details are to be mentioned."**

3. Learned counsel for the petitioner, inter alia, argued that the representation filed by the Board before the President was not valid as no such remedy was provided for by the FOI Ordinance. On merits it was stated that there was no prohibition in the FOI Ordinance for providing the necessary information/documents to the petitioner. Learned counsels for the respondents, on the other hand, stated that representation to the President was permissible in terms of section 32 of Federal Tax Ombudsman Ordinance, 2000 and that that right was

reaffirmed in section 14 of the Federal Tax Ombudsman Institutional Reforms Act, 2013. The learned Standing Counsel representing the Federation also took a series of objections by stating that the complaint to the Tax Ombudsman was filed by the petitioner alleging mal-administration under section 3 of the Federal Tax Ombudsman Ordinance, 2000 and that by virtue of section 23 of the Ordinance, the representation before President was thus competent in terms of sections 32 and 37 of the Federal Tax Ombudsman Ordinance, 2000 and sections 14 and 24 of the Federal Tax Ombudsman Institutional Reforms Act, 2013. In this regard reliance was placed on judgments reported as Muhammad Hussain and others v. Islamic Republic of Pakistan **PLD 1991 SC 385** and S.M. Rahman & Co. v. Motabar and others **PLD 1981 SC 282**. It was also urged that the record sought by the petitioner fell in the exclusions contained in section 8 (c), (g) and (h) of the FOI Ordinance and, therefore, the Board was justified in not providing the said record to the petitioner.

4. From the arguments advanced by the learned counsels for the parties, the following issues of law have arisen requiring decision by this Court.

(a) Whether representation by the Board before the President against the decision of the Tax Ombudsman was competent in terms of section 32 of Federal Tax Ombudsman Ordinance, 2000?

(b) Whether the information/documents sought for by the petitioner fall in the exclusions mentioned in section 8 of the FOI Ordinance?

5. The various parts of the FOI Ordinance relied upon by the parties to provide guidance towards its true construction, scope and intent need reproduction in whole or in summary form. The object of the FOI Ordinance is conveyed by its preamble, which states that

> WHEREAS it is expedient to provide for transparency and freedom of information to ensure that the citizens of Pakistan have

> improved access to public records and for the purpose to make the Federal Government more accountable to its citizens, and for matters connected therewith or incidental thereto;

The right of access is given by section 3 of the FOI Ordinance which declares that no requester shall be denied access to any official record except for the exemptions provided in section 15, which relate to international affairs, and that the FOI Ordinance shall be interpreted so as to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information. Under the FOI Ordinance, both the existence and the access rights attach to "information" and "public record". Section 2 (h) and (i) of the FOI Ordinance provides the definitions of "public body" and "record". Sections 7 thereof is relevant and is reproduced hereunder

> **7. Declaration of public record.**- Subject to the provision of section 8, the following record of all public bodies are hereby declared to be the public record, namely:-
>
> (b) transactions involving acquisition and disposal of properly and expenditure undertaken by a public body in the performance of its duties;
>
> (c) information regarding grant of licenses, allotments and other benefits and privileges and contract and agreements made by a public body;
>
> (d) final orders and decisions, including decisions relating to members of public; and
>
> (e) any other record which may be notified by the Federal Government as public record for the purposes of this Ordinance.

In recognition of the delicate balance between the public's interest in knowing and in expressing its opinion and the need in some cases to protect confidentiality and privacy, FOI Ordinance provides a wide range of exemptions/exclusions, as mentioned in section 8, which reads as under

> **8. Exclusion of certain record.**- Nothing contained in section 7 shall apply to the following record of all public bodies, namely:-
> (a) nothing on the files;
> (b) minutes of meetings;
> (c) any intermediary opinion or recommendation;
> (d) record of the banking companies and financial institutions relating to the accounts of their customers;
> (e) record relating to defence forces, defence installations or connected therewith or ancillary to defence and national security;
> (f) record declared as classified by the Federal Government;
> (g) record relating to the personal privacy of any individual ;
> (h) record of private documents furnished to a public body either on an express or implied condition that information contained in any much documents shall not be disclosed to a third person; and
> (i) any other record which the Federal Government may, in public interest, exclude from the purview of this Ordinance.

Similarly, section 19 of the FOI Ordinance in the context of the first issue identified by this Court is most relevant and is reproduced hereunder

> **19. Recourse of the Mohtasib and Federal Tax Ombudsman.**- (1) If the applicant is not provided the information or copy of the record declared public record under section 7 within the prescribed time or the designated official refuses to give-such information or, as the case may be, copy of such record, on the ground that the applicant is not entitled to receive such information or copy of such record, the applicant may, within thirty days of the last date of the prescribed time for giving such information or, as the case may be, of such record, or the communication of the order of the designated official declining to give such information or copy of such record, file a complaint with the head of the public body and on failing to get the requested information from him within the prescribed time may file a complaint with the Mohtasib and in cases relating to Revenue Division, it subordinate

> departments, offices and agencies with the Federal Tax Ombudsman.
>
> (2) The Mohtasib or the Federal Tax Ombudsman, as the case may be, may, after hearing the applicant and the designated official, direct the designated official to give the information or, as the case may be, the copy of the record or may reject the complaint.

6. The examination of the above provisions show that the citizens have been granted a right to access to official/public record and that an applicant (requester) need not provide any reason for seeking such record and it is for the designated official to determine whether the record sought for does not constitute public record or that the record sought for is excluded under section 8 of the FOI Ordinance. Section 19 of the FOI Ordinance itself provides a three tier process and is a complete code for processing the application of a requester with self help remedies in case of denial of his request. Down the chain is the designated official to whom the application is made in terms of section 13 of the FOI Ordinance. In case of denial by the designated official to provide the information or the record, as the case may be, the requester has the remedy to approach the head of the public body with the complaint. In case the requester fails to get the information or record from the head of the public body, he can approach the Tax Ombudsman or the Mohtasib, as the case may be. For all intents and purposes, the Tax Ombudsman or the Mohtasib under the provisions of FOI Ordinance is the last appellate forum to entertain the complaint and redressal of grievance of a requester. Another important distinction that needs to be brought to light is that section 19 of FOI stands on a different footing in comparison to other laws which create the office of Mohtasib in that the Tax Ombudsman under the FOI passes a *decision* on the complaint of a requester rather that making *recommendation* on mal-administration of the delinquent officials. This difference must not be lost sight of as it brings into sharp focus the type of jurisdiction being

exercised by the Tax Ombudsman under section 19 of the FOI Ordinance.

7. Keeping in view the three tier process provided for in section 19 of the FOI and the fact that no further appeal was provided against the decision of the Tax Ombudsman, it appears that FOI Ordinance intended finality to be attached to the orders of the Tax Ombudsman passed as on appellate authority under section 19 of the FOI Ordinance. It is an elementary principle of law that is well settled by now that appeal is a creature of statute and unless provided it cannot be resorted to by recourse to the right of appeal provided in another law. Which brings us to the submissions made by the learned counsels for the respondents that the right of representation, which is akin to that of an appeal, provided in Federal Tax Ombudsman Ordinance, 2000 and Federal Tax Ombudsman Institutional Reforms Act, 2013 is available to the department against the decision of Tax Ombudsman. The learned counsel for the petitioner relied upon judgments reported as Mst. Bibi Chazala v. Member, Board of Revenue, Punjab, Lahore and others **2011 SCMR 749**, Capital Development Authority through Chairman v. Raja Muhammad Zaman Khan and another **PLD 2007 SC 121** and Mst. Tabassum v. Waqar Hussain and another **2011 MLD 351** to argue that appeal is a creature of statute and unless available in the relevant law cannot be invoked by resorting to the other laws even if they be of similar nature and that in the absence of a right of further appeal, the only remedy available to a person is to invoke the writ jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the **Constitution**). This position was controverted by the learned Standing Counsel who relied upon case law to the contrary.

8. In Muhammad Hussain and others v. Islamic Republic of Pakistan **PLD 1991 SC 385** relied upon by the learned Standing Counsel, the issue was with regard to the availability of revision with the Labour Appellate Tribunal against the decision of the

Labour Court passed in appeal under section 17 (1) of the Payment of Wages Act, 1936 as there were conflicting opinions on the issue by the Lahore High Court and the learned Sindh High Court. The Lahore High Court relying upon a judgment reported as Pakistan v. Maqsood Ali **1981 PLC 307** held that the Labour Appellate Tribunal was concerned only with matters arising out of proceedings taken under Industrial Relations Ordinance and that the appeal heard by the Labour court under Payment of Wages Act fell outside its revisional jurisdiction. The learned Sindh High Court, however, came to a totally opposite conclusion by holding that the disputes under the Payment of Wages Act and the Industrial Relations Ordinance bear such close resemblance that there is no reason to hold that the Legislature did not intend to make available the remedy of revision against the decisions of the labour court delivered under the Payment of Wages Act. Relying upon section 35 (5) (d) of Industrial Relations Ordinance, it was thus held by the learned Sindh High Court

> *In our opinion, when a matter under any special law is transferred to the Labour Court under a statutory provision its adjudication and determination by the Labour Court becomes a proceedings under the I.R.O. by virtue of subsection (5) (d) of section 35 so that it is amenable to the revisional jurisdiction of the Appellate Tribunal.*

When the matter reached up to the Hon'ble Supreme Court relying upon the ratio of S.M. Rahman & Co. v. Motabar and others **PLD 1981 SC 282**, it also came to the similar opinion by holding that

> *In our opinion, the provisions of clause (d) of section 35 (5), Industrial Relations Ordinance should put an end to the controversy. It will appear from this clause that the performance of functions under other laws is a part of the normal duties of a Labour Court. That being so, even when it exercises jurisdiction under other laws it does not act as a special forum outside the ambit of the Industrial Relations Ordinance, but, on the other*

> *hand, it is performing a function specifically provided for by the Ordinance.*

9. Pakistan Fisheries Ltd., Karachi and others v. United Bank Limited **PLD 1993 SC 109** was a case in which the Hon'ble Supreme Court, however, took a contrary view. In the said case, the issue was whether an appeal lies under section 15 of the Code of Civil Procedure (Amendment) Ordinance, 1980 against the interlocutory orders passed by High Court in suits under Banking Companies (Recovery of Loans) Ordinance, 1979. It was held that

> *The jurisdiction conferred on the High Court under the Ordinance is a special jurisdiction and while exercising such jurisdiction the High Court bears the fictional character of a special court as deemed in the Ordinance. It is a fundamental rule, that where an enactment creates a new jurisdiction, prescribes the manner in which that jurisdiction is to be exercised and further specifies the remedy, such remedy is exclusive and the party aggrieved of an order made in the exercise of that jurisdiction must seek only such remedy and no other.*

The judgment in *Pakistan Fisheries* case, it would thus appear, was in stark contrast to the judgment in *Muhammad Hussain's* case and also to *S.M. Rahman's* case. The latter case, incidentally, was relied upon by the appellants in *Pakistan Fisheries* case but was distinguished by the Hon'ble Supreme Court. The ratio of the judgment in *Pakistan Fisheries* case, it may be stated, has ever since been accepted to have laid down the correct law that special law confines the party to the remedies provided therein without taking recourse to other laws. The ratio of *Pakistan Fisheries* case has never been deviated ever since by the Courts in this country. Also being later in time, the judgment in Pakistan Fisheries case is binding on this Court and according to its ratio, the decision of Federal Tax Ombudsman on a complaint filed by a requester under FOI is final with no further remedy available to the Board.

10. There are other features in this case on the basis of the applicable law that distinguish the judgment render in *Muhammad Hussain's* case and makes it ratio inapplicable. In *Muhammad Hussain's* case, as is apparent from the excerpt quoted above, what clinched the issue in favour of the appellants was clause (d) of sub-section (5) of section 35 of Industrial Relations Ordinance, which stipulated that a Labour Court shall

> exercise and perform such other powers and functions as are or may be conferred upon or assigned to it by or under this Ordinance or **any other law**.

Based on the afore-mentioned clause, the Hon'ble Supreme Court found the decision of the labour court passed under section 17 (1) of the Payment of Wages Act to be amenable to revisional jurisdiction exercised by Labour Appellate Tribunal under section 38 of the Industrial Relations Ordinance. In the present case, however, there is no comparable provision in Federal Tax Ombudsman Ordinance, 2000. Section 37 of the said Ordinance was referred to by the learned counsels for the parties to find support for the premise that finality attached to the decision of the Federal Tax Ombudsman would yield to the remedy of representation to the President provided for in section 32 thereof. The argument is misplaced and the basis thereof is not free from difficulties in as much as section 37, in the language it is couched, merely grants effect to the provisions of the Federal Tax Ombudsman Ordinance over other laws for the time being in force but no more. The purpose of a *non-obstante* clause of the nature found in section 37 is nothing more than to point out that it shall have precedence over anything contrary in any other law in force. The object appears to prevent reliance on any other law to the contrary. However, FOI having been promulgated in the year 2002 and also being a special law, its provisions cannot be made subservient to the Federal Tax Ombudsman Ordinance, which was an earlier law. Both being special laws, the later in time

shall prevail. In Sheikh Khalid Mahmood v. Banking Tribunal, NWFP, Peshawar and another **1997 CLC 1812**, while faced with reconciling inconsistencies between two special laws, it was held that

> It is a settled proposition of law that if two provisions of two different enactments are in clash with each other and cannot be reconciled, then the latter in date shall prevail.

Similarly, in *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. and Others* (2001) 3 SCC 71, it was held that

> It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail.

Be that as it may, on a careful examination of the scheme of both FOI Ordinance and Federal Tax Ombudsman Ordinance, it becomes apparent that there is nothing inconsistent or contradictory between the two enactments inasmuch as the subject matter of both the enactments is different and distinct. FOI Ordinance is specially designed to provide access to the citizens to the information and public record and deals, inter alia, with the procedure for providing documents/record of the public bodies to a requester subject to the exclusions contained in section 8 thereof. In fact it is a complete, self-contained, exhaustive code in regard to a person's right to access to information/record of public bodies. The legislative intent thus is apparent that any person desirous of obtaining information/record of public bodies must have recourse to the procedure provided for in FOI Ordinance. The Federal Tax Ombudsman Ordinance, as is clear from its preamble and other provisions, deals, inter alia, with the investigation and redressal of injustices done to a person on account of maladministration by the officials of the revenue department. Both the enactments by the plain reading of their text, thus, have nothing in common. When the object and aim of a statute is clearly expressed in its provisions, the scope and intent thereof cannot be restricted or rendered nugatory by the

provisions of another statute particularly when the other statute does not contain any provision inconsistent with it. The Courts cannot ignore the express language and the plain meaning of the various provisions of a statute in attempting to find the object of the law and the goals fixed by the legislature. By section 19 of the FOI Ordinance, a final remedy of approaching the Tax Ombudsman has been provided to a citizen who has been denied information or public record. The FOI Ordinance does not provide any further appeal beyond the forum of Tax Ombudsman and as such finality must be attached to its decisions subject to the challenge made to its decisions in the Constitutional jurisdiction of this Court. By providing the forum of Tax Ombudsman for lodging complaints by a person denied access to information or public record does not mean that the remedy of representation to the President provided for in section 32 of Federal Tax Ombudsman Ordinance, 2000 also becomes available to the public bodies. This interpretation would be in violation of the ratio of the *Pakistan Fisheries* case and is not borne out from the provisions of Federal Tax Ombudsman Ordinance, 2000. The Federal Tax Ombudsman Institutional Reforms Act, 2013 too stands on no better footing. Its section 2 (b) provides the definition of "Ombudsman" to mean Ombudsman appointed under the "relevant legislation". The Freedom of Information Ordinance, as defined in section 2 (c), is not included in the definition of "relevant legislation". Recourse to section 14 of the said Ordinance is, therefore, of no avail to the respondents.

11. Even otherwise, section 32 of the Federal Tax Ombudsman Ordinance by its terms provides the remedy of representation before the President against the *recommendation* of the Tax Ombudsman. It was alluded to in the earlier part of this judgment that unlike other laws pertaining to Ombudsman, the Tax Ombudsman passes a *decision* on the complaint of an aggrieved person under the FOI Ordinance whereas while exercising jurisdiciton under the Federal Tax Ombudsman

Ordinance, he merely makes recommendations. The two expressions "decision" and "recommendation" have different connotations. A decision is a binding adjudication of rights and claims between two or more persons whereas recommendation denotes something in the nature of a suggestion. It is, therefore, held that the President had no jurisdiction to entertain and pass a decision on the representation filed by the Board against the decision of the Tax Ombudsman.

12. This Court has on merits also come to the conclusion that the respondents have made out no case for interference in the order passed by the Tax Ombudsman and that the President was wrong in modifying the order of the Tax Ombudsman. The petitioner requested for the record of the recommendations issued by the ADRC constituted under section 134-A of the Income Tax Ordinance, 2001 and section 47-A of the Sales Tax Act, 1990. The said provisions envisage the formation of an ADRC by the Board upon the application of an aggrieved person in regard to a matter which is pending before an Appellate Authority and which involves a dispute or a hardship case. The Board may appoint an ADRC consisting of an officer of Inland Revenue and two persons from a panel comprising of a chartered accountant, advocate, income tax practitioner or reputable tax payer. ADRC is required to make its recommendations within a period of 90 days to the Board whereupon the Board may pass an order as it may deem appropriate. The order passed by the Board on the recommendation of ADRC shall finally be submitted before the authority, tribunal or court where the matter was subjudice for its consideration and passing appropriate orders. The afore-mentioned provisions in the Income Tax Ordinance, 2001 and Sales Tax Act, 1990 provide a wholesome procedure for the constitution of ADRC and the follow up measures to be taken upon its recommendations.

13. The learned Standing Counsel contended that the exclusions contained in section 8 of the FOI Ordinance were

very much applicable to the recommendations of ADRC. In this regard reference was made to section 8 (c) of the FOI according to which "any intermediary opinion or recommendation" of a public body does not form part of the public record and cannot be made available to a requester. The expression "any intermediary opinion or recommendation", according to the learned Standing Counsel, included the recommendations made by ADRC. It was also submitted that such record pertained to the individuals and that its publication would infringe upon their privacy, which is prohibited by the FOI Ordinance. Recourse was also made to the clause (h) of section 8 of FOI Ordinance to state that record of private documents furnished to a public body on an express or implied condition that information contained in any such document shall not be disclosed to a third person places restrictions on the Board from making a disclosure of the documents requested for. It was further the case of the respondents that record submitted to ADRC and its recommendations are not public record

14. The arguments advanced by the learned standing counsel encounter a number of formidable obstacles. First, section 3 (2) of FOI Ordinance provides the guidelines for interpreting the statute. In order to understand the scheme of FOI Ordinance, it is necessary to reproduce section 3 thereof.

> **Access to information not to be denied.** (1) Notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of this Ordinance, no requester shall be denied access to any official record other than the exemptions as provided in section 15.
> (2) This Ordinance shall be interpreted so as to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information.

The Court's approach in terms of section 3 obligation is to interpret and apply FOI Ordinance so as to further its objects, bearing in mind that while FOI Ordinance gives a legally enforceable right to every person to be given access to public record held by the Government, that right is subject to an exemption contained in section 15 thereof relating to the

international relations. It would, therefore, be proper to give to the relevant provisions of the Ordinance a construction which would further, rather than hinder, free access to information. In addition to section 15, certain exclusions in relation to public record are provided for in section 8 of the FOI Ordinance which makes the documents mentioned therein not to constitute public record. Second obstacle in the way of the respondents is that subsequent to the passing of the FOI Ordinance, Article 19-A was inserted in the Constitution through eighteenth amendment which gives every citizen the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law. In addition to the FOI Ordinance, the citizens now have the constitutional guarantee of freedom of access to information. After the introduction of Article 19-A of the Constitution, the exclusions contained in section 8 of the FOI Ordinance shall have to be strictly construed justifying the denial of access of public record to the citizens.

15. The critical question is how to interpret the exclusions contained in section 8 of the FOI Ordinance by creating the correct balance between the competing public interest and the proper administration of the Government for which these exclusions are sometimes reasonably necessary. Before proceeding any further, it may be stated that the exclusions contained in section 8 of the FOI Ordinance are quite loosely worded, open-ended and in abstract form without prescribing the circumstances and criteria on which the application of a requester may be turned down for their supply. In short, the FOI Ordinance has not set any standards for determining which record or portions thereof should or may be withheld from disclosure. To take the example of the exclusion contained in section 8 (c) of the FOI Ordinance, what does the expression “any intermediary opinion or recommendation” mean and under what circumstances will the application for its supply rejected? It is not every opinion or recommendation in a file which is

excluded being not a public document. Section 15 of the FOI Ordinance grants absolute exemption to such information the disclosure of which is likely to cause grave and significant damage to the interests of Pakistan in the conduct of international relations. The standard of "likely to cause grave and significant damages to the interests of Pakistan" thus would trump the right of the requester seeking information regarding the international relations. In regard to section 8 exclusions, however, the FOI Ordinance explicitly specifies [*section 13 (2) (d) & (e)*] that it is for the designated official to *form an opinion* that he is excused from disclosing/providing the information/record requested on the ground that the same does not constitute public record under section 7 and is excluded in terms of section 8 of the FOI Ordinance. The designated official furthermore is required to record his decision in writing and inform the applicant about the same within twenty-one days of the receipt of the application. This forming of opinion *per se* makes the section 8 exclusions qualified and not absolute as it is dependent upon the subjective opinion of the designated official. The onus is on the designated official to make out a case for exclusion of a document based on the scheme of FOI Ordinance which obligates disclosure. The forming of opinion or expressions of like nature on their face appear to confer on the public official unlimited power, or at least the power to choose from a wide range of alternatives, the purpose being to free them of judicial interference. The Courts, however, do not readily defer to the finality and conclusiveness of an administrative body's decision as to the existence of a question of fact upon which the validity of its exercise of power rests. Exercise of powers couched in subjective terms is still to be made in good faith and on relevant considerations. The Courts have always insisted and rightly so that such seemingly unconstrained power is limited by the purpose of the statute. Where the purpose of the statute is clearly defined, the Courts would require the public official to take into account the

specified considerations and ignore the irrelevant. As was said by Lord Upjohn in *Padfield v Minister of Agriculture Fisheries and Food* [1968] A.C. 997, even if a statute were to confer upon a decision maker an ''unfettered discretion'';

> [T]he use of that adjective [unfettered], even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely, that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the minister rather than by the use of adjectives.

The FOI Ordinance casts a duty on the designated official to make a determination whether the documents requested for fall in the exclusions contained in section 8. Taking into account the purpose of FOI Ordinance as mentioned in its preamble and section 3 (2) obligation, it is apparent that the object of FOI Ordinance was to provide improved access to public record and to make the Government more accountable to the citizens and to facilitate and encourage the disclosure of information. The basic scheme of FOI Ordinance and the language employed suggests that the public's right of access and the public interest in disclosure of information/record is the primary interpretative tool to be employed in making a determination regarding the section 8 exclusions. The duty of a public body to disclose and provide the information/record is thus displaced by the section 8 exclusions only if the public interest in maintaining exclusions is outweighed by the public interest in disclosing and providing the information/record sought. Merely because the record falls in the section 8 exclusions does not necessarily mean that its disclosure would harm the interest protected by that exclusion. Accordingly, where exclusion under section 8 is relied on by the public body, it is for the public body to justify/demonstrate that that stance is supported (with sufficient particulars and by demonstrable factual basis) by weighing of the relevant aspects of the public interest.

16. The research conducted by this Court shows that statutes pertaining to freedom of information in different countries also exclude the recommendations and opinions received by the Governments from various quarters/persons/experts during its deliberative process in the run up to formation of the policy or any other decision. For example, Section 36 of the Australian Freedom of Information Act, 1982 provides the necessary standards designed to protect deliberative process documents in appropriate cases. Its key portions are reproduced hereunder.

> 36 (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act-
>
> (a) would disclose matter in the nature of, or relating to opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has
> taken place, in the course of, or for the purposes of the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth;
>
> (b) would be contrary to the public interest.
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> …………………………………………………………………………
> ……………………………
>
> (5) This section does not apply to a document by reason only of purely factual material contained in the document.

From the reading of the above provision, it is clear that documents including those prepared by an officer, a minister or a member of Council which relate to the deliberative processes of the agency or Government attract exemption if the release of those documents would be contrary to the public interest. Examples of documents which may attract this exemption include Ministerial briefs, internal memoranda, consultants' reports, drafts. This exemption of course does not apply to documents containing purely factual material. One purpose of such exemption is to safeguard the deliberative policymaking process of government, which encourages open discussion of policy matters between officials. The exemption thus allows

certain pre-decisional, deliberative documents to be withheld from public disclosure. Another purpose of this exemption is to protect against premature disclosure of deliberations before final adoption of the policy or position of an agency. It is, however, not enough to establish exemption under section 36, it is also to be shown that their disclosure would be contrary to the public interest. The following passage from Jordan v Department of Justice **[1978] USCA DC 317; 591 F (2d) 753** neatly sums up the position regarding the documents forming part of the deliberative process and the purpose for their non-disclosure:

> ………….The privilege attaches to inter and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy. There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. See NLRB v Sears Roebuck & Co, 421 US at 151; [1975] USSC 81; 95 S Ct 1504; Montrose Chemical Corp v Train, [1974] USCADC 40; 160 US App DC 270, 273; [1974] USCADC 40; 491 F 2d 63, 66 (1974). Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. See Grumman Aircraft Eng Corp v Renegotiation Board, note 77 supra, 157 US App DC at 129; 482 F 2d at 718; Sterling Drug Inc v FTC, [1971] USCADC 275; 146 US App DC 237, 245-246; [1971] USCADC 275; 450 F 2d 698, 706-708 (1971). And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decide not for matters they considered before making up their minds". Grumman Aircraft Eng Corp v Renegotiation Board, supra. See Boeing Airplane Co v Coggeshall, 108 US App 106, 112; 280 F 2d 654, 660 (1960); Carl Zeiss Stiftung v VEB Carl Zeiss Jena, note 77 supra, 40 FRD at 325-326'.

17. If it were the documents containing opinion, advice, recommendations etc relating to the internal processes of deliberation of an agency/department/authority before arriving at a policy decision that are potentially shielded from disclosure through the exclusion contained in section 8 (c), the FOI

Ordinance does not say so. Keeping in view section 3 obligation to interpret and apply the FOI Ordinance to facilitate and encourage the disclosure of information coupled with Article 19-A guarantee to the citizens for giving access to information/documents held by Government and its agencies, this Court is not ready to accept that every intermediary opinion or recommendation on a departmental file will fall into the category of excluded documents. The method for discerning the purpose of a statute or group of provisions contained therein has aptly been laid down in *Ealing London Borough Council v. Race Relations Board* **[1972] 1 All ER 105** as follows

> In the absence of [looking at the legislative history and preparatory works] the courts have principal avenues of approach to the ascertainment of the legislative intention: (1) examination of the social background, as specifically proved if not within common knowledge, in order to identify the social or juristic defect which is the likely subject of remedy; (2) a conspectus of the entire relevant body of the law for the same purpose; (3) particular regard to the long title of the statute to be interpreted (and, where available, the preamble), in which the general legislative objective will be stated; (4) scrutiny of the actual words to be interpreted in the light of the established canons of interpretation; (5) examination of the other provisions of the statute in question (or of other statutes in pari material) for the light which they throw on the particular words which the subject matter of interpretation.

The expression "Intermediary opinion or recommendation" has to be interpreted in a manner so as to confine its scope to the deliberative process during the formation of policy of a department/agency/authority i.e. a process involving deliberation, consultation and recommendation that occurs prior to a decision, or before or while undertaking a course of action. Thus, any intermediary recommendation or opinion given to an agency/department/ authority during a process which involves weighing up or evaluating competing arguments or considerations that may

have a bearing on a course of action, decision, proposal or policy may be excluded from the public record in terms of section 8 (c) of the FOI Ordinance. Section 8 exclusions can be seen as an attempt to protect the integrity and viability of the decision making process. If the release of record of Government/public bodies would significantly harm and prejudice the decision making process and on balance there is no benefit to the public which outweighs that impairment then it would be contrary to the public interest to grant access to such record.

18. The expression "any intermediary opinion or recommendation" thus interpreted does not include the opinion given by ADRC to the Board under a dispute resolution mechanism, which is otherwise statutory in nature and recognized in various enactments. Under the scheme of Sales Tax Act and Income Tax Ordinance, finality is attached to the opinion rendered by ADRC as upon its submission to the Board the role of ADRC comes to an end. The afore-mentioned enactments do not envisage any further act on the part of ADRC after rendering its opinion to the Board. After the opinion of ADRC, the decision on the opinion rests with the Board or the Appellate Authority where the matter was pending before it was sent to ADRC. The expression "any intermediary opinion or recommendation" means a step in the deliberative process which is made basis of formulation of a policy or other decision of like nature. The proceedings of ADRC and its recommendation, though not binding on the Board, have no nexus with the policy making or the kind of policy bases referred to in the judgment <u>Jordan v Department of Justice</u> [1978] USCA DC 317; 591 F (2d) 753. The recommendations of ADRC, which are made under a statutory arrangement, are not covered by the exclusion contained in section 8 (c) of the FOI Ordinance.

19. The learned standing counsel also sought help from section 8 (g) and (h) of the FOI Ordinance to contend that the

record of ADRC pertains to the personal privacy of the individual and this record pertains to the private documents furnished on the express or implied condition that the information contained in any such document shall not be disclosed to a third person. On a plain reading of section 8 (c) of the FOI Ordinance, this Court does not find the interpretation placed on it by the learned standing counsel to be valid. Firstly, in order for a matter to be referred to ADRC it has to be pending before the Appellate Authority, which essentially means that the matter is under litigation between the Revenue and the tax payer and pending before an adjudicatory forum. The record of such litigation can by no stretch be termed as private record. Secondly, the alternate dispute resolution mechanism as the name implies is a system for resolving the disputes between the parties out of the court, which system operates alongside the normal adjudicatory mechanisms and thus cannot be allowed to be shrouded in mystery. The recommendations of the ADRC can potentially form basis for an out of court settlement between the tax payer and the Revenue pertaining to matters of liability of duties, taxes, additional duties/taxes, admissibility of refund or rebate, waiver or fixation of penalty or fine, confiscation of goods and relaxation of time limitations, procedural and technical conditions. As the matter pertains to payment of taxes etc, which has been taken outside the normal adjudicatory mechanisms by virtue of ADRC, it is of utmost importance. Accordingly the general public has an interest and a right to know about the same. It is with this background in mind that this Court now turns to consider the two particular exemptions, which were urged by the learned Standing Counsel. The dispute between the Revenue and the tax payer, which is already pending in a court/tribunal/authority, and which has been referred to ADRC cannot be said to contain record relating to the personal privacy of an individual. ADRC has to give its recommendations on the dispute between the parties in regard

to which the relevant documents are already on the record before the Appellate Authority and therefore accessible to public. It would take quite a leap of logic to grant the status of exemption to the recommendation given by ADRC when the documents underpinning it are available to general public. As stated earlier, alternate dispute resolution is merely an adjudicatory mechanism functioning alongside the normal adjudicatory procedures. The decision of the Appellate Authority on the same set of documents would be public property but the recommendation of ADRC would stand exempted, if logic of the argument advanced by the learned standing counsel is to be accepted. This line of reasoning would be invalid were it to be made basis for a decision. Furthermore, the phraseology used in section 8 (g) indicates that the legislature had in mind only a natural person as having, for the purposes of the section, personal affairs and not a corporation. It is significant to note that no provision of the Ordinance deals with the need to preserve privacy of business/tax documents be that of an individual or a corporation. The right of individual privacy urged by the learned standing counsel, therefore, has no application to the proceedings of ADRC. Moreover, the composition of ADRC is such that the privacy of the individual cannot be retained not that that is the case here. The other exclusion urged by the learned Standing Counsel contained in section 8 (h) of the Ordinance is also of not much help to the respondents. The assertion that documents before the ADRC are submitted either on express or implied condition that information contained therein shall not be disclosed to a third person is not rooted in law and, therefore, does not merit serious consideration.

20. Before parting with this judgment, it must be stated that no judgment under the FOI Ordinance from our jurisdiction was brought to the notice of this Court and as such much reliance was placed upon foreign law and judgments. Be that as it may, the FOI Ordinance was clearly intended to cast aside the era of

closed government and to transform the culture of secrecy to one of openness. Unnecessary secrecy in Government and public bodies undermines good governance and public administration. The United States Supreme Court in National *Labor Relations Board v. Board of Robbins Tire & Rubber Co* **(1978) 437 U.S. 214** stated the basic purpose of the Freedom of Information Act to "……*ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.*" Similarly, the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* **[1997] 2 S.C.R. 403** described the objectives of the Access to Information Act as follows

> [It] is concerned with securing values of participation and accountability in the democratic process. The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry……Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.

The principles propounded in the above judgments very much underlie the objects for which FOI Ordinance was promulgated. The application by the petitioner was not responded to by the Board contrary to the command of the FOI Ordinance, which prompted him to approach the Tax Ombudsman. The Board instead of complying with the direction of Tax Ombudsman rushed to the President to get its decision set aside even though the President had no authority to entertain the said representation under the applicable law. The Board and its Chairman did not pass any order on the petitioner's application and the President did not furnish any reasons in his impugned order for claiming section 8 exclusion on the recommendations given by ADRC. The very purpose for which the FOI Ordinance was promulgated was thus defeated

by the Board and the President and that too without application of mind and, it appears, for improper motives.

21. In the result, this writ petition succeeds and the decision passed by the President (impugned herein) is declared to be without lawful authority and of no legal effect. The respondents are accordingly directed to forthwith provide the requisite information/documents to the petitioner.

(Shams Mehmood Mirza)
Judge

Announced in open Court on 18.01.2016.

Judge.

Approved for reporting.

Judge.

Ihsan