APPELLATE TRIBUNAL INLAND REVENUE OF PAKISTAN, KARACHI BENCH, KARACHI

Present: **Mr. Muhammad Jawed Zakaria, Judicial Member**
Ms. Farzana Jabeen, Accountant Member.

F.E.A No. 39/KB/2013

M/s. J& P Coats Pakistan,
(Pvt.) Ltd, Karachi.....Appellant

Versus

The CIR, Zone-I, LTU, Karachi.....Respondent

Appellant by : Mr. Asif Haroon, ACA.
Respondent by : Dr. Ghulam Murtaza, DR.

F.E.A No. 37/KB/2013

The CIR, Zone-I, LTU, Karachi.....Appellant

Versus

M/s. J& P Coats Pakistan,
(Pvt.) Ltd, Karachi.....Respondent

Appellant by : Dr. Ghulam Murtaza, DR.
Respondent by : Mr. Asif Haroon, ACA.

Date of Hearing : 13.06.2014
Date of Order : 17.06.2014

ORDER

MUHAMMAD JAWED ZAKARIA (Judicial Member):-

The above two titled appeals have been filed by the person/taxpayer as well by the department against consolidated order No.STA/14/LTU/2012 dated 28.2.2013 passed by the Commissioner (Appeals-1), Karachi on the grounds set-forth in the Memo of appeals. We firstly, intend to dispose of the appeal of the person/taxpayer.

Taxpayer's Appeal (F.E.No.39/KB of 2013)

2. Brief facts of the case are that the appellant company [M/s. J&P Coats Pakistan (Pvt) Limited] being registered Person, entered into a Royalty and Intellectual properties Licensing Agreement with M/s.J&P Coats Limited- UK (the Parent Company) w.e.f. January 1, 2004 for using its products, research and development and management assistance etc. as per the said agreement, the appellant company was required to pay royalty. The Department, while passing the Assessment Order as a result of Sales Tax and Federal Excise Audit for the period from July 2005 to June 2009, has levied FED of Rs. 3,840,515 under the Federal Excise Act, 2005 (FE Act), for the periods from July 2006 to December 2008. However, the royalty for the above period (i.e. from July 2006 to December 2008) was not paid by the appellant but reversed in accounts for the income

year ended December, 31, 2009. In the ground of appeal filed, the appellant is contesting the levy of FED since no royalty has been paid, therefore, FED was not leviable. Being aggrieved and dissatisfied with the order of the DCIR the appellant filed appeal before the CIR (A) who vide order mentioned supra partly confirmed the treatment of the officer below. Hence the instant appeals before this Tribunal. However, the department has agitated appeal on the ground of non-providing opportunity of hearing or without taking into account the view point of the department at the time of hearing before the CIR (A).

3. Mr. Asif Haroon, the learned counsel for the appellant at the very outset contended that CIR (A) erred in maintaining the levy of FED of Rs.1,422,729/= on royalty for the period July 1, 2008 to December 31,2008 and also principally erred in not considering the fact that royalty was not paid by the appellant to the franchiser and that the franchiser has already waived the royalty on account of financial position of the appellant (franchisee), thus FED also cannot be levied. In this respect our attention has drawn to a decision of the learned ATIR, Headquarter Bench, Islamabad vide FE No. FE No. 27/IB/2001 dated May 7, 2012 wherein it has inter alia been held that the FED is payable only at the time of the payment/ remittance of franchise fee (royalty) and not on mere accrual in the books of accounts. The relevant excerpt therefrom is reproduced below for convenience:

> *"13…… We are also persuaded by the submissions of the learned AR that FED is payable only at the time of payment/ remittance of franchisee fee and as such liability does not arise, under the law, on the basis of mere accrual. Resultantly, the appeal is accepted and the orders of both the authorities below are vacated being contrary to legal provisions of statute."*

4. It was further argued that the appellant, in order to avail amnesty scheme announced by the FBR, made payment of FED of Rs.1,422,729/- under protest for six (6) months from July 2008 to December 2008; the computerized payment Receipt (CPR) in respect of this payment had been furnished to the Additional Commissioner Inland Revenue, Range-B, Zone-I, LTU, Karachi vide letter AT 2247 dated March 12, 2013.

5. The learned D.R, on the other hand, submitted that the Audit of the Sales Tax & Federal Excise records maintained by M/s. J & P Coats Pakistan (Pvt) Ltd, Karachi for the period July-2005 to June- 2010 was conducted by the Audit, Unit-03 & 4, Zone-1, LTU, Karachi and during audit, following discrepancies on part of the Registered person have been observed:-

i) That the Registered person has wrongly claimed and adjusted the amount of input tax of Rs. 603,630/- against the Sales Tax invoices issued by the blocked/black listed suppliers which is also violation of Section 7, 8 & 8A of the Sales Tax Act, 1990 read with Rule 12 (5) of Sales Tax Rules, 2006 on part of the claimant.

ii) That the Registered person has wrongly claimed and adjusted the amount of input tax Rs. 2,305,110/- against the Electricity bills, Hotel services bill & Tracker services bills which are not issued in the name of the Registered person/ claimant and also not used in the manufacture of

taxable supplies which is violation of Section 7,8 & 8A of the Sales Tax Act, 1990.

iii) That the Registered person has not paid FE Duty amounting to Rs. 2,417,786/- on Royalty for the Period Prior to July-2008 & Rs. 1,422,729/- for the Period July-2008 to December-2008 which is violation of Section 3 of the Federal Excise Act, 2005.

6. The learned D.R. further argued that however, a show cause notice was issued to M/s. J&P Coats Pakistan (Pvt) Ltd, Karachi vide C.No. DCIR-3&4/Z-I/LTU/JNPC/2011-12 dated 29.05.2012. The said case was decided vide Order-in-Original No. 03/2012-13 dated 30.07.2012 passed by the Deputy Commissioner Inland Revenue, Audit Unit-03 & 04, (Zone-I), Large Taxpayer Unit, Karachi under which the charges enumerated in the show cause notice have been fully established and M/s. J&P Coats Pakistan (Pvt) Ltd, Karachi was directed to pay Sales Tax amounting to Rs. 2,908,740/- & Federal Excise Duty amounting to Rs. 3,840,515/- alongwith default surcharge (to be calculated at the time of final payment) & penalties under section 34 & 33 of the Sales Tax Act, 1990 and Section 8 & 19 of the Federal Excise Act, 2005 respectively.

7. The learned D.R. submitted that being aggrieved and dissatisfied with the above said order, the Registered person has filed an appeal before the Commissioner Inland Revenue (Appeals-I), Karachi which was decided vide Order in Appeal No. STA/14/LTU/2012 dated 28.02.2013 pertaining to issue mentioned at para (iii) above. The Commissioner (Appeal-I) vide his decision mentioned above has partly allowed the appeal in favour of the appellant and held that FE duty on Royalty for the period July-2006 to June-2008 is not payable, according to him, the same is not valid as per law. In respect of duty payable for the period July-2008 to December-2008, the learned DR urged that the CIR(A) has erred that FE Duty is payable on Royalty by the appellant for which the appellant has already made the payment of FE Duty of Rs. 1,422,729/- and directed the concerned tax officer to allow credit of the duty paid by the appellant. Further the default surcharged & Penalty levied/ imposed under the impugned Assessment order has also been waived by CIR (A). The learned DR pointed out that the issue regarding paras (i) & (ii) above has been decided separately by the Commissioner Inland Revenue (Appeals-I), Karachi vide Order in Appeal No. STA/13/LTU/2012 dated 28.02.2013 for which a separate appeal is being filed by the department before ATIR.

Departmental Appeal (F.E. No. 37/KB of 2012)

8. The learned D.R. argued that The Commissioner (Appeal-I) vide his decision mentioned above has partly allowed the appeal in favour of the Respondent taxpayer and held that FE duty on Royalty for the period July-2006 to June-2008 is not payable as which is not valid as per law. In respect of duty payable for the period July-2008 to December-2008, the CIR(A) has erred that FE Duty is payable on Royalty by the appellant for which the appellant has already made the payment of FE Duty of Rs. 1,422,729/- and directed the concerned tax officer to allow credit of the duty paid by the appellant. Further the default surcharged & Penalty levied/ imposed under the impugned Assessment order has also been waived unjustifiably by CIR(A).

9. The main emphasis of the Department is that The CIR (A) is not justified in not providing opportunity of hearing or without taking into account the view point of the department at the time of hearing before him [the CIR (A)].

10. Dr. Ghulam Murtaza, the learned D.R. further contended that though the department has no inherent or statutory right to file an appeal before the CIR (A). However, before deciding the appeal, the CIR (A) must give an opportunity of hearing to the department or at least obtain their comments on the arguments of the person/taxpayer. The main contention of the department in this case is that the CIR (A) has partly allowed the appeal without giving an opportunity to the department and without taking into account the view point of the department and made ex parte decision without giving any chance of hearing for rebuttal and CIR (A) had even not considered judiciously, judicially and consciously the view of the department. The learned D.R. contended that CIR (A) order is nothing but ex-parte decision without any notice/opportunity to the Revenue Department. The CIR (A) simply reproduced the contention of the person/taxpayer and gave the findings in slipshod manner.

11. The learned D.R. further submitted that the Order in appeal passed by CIR (A) is not a speaking order, which is against the principle of natural justice, in this regard various judgments were cited. He argued that impugned order cannot be termed as a Judicial or quasi-judicial order and that the same is sketchy, slip-shod without application of judicial, judicious and conscious mind and devoid of reasons. The learned D.R. vehemently contended that order is not at all a specking order and cannot be called a "quasi judicial order" within the parameters set up by judge-made-law. It has been passed without giving notice to the tax department. The tenor of the order amply manifests non application of judicial mind and no reasons have been assigned by the learned CIR (A) in coming to the impugned conclusions. Even it has been enjoined upon an executive authority, as per section 24 (A) of General Clauses Act, 1897 (inserted by General Clauses Amendment Act, 1997,Act No.XI of 1997) to give reasons for making the order. Learned DR further argued that the Honorable Supreme Court of Pakistan time and again unapproved the passing of such perfunctory orders in the causes involving valuable rights of the parties. It is settled law that quasi-judicial order must be a speaking order manifesting by itself that the authority has applied its judicial mind to the issues and the points of controversy involved in the causes. Furthermore, when the reasons would not be forthcoming, obviously the higher appellate fora would be deprived of the views of the subordinate forum. In any way the impugned order has not properly considered the reasoning of the tax department without hearing and without opportunity of being heard to the department, hence he submitted that order of CIR (A) is not a speaking order and devoid of reasons is not sustainable in law being in contravention of law declared by the Honorable Supreme Court of Pakistan in various cases like Adamjee Jut Mills Ltd.V The Province of East Pakistan and others (PLD 1959 SC (Pak.) 272, Gouranga Mohan Sikdar v. The Controller import and Export and 2 Others [PLD 1970 SC 158], Mollah Ejahar Ali v. Government of East Pakistan and others [PLD 1970 SC 173] and Muhammad Ibrahim Khan v. Secretary, Ministry of Labour and other others [1984 SCMR 1014] etc. After insertion of section 24-A of General Clauses Act the obligation to advance reasons is now a statutory requirement and cannot be casually ignored. He also cited the reported judgment of Supreme Court of Pakistan in the case of Airport support Services V. Airport manager PIA 1998 SCMR 2268. He, therefore, submitted that the CIR (A) order and issues in both the cross appeal and the matter may be remanded back to the CIR (A) for proper speaking order after recording valid and

solid reasons and application of judicial, judicious and conscious mind strictly in accordance with law and after giving opportunity to both the parties. The learned counsel for the appellant has not offered any argument or rebuttal of the assertion of the learned D.R regarding non-issuance of hearing notice to the Department.

12. The learned counsel for the respondent /taxpayer while rebutting the arguments of the learned D.R. submitted that the FED is chargeable under section 3 of the FE Act, which was amended through substitution of clause (d) in sub-section (1) of section 3 through the Finance Act, 2008 as under:

Prior to Amendment:
"(d) Services, provided or rendered in Pakistan."

After amendment:
"(d) Services provided in Pakistan including the services originated outside but rendered in Pakistan."

13. The above-referred amendments are prima facie evidence of the fact that upto June, 30, 2008, franchise services originated outside Pakistan but rendered in Pakistan are excluded from the purview of section 3 of the FE Act. The ATIR in a case reported as 2012 PTD 144 (Trib.) has agreed that before the amendments made through Finance, Act, 2008, services originated outside Pakistan but rendered in Pakistan were not subject to FED. The relevant extract from the aforesaid decision is reproduced below for ready reference: -

"We find no justification in observation made by the learned CIRA(A) in respect of retrospective applicability of the remedial/ curative legislation as in this case the substitution in clause (d) taking the "service provided in Pakistan including the services originated outside but rendered in Pakistan" has been made through Finance Act, 2008 which can in no way be made applicable to the case of the appellant which is regarding period of 1st July, 2006 to 30.07.2007. The impugned order of the learned CIR(A) in this respect is therefore, vacated and the order in original is cancelled."

14. The learned counsel further submitted that there are two other unreported decisions bearing ITA No. CE No. 1/KB/ of 2010 dated February 1, 2011 and NO. FE No. 30 & 31/KB/2010 Dated August 9, 2011, wherein particularly the issue of franchise services provided from outside Pakistan (prior to July 1, 2008) were involved and the Hon'ble Tribunal has held that franchise service prior to July 1, 2008 were not subject to FED, if these were rendered outside Pakistan. He vociferously contended that these case laws are squarely applicable to this case: hence the application of FED on royalty for the period upto June, 30, 2008 is not chargeable to FED.

15. In respect of Department's intention to charge Default Surcharge and Penalty under section 8 and 19 of the FE Act, it is submitted that in order to invoke these punitive provisions, mens rea is necessary and the tax authorities have to prove independently, the guilty intent on the part of an assesee, which according to learned AR of person/taxpayer, the tax authorities have not proved in the appellant's case.

16. The learned counsel for the respondent taxpayer vehemently argued that Penalty/ Default Surcharge can only be invoked if it appears that the act of the person/taxpayer was calculated and there must be an element of 'mens rea'. In other words, he contended that for invoking the penalty provisions that Tax Department has to prove independently, the guilty intent on part of the assessee, which the Tax Department has not proved in the instant case.

17. We have heard the learned representatives of both the parties and perused the record of the case as well as case laws cited at bar.

18. After perusing the order of the learned CIR (A) we are persuaded to agree with the contentions made by the learned D.R. The CIR (A) being an executive /quasi judicial is always required to dilate upon all the questions of facts and law agitated before him so that the Tribunal is not handicapped in deciding the questions of fact and law, and if the CIR (A) fails to pass proper speaking, judicial and judicious order by considering all the facts and points of law raised and CIR (A) fails to apply judicial and conscious mind without valid reasons, therefore, it would amount to a negation of justice. The CIR (A) is directed that in future no appeal should be disposed of by the CIR (A) without giving due consideration to each and every point of fact and law in terms of a speaking Order based on solid reasons and application of proper conscious and judicial mind and view point of both the parties to be considered after giving opportunity to the taxpayer as well as to the revenue. In this case it appears from impugned order that neither any notice of hearing nor any opportunity given to the department. Though department has no right of appeal before the CIR (A) despite that he is bounded duty to issue a notice to the department. The learned CIR (A) has not given any opportunity to the department while disposing of the appeal. The said provisions of section 33 (2) of the Federal Excise Act, 2005 are reproduced as under:

> *"33(2)- The Commissioner (Appeals) may, **after giving both parties to the appeal an opportunity of being heard**, pass such order as he thinks fit, confirming varying altering, setting aside or annulling the decision or order appealed against.*
>
> (Underlining is ours)

19. From perusal of the above order it can be seen that the learned CIR (A) has violated the above quoted provision. The learned CIR (A) has to follow the same in letter and spirit. **No party can be condemned on basis of evidence or information adduced behind his back and without any notice to him. Rule of justice demands that before any adverse order, penalty or liability is passed or imposed upon a party he should be afforded full opportunity to meet the case and rebut the evidence used against him.** The public functionaries are bound to decide the controversies between the parties after application of independent mind, supported with reasons and affording them opportunity of being head. The CIR(A) while deciding an appeal is clothed with very wide powers so as to do justice to the aggrieved person and **ALSO TO THE INTEREST OF THE REVENUE DEPARTMENT/STATE.**

20. The learned CIR (A) has not served the notice on the department. The learned D.R. appeared without record of the assessment proceedings and appellate proceedings so that we are unable to ascertain as to whether any notice to the department was issued or not. However, as it is gleaned from the bare reading of the CIR (A)'s order and as

contended by the D.R. notice was not issued to the department and even the comments or cross objections of the department were not obtained to support the findings of the assessing officer. Further, the learned CIR (A) after reproducing the written arguments simply given his findings in a short paragraph, which is lucidly and vividly discussed in the preceding paragraphs of this order, is violative of section 124A of General Clauses Act and the Articles 4 and 10A of Constitution of Pakistan.

21. For the foregoing reasons, the impugned order is absolutely against the **DOCTRINE OF HEARING** and the **PRINCIPLES OF NATURAL JUSTICE** (no body be condemned unheard). We do hereby not only disapprove the method of conducting appeal by the CIR (A) which is against the basic tenet of law, procedure and doctrine of Hearing. The CIR(A)'s order is also contrary to the norms of justice and against the principles applicable to performing judicial or quasi judicial functions. In these circumstances the order of the learned CIR (A) is vacated and the appeal is remanded back to the CIR (A) with the direction to rehear the appeal denovo after giving reasonable opportunity of being heard to both the parties and decide all the issues of facts and law raised by the parties before the CIR(A), by an elaborate and speaking order must be supported by reasons and after application of judicious, judicial and conscious mind for and against as the case may be.

22. We also direct the CIR (A) that, in future no appeal should be disposed by a summary and slipshod order. The Tribunal is a final forum for deciding facts, therefore, the CIR (A) should not merely dispose of the appeals but should decide the same, meaning thereby, that, each and every point of facts and law should be given due consideration and be decided by speaking order. It is incumbent upon the CIR (A) to pass a speaking order, which was one of the exhilarating principles of the value concept, around which the principles of natural justice revolved. **Order by the CIR (A) must be based upon sound, cogent and plausible reasons; and should reflect his process of thought, through introspection. The recording of reasons were the essence of a speaking order** within the purview of section 124-A of the General Clauses Act and Article 4, 5 and 10A of the Constitution of Islamic Republic of Pakistan. We may further observe that the doctrine of natural justice is a facet of fair play in action. No person including revenue department shall be saddled with a prejudicial order without being heard. In administrative law, this doctrine has been extended when any prejudicial action taken without being heard. The principles of natural justice do not supplant the law but merely supplement the law or even humanise it. If a statutory provision can be read consistent with the principles of natural justice, the court could do so, for the legislature is presumed to intend to act according to the principles of natural justice. The impugned order of the CIR (A) is in clear negation of rulings of Superior Courts wherein it is clearly held if a basic action is in violative to provision of law reproduced supra. In this particular case, it is noted that when the given periphery of notice of hearing to Department is not followed. Failure to issue notice to department what is envisaged u/s.33(2) F.E. Act 2005 results in penalising the department. We, therefore, hold that the provisions of Section 33(2) of the F.E. Act is mandatory, and not directory or regulatory. The right of notice of hearing, the basic statutory right of being heard and affording an opportunity of being heard cannot be denied to any party (person/taxpayer as well as Tax Department). Department has been deprived of his right of hearing of representation. The department was entitled to a statutory notice of appeal hearing and this having not been done by CIR(A). Authority vested with the powers to decide the case judicially has to follow the dictates of law and not to decide it at his [CIR(A)] whim or at the request of

the parties concerned. An order affecting the rights of a party including revenue cannot be passed without an opportunity of hearing to that party. The Courts and quasi-judicial officers are required not only to do justice but to perform their duties in such a manner that justice is seen to have been done. In discharge of such duties no steps should be taken which may create apprehension in the mind of a litigant that justice may not be done. No party can be condemned on basis of evidence or information adduced behind his back and without any notice to him. Rule of justice demands that before any adverse order, tax/duty or penalty or liability is passed or imposed upon a party he should be afforded full opportunity to meet the case and rebut the evidence used against him. Law regarding notice to the concerned party is settled by this time and the superior judiciary of country is consistent on the question of giving notice to the concerned persons before proceeding against him, besides the applicability of principles of natural justice whereunder no one is to be condemned unheard. The Hon'ble Supreme Court of this country has very graciously mandated that provision of notice to the person against whom propose to proceed, has to be read in every statute irrespective of the fact that no such provision is incorporated therein.

23. According to the golden words of Lord Morris "Natural justice", it has been said in *[Wiseman v. Borneman (1969) 3 All ER 275, 278]*, is only **"fair play in action".** "The principle" so far as this country is concerned, is accordingly well settled that where notice required to be given by the statute is a mandatory notice, then the failure to comply with the such mandatory requirement of the statute would render the act void ab-initio as being an act performed in disregard of the provisions of the statute. Furthermore any further action taken on the basis of such a void order would also be vitiated and the defect at the initial stage would be incurable by a hearing at a subsequent stage reliance placed on the judgment of Hon'ble Supreme Court reported as 1971 SCMR 681.

24. In our humble opinion **"Hear the other party"**, i.e., no party including Revenue Department should be condemned unheard. The party affected must be given sufficient opportunity at any stage. This means to inject justice into the law and it does not mean to defeat the ends of justice.

25. The maxim ***Audi Alteram Partem*** is of universal application. When a statute is silent regarding observation of the principles of natural justice, the rule shall be read into the statute as inbuilt provision. The rule must be held to be a necessary postulate in all cases where a decision is to be taken affecting a person's rights or interest unless such rule is specifically excluded by the relevant statute. Failure to observe natural justice cannot be justified merely because the Authority vested with the powers to decide is of the opinion that granting of such opportunity would be an exercise in futility since the person to be condemned can have nothing more to add. Non-observance of natural justice is itself a prejudice, & independent proof of prejudice due to denial of natural justice is necessary. The Maxim ***AUDI ALTERAM PARTEM*** came up for consideration before our own **Hon'ble Supreme Court of Pakistan in the decision [Mrs. Anisa Rehman v. P.I.A.C. & Others 1994 SCMR 2232]** where the Supreme Court observed that "***Maxim audi alteram partem*** would be applicable to judicial as well as to non-judicial proceedings and it would be read into every statute as its part if right of hearing has not been expressly provided therein – Violation of the Maxim could be equated with the violation of a provision of law warranting pressing into service Constitutional jurisdiction".

26. No unfettered or un-examinable discretion vested in the CIR(A) and the power should be exercised reasonably "bonafide and in accordance with law. The scope of judicial scrutiny in cases of exercise of discretionary powers is well settled by the cantana of decisions of the Supreme Court, the House of Lords and other courts. The eternal principle is that there is nothing like "unfettered", or "absolute" discretion immune from judicial scrutiny by a higher appellate *fora*.

27. If we look at the Constitution of Pakistan we can see that Article 4, 5 & 10A of Constitution of Pakistan 1973 envisage **"DUE PROCESS OF LAW"**, **"FAIR TRIAL"** and **"RULE OF LAW"**. There are certain basic norms of justice. One of the cardinal principles of such basic norms is that [***Memo judex in casue Sua***] one cannot be a judge in his own cause. The Romans put this in this maxim. The breach of the said cardinal principle of jurisprudence will in fact be violative of the right of 'access to justice to all' which is a well-recognized inviolable right enshrined in Article 4 and 10A of the Constitution. This right is equally founded in the doctrine of 'due process of law'. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial under Article 10A of the Constitution and the right to have an impartial Court or Tribunal. This Article of the Constitution provides the right to be treated, 'in accordance with Law', which obliges the Administrative Authorities to determine the facts of a case first and then to apply the Law. Law is a body of principles recognized and applied by the State and acted upon by the Courts in the Administration of Justice. **In Britain, the principles of 'Rule of Law'**, in America, the principles of 'Due Process of Law' and in **Pakistan, the principles 'in accordance with Law'** are applicable. However, on **passing of the Constitution (18th Amendment) Act, 2010, the principle of 'fair trial and due process' has been adopted as 'fundamental right' in Art.10-A of the Constitution,** and this would change the British strict interpretation of law into a progressive due process interpretation of law, which would further protect the right of accused in proceedings. Rule of Law refers to formal characteristics, which Rule of Legal System must possess to enable citizens to determine their future conduct. Due Process of Law refers to the rights that are due and covers all the beneficial rights of the citizens. However, the term, 'in accordance with Law' means that for exercise of every authority, there must be some legal sanction, and the actions are subject to the scrutiny of Law. When the Constitution of 1962 was framed, fundamental rights were not mentioned therein first, but still the Courts safeguarded these rights with only Article-2 to treat the citizens 'in accordance with Law'. It was on the basis of this principle of Law that the actions of the Executive Authorities stated to be challenged. However, when a protest was made by the Public, the fundamental rights were also inserted in the year, 1964, but Article-2 was not omitted and the same position was adopted in the Constitution of 1973 in its Article-4, in result of which the Executive Authority can exercise only those functions behind which there is force of some Law, and whenever those actions are challenged, it is for the Executive Authority to establish under what Law those powers were exercised, and it is further on the Courts to check the correct application of Law. It is on the basis of this principle that the actions of the Executive Authorities are declared unlawful, because Article-5 creates an obligation for the State Authority to obey the Constitution and the Law. It is the constitutional right of a person that Law must properly be applied on his rights and he must be treated in accordance with properly applied and interpreted Law. If the Law is misapplied or misinterpreted, then Article-5 is violated because it is the constitutional duty of the Public Functionary to obey the Law. Every organ of the State should act strictly in accordance with provisions of Article 4. It is inherent right of an accused person to be treated in accordance with Law. It is duty and

obligation of public functionaries to act within framework of Constitution and law as is envisaged by Art.4. The Constitution of every country is commitment to the Nation to act within mandate of Constitution Art.4 obliges every person to act in accordance with law, and Art.5(2) lays down loyalty to Constitution as a pre-condition. Legally and technically, the term 'law' given in Art.4, means general law of the land, special laws, rules and regulations vis-à-vis a citizen. The word 'Law' in Art.4 includes not only statutory law, but also judge-made law and principles settled by superior Courts in exercise of judicial and quasi-judicial powers. Failure to exercise his powers in accordance with such settled and well-recognized principles is violation of Art.4 and any order passed in disregard of those principles is liable to be struck down by superior Courts under Art.4. This determination of civil right, as a fundamental right, is in addition Art.4, which provides the treatment, 'in accordance with law'. Similarly, the determination of obligations of the defendant too shall be in accordance with law under Art.5 of the Constitution, and with fair trial under this new Article 10-A. Not only the civil rights may be determined through a fair trial and with due process of law, **but the obligation opposite party too** shall be determined in accordance with fair trial and due process of law. The words, 'fair trial' and 'due process' of law have been taken from American system. In English system, it is the 'rule of law', which prevails. In America, it is the 'due process of law' which shows that whatever is 'due' is to be demanded, and not prayed for. In English system, it is based on principle of 'rule of law', which points out that it is the law, which rules the subjects. In American system, it is based on the principle of 'due process of law', which points outs that it is the right of the subject which is 'due' and which can be determined in due process of law, which is more ahead than the principle of 'rule of law', or 'in accordance with law', which is more ahead than the principle of 'rule of law', or 'in accordance with law'. The judicial determination of civil rights, fundamental right and obligations have now been converted into an American System which is liberal and progressive interpretation, and the Courts have been provided an opportunity not only to rely on the principles of Natural justice, but on this new fundamental right of 'fair trial and due process'. Similarly, in any charge, a person is now entitled for 'fair trial with due process of law', which has created a 'right in procedure for the accused'. Previously, the accused has no right in procedure. Now, when it is fundamental right, it is binding not only on the Courts, but it is also binding on the Legislatures and the Executive, as no law in violation of fundamental right could be passed, which if passed in derogation of this fundamental right, shall be 'void' to that extent under Art.8 of the Constitution. The fundamental rights, once inserted, cannot be taken away. This right is available not only to a citizen, but to every person, whether an artificial or natural. The association of persons, firms, companies, institutions, departments and all other entities, having legal personalities, are having this fundamental right, in addition to the individuals, as natural persons. "Fair trial and dues process of law". Significance. Although from the very inception the concept of fair trial and due process has always been the golden principles of administration of justice but after incorporation of said Article vide 18th Amendment, it has become more important that due process should be adopted for conducting a fair trial and order passed in violation of due process may be considered to be void. Right to a "fair trial". Connotation. While incorporating said Article and making the right to a "fair trial" a fundamental right the legislature did not define or describe the requisites of a "fair trial". By not defining the term the legislature perhaps intended to give it the same meaning as is broadly universally recognised and embedded in our own jurisprudence. The term **'due process of law'** has been **summarized by** the observation of **Willoughby in Constitution of United States, Second Edition, Vol-II, Page-1709: -**

(1) **A person shall have notice of proceedings which affect his rights.**

(2) **He shall be given reasonable opportunity to defend.**

(3) **That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of its honesty and impartiality, and**

(4) **That it is a Court of competent jurisdiction.**

28. Above are the basic requirements of the doctrine 'due process of law' which is enshrined, inter alia, in Article 4 and Article 10A of the Constitution. It is intrinsically linked with the right to have access to justice which is a fundamental right. This right, inter alia, includes the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. A person cannot be said to have been given a fair and proper trial unless he is provided a reasonable opportunity to defend the allegation made against him.

29. It may be observed that by now it is a well-settled proposition that a person cannot be condemned without providing him a fair opportunity to meet the allegation. In this regard reference may be made to the case of Government of Baluchistan through Addition Chief Secretary v. Azizullah Memon and 16 others (PLD 1993 SC 341), wherein after referring certain case law the following conclusion was recorded by this Court as to the right of access to Courts and justice:-

> "12 Another aspect of the case is that by these provisions the rights of access to Courts and justice has been denied. This by itself is an infringement of fundamental rights which provide that every citizen shall be entitled to equal protection of law and will not deprived of life or liberty save in accordance with law. An examination of Articles 9 and 25 read collectively does not permit the Legislature to frame such law which may bar right to access to the Courts of law and justice. This aspect of the case was considered in Sharaf Faridi v. Islamic Republic of Pakistan (PLD 1989 Karachi 404) when after referring to Syed Abul A'la Maudoodi's case (PLD 1964 SC 673 at 710) and Ms. Benazir Bhutto's case (PLD 1989 SC 416) had observed as follows:-
>
> > "The right of 'access to justice of all' is a well-recognised inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of 'due process of law'. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trail and a right to have an impartial Court or Tribunal."

30. From what has been discussed above we hold that the department was entitled to a notice of appeal hearing right to defend and right to rebut and this having not been done by CIR (A). The order of the CIR (A) suffers from illegality and deserves to be quashed. The CIR (A) is directed to proceed and re-hear appeal afresh in the matter / issues raised in aforesaid appeals in accordance with law and as directed above in the preceding paragraphs of this order.

31. Lastly, we may observe that in most of the cases while conducting appeal hearing, the learned CIR (A) send notices as envisaged u/s. 33(2) of the Federal Excise

Act, 2005 or under the relevant provisions of Income Tax Ordinance, 2001 or Sales Tax Act, 1990 (as the case maybe) to the Department to have the comments / view points of the department but regretfully it is usually noted that the department do not respond them. It is also very shocking to note that in the instant case as gleaned from the impugned order and as contended by the D.R., the learned CIR (A) did not even bother to issue notice and decided the appeal without taking comments/view points of the department, which is as discussed in the preceding paragraphs violation of the statutory law as well as against the maxim *"Audi Alteram partem"*.

32. The Roster Section is directed to send a copy of this judgment to the **learned Member (Legal) FBR, learned Member (Admin) FBR and the learned Chief CIR, LTU, Karachi, the Chief CIR RTO-I, the Chief CIR RTO-II, the learned Chief IR RTO-III, Karachi** for their necessary action and issuance of directions to all the learned CIRs (A) to issue notice to the DCIR in each and every case for obtaining comments / view points and, if the notices are not complied by the OIR/DCIRs/ACIRs **strict disciplinary action be taken against them. And if the concerned OIR/DCIRs/ACIRs are unable to attend the hearing before the CIR (A) for any reasons or busy in finalising the assessment or in other official work etc., then a senior officer may be deputed to represent the department so that the view point of the department may be fully considered in the order of the CIR (A) and the department's interest may be safeguarded and it may not lose its good cases and CIR(A) may arrive just and equitable conclusion. However, if it is not possible to attend personal hearing arrangements may be made to obtain at least written comments from the OIR/DCIR/ACIR. We may further suggest that CIR(Appeal) Management System be introduced and evolved whereby compliance of notices issued by CIR (A) / (Trib). (Such as submission of parawise comments and counter arguments / rebuttal of Department/brief of the Author on arguments of the appellant be monitorised to protect and safeguard the interest of revenue. This is all the more necessary not only to dispense quick and meaningful justice to the taxpayer but will greatly help for the interest of the legitimate government revenue which is lost in many cases due to indifferent and careless attitude of departmental officers coupled with either lack of effective monitoring mechanism in such appellate matters or lack of non-availability of proper / equipped legal monitoring system, proper legal acumen person with highly qualified and trained officers be developed and implemented to safeguard the interest of revenue and dispensation of justice. It may further be noted by us that various Directorate Generals have been established by enacting provisions of law. U/s. 228 the Directorate General of Inspection and Internal Audit and u/s. 229 Directorate General of Training and Research and u/s. 230 Directorate General (Intelligence and Investigation), Inland Revenue (I & I), u/s. 230B Directorate General of Law, u/s. 230-C Directorate General of Research and Development have been established. The provisions of sections are reproduced as under:**

> *[229. **Directorate General of Training and Research**:-(1)The Directorate General of Training and Research shall consist of a Director General, Additional Director General and as may Directors, Additional Directors, Deputy Directors, Assistant Directors and such officers as the Board, may, by notification in the official Gazette, appoint.*

(2) The Board may, by notification in the official Gazette, specify the functions, jurisdiction and powers of the Directorate General of Training and Research and its officers.]

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

[230 B. Directorate-General of Law.- *(1) The Directorate-General of Law shall consist of a Director General and as many Directors, Additional Directors, Deputy Directors, Assistant Directors, Law Officers and such other officers as the Board may, by notification in the official Gazette, appoint.*
(2) The Board may, by notification in the official Gazette, specify the functions, jurisdiction and powers of the Directorate-General of law.
230.C Directorate-General of Research and Development.-*(1) The Directorate-General of Research and Development shall consist of a Director General and as may Directors, Additional Directors, Deputy Directors, Assistant Directors and such other officers as the Board may, by notification in the official Gazette, appoint.*
(2) The Board may, by notification in the official Gazette, specify the functions, jurisdiction and powers of the Directorate-General of Research and Development.]

33. The above Directorate Generals have been established just to make the department more effective and efficient so that the expert officers may be produced. However, it is shocking to note that these Directorate Generals are not functioning within the parameters prescribed by the law. It seems that they remained dormant so far as departmental representation before CIR(A) and Tribunal (ATIR) is concerned and are not playing effective positive roles on this count. If these Directorate Generals I&I conduct audit, scrutiny and enquiry of the taxpayers why they should not conduct the scrutiny, enquiry and check and balance by checking performance of the officers Inland Revenue. The officers Inland Revenue more particularly, the Senior ACIR (Departmental Representatives) and officers may be imparted training through these Directorate Generals and Directorate General of Law be implemented starting functioning with full force and ability with fresh changed and positive mind set and outcome of training to them must be seen and expertise D.Rs, Senior Officers and the Commissioner maybe produced and the D.R appearing before this Court may defend the Department more effectively and the orders passed by the CIR(A) legally, factually and quality-wise may be worth to stand before this Tribunal.

34. After concluding this judgment we may quote the classical words of the **FOUNDER OF PAKISTAN QUADI AZAM MUHAMMAD ALI JINAH** while addressing the Civil Officers on 12th February 1948, which seems that the Father of the Nation is addressing today to present Government Bureaucrats/Civil Servants:

"I can assure you that there is nothing greater in this world than your own conscience and when you appear before your God you can say that you did duty with the highest sense of integrity, honestly and will loyalty and faithfulness. This is the sprite I want you to develop and I am sure that you will develop this spirit and work in accordance with it."

35. The appeals stand disposed as above.

-sd-
(MUHAMMAD JAWED ZAKARIA)
JUDICIAL MEMBER

-sd-
(FARZANA JABEEN)
ACCOUNTANT MEMBER