

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit Nos. 200 and 201 of 2019

DATE

ORDER WITH SIGNATURE OF JUDGE

Plaintiffs in both Suits: M/s Agha Steel Industries Ltd. & M/s. Denim International Through M/s. Khawaja Shamsul Islam, Imran Taj and Muhammad Mustafa Ali Advocates.

Defendant No.1: Directorate of Intelligence & Investigation (Inland Revenue) Through Syed Mohsin Imam, Advocate alongwith Mr. Azam Nafees, Assistant Director on behalf of Defendant No.1.

Defendant No.2: Commissioner Inland Revenue Zone-III Through Mr. Muhammad Aqeel Qureshi, Advocate.

Defendant No.3: Federation of Pakistan through Mr. Osman A. Hadi, Assistant Attorney General.

Suit No. 200/2019.

For hearing of CMA No. 1668/2019. (U/O 39 Rule 1 & 2 CPC)

Suit No. 201/2019.

For hearing of CMA No. 1671/2019. (U/O 39 Rule 1 & 2 CPC)

Date of Hearing: 10.04.2019

Date of Order: 10.04.2019

ORDER

Muhammad Junaid Ghaffar J. Both these Suits are somewhat connected with each other. In Suit No. 200/2019, the Plaintiff has impugned three Notices and Authorizations dated 30.01.2019 issued under Section 175 of the Income Tax Ordinance, 2001 (**Ordinance 2001**) and Section 38 and 40B of the Sales Tax Act, 1990 (**1990 Act**). In Suit No. 201/2019, the Plaintiff has impugned two Letters/Notices and Authorizations issued under Section 175 of the Ordinance 2001 and Section 38 of the 1990 Act. Listed applications in both Suits have been heard

together and they are being decided through this common order. Plaintiffs' case in both these Suits is to the effect that these Notices and Authorizations were issued simultaneously on the same date and their offices and factories were raided; were harassed by a team of the department, whereafter, they have taken away the entire record and have threatened unlawful actions against the Plaintiffs; hence instant Suit(s). On 01.02.2019, by way of an ad-interim order, the Defendants were restrained from taking any coercive action pursuant to the impugned notices and authorizations, raid conducted and impounding of records including any recovery proceedings.

2. Learned Counsel for the Plaintiff has contended that the Plaintiff in Suit No. 200/2019 has established a State of the Art Steel Factory based on an electric furnace; whereas, in terms of Sales Tax Special Procedure Rules, 2007 under Rule 58H, the Plaintiff is required to pay fixed sales tax on the basis of electricity consumed, and therefore the liability to pay sales tax is itself crystalized and there can be no question of alleged short payment or evasion of sales tax. According to the learned Counsel, sales tax returns are being filed regularly and there was no occasion for the Defendants to take and initiate such an adverse action. Per learned Counsel, the Defendant No.1 i.e. Directorate of Intelligence and Investigation, Inland Revenue, has no lawful authority and jurisdiction to exercise any powers under Section 38 of the 1990 Act and Section 175 of the Ordinance 2001, whereas, the attempt by FBR through issuance of S.R.O1301(I)/2018 and S.R.O.1302(I)/2018 both dated 28.10.2018 is an eyewash and no jurisdiction can be conferred upon the Directorate of Intelligence by implication. Learned Counsel has then referred to the conduct of raid and the photographs from the CCTV coverage, and has contended that the entire staff including female staff was held hostage, threatened and coerced in a very indecent manner, which has seriously prejudiced and tarnished the image of the Plaintiffs as well. Per learned Counsel such exercise was carried out without any female official and threats of arrest were also given. Per learned Counsel it is only the concerned Commissioner, who has been conferred jurisdiction under Section 175 of the Ordinance

2001 and Section 38 of the 1990 Act, who could exercise such powers and not the Directorate of Intelligence under the garb of any notification. According to him, if the Act confers powers on a specific authority, then any other person or officer cannot be conferred any such powers. Insofar as the purported action under Section 40B of the 1990 Act against the Plaintiff in Suit No. 200/2019 by FBR is concerned, again learned Counsel submits that the said letter has been issued by some Second Secretary, who is not authorized to exercise jurisdiction under Section 40B of the 1990 Act; hence the same is also without lawful authority and jurisdiction. He has further argued that the monitoring of the factory in terms of Section 40B of the 1990 Act is also unlawful and illegal inasmuch no reason has been assigned as to why such powers are being exercised and such an extreme order is being passed, whereas, no inquiry or investigation was pending against the Plaintiffs at the relevant time. He has further argued that while exercising powers to carry out such a harsh action, the discretion must be exercised with restraint and only in exceptional circumstances; but not as a matter of routine. According to the learned Counsel it has been alleged that the Plaintiff in Suit No.200/2019 was using gas furnace for its production and thereby allegedly was evading sales tax, whereas, according to him Sui Southern Gas Company Ltd has confirmed that there is no gas connection installed at the premises of the Plaintiff; hence the entire case setup on the basis of a vilification campaign through social media has been exposed. According to him the machinery installed at the factory of Plaintiff in Suit No.200/2019 works on an Electric Furnace and not on natural Gas as alleged. Learned Counsel has prayed that all these impugned notices be set aside and record resumed by the department/defendant be returned and they may be restrained from taking any action pursuant to the illegal raid and monitoring of the factory premises till final adjudication of these Suits. In support of his contention he has relied upon the cases of ***National Bank of Pakistan and 117 others v. SAF Textile Mills Ltd. and another*** reported as **PLD 2014 SC 283**, ***A.M.Z. Spinning & Weaving Mills (Pvt.) Ltd. through Manager Finance v. Federation of Pakistan through Secretary, Revenue Division*** reported as **2009 PTD 1083**, ***N.P.***

Water Proof Textile Mills (Pvt.) Ltd. Through Director v. Federation of Pakistan through Secretary Revenue Division/Chairman, Central Board of Revenue, Islamabad and another reported as **2004 PTD 2952**, ***Shahzad Ahmed Corporation through Shahzad Ahmed v. Federation of Pakistan through Secretary, Ministry of Finance, Government of Pakistan, Islamabad and 2 others*** reported as **2005 PTD 23**, ***Collector of Sales Tax and Central Excise (Enforcement) and another v. Messrs Mega Tech (Pvt.) Ltd*** reported as **2005 SCMR 1166**, ***Messrs Z&J Hygienic Products (Pvt.) Ltd. v. Commissioner Inland Revenue, Sales Tax Gujranwala and others*** reported as **2014 SCMR 30**, ***Collector of Sales Tax and others v. Messrs Food Consults (Pvt.) Ltd. and another*** reported as **2007 PTD 2356**, ***Messrs Munir Foundry v. C.I.R. (Appeals-II), Lahore and others*** reported as **2016 PTD (Trib.) 485**, ***K.K. Oil and Ghee Mills (Pvt.) Ltd. v. Federation Board of Revenue and others*** reported as **2016 PTD 2601** and ***Chairman, Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Limited, Rawalpindi*** reported as **PLD 1991 SC 14**.

3. On the other hand, learned Counsel for Defendant No.1 i.e. The Directorate of Intelligence has contended that proper jurisdiction and authority has been conferred vide S.R.O.1301(I)/2018 and S.R.O.1302(I)/2018 both dated 29.10.2018, and therefore, the entire action was lawful and within the mandate of law. He has also referred to Sections 30A & 30E of the 1990 Act in support of his contention. Per learned Counsel it is the case of Defendant No.1 that huge amount of sales tax has been evaded inasmuch the Plaintiff in Suit No. 200/2019 was using a gas connection and supply from the Plaintiff in Suit No.201/2019, and thereby has evaded huge amount of sales tax and such liability has been worked out from the resumed record to the extent of Rs.775.268 Million. According to him in view of such position, the Suit is not maintainable as 50% of this amount is to be deposited pursuant to the Judgment of Hon'ble Supreme Court in the case reported as ***Searle IV Solution (Pvt.) Ltd and others V. Federation of Pakistan and others (2018 S C M R 1444)*** . He

has further argued that since evasion was taking place and credible information was received, the action under Section 38 of the 1990 Act and under Section 175 of the Ordinance 2001 was taken lawfully.

4. Mr. Muhammad Aqeel Qureshi, learned Counsel for Defendant No.2 (Commissioner Inland Revenue) has contended that pursuant to directions of the Board dated 30.1.2019 action under Section 40B of the 1990 Act was taken for monitoring of the production and such action is lawful and without any illegality. According to him the Board has been conferred such powers and there is no restriction or rider attached to the exercise of such powers, therefore, the objection taken by the taxpayer is not justified. According to him there was some credible information with the Board that huge amount of sales tax was being evaded; hence the action was required and taken in accordance with law. Per learned Counsel, law does not require that any reason be assigned for initiating such an action, therefore, the listed applications are liable to be dismissed. In support of his contention he has relied upon the cases of ***Messrs Vincraft (Pvt.) Ltd. through authorized Representative v. Federal Board of Revenue through Chairman and 4 others*** reported as **2017 PTD 2114**, ***Commissioner Inland Revenue Karachi v. Pakistan Beverages Limited Karachi*** reported as **2018 PTD 1559**, ***Messrs BILZ (Pvt.) Ltd. v. Deputy Commissioner of Income Tax, Multan and another*** reported as **2002 PTD 1**, ***Messrs Indus Basin & Co. v. Commissioner of Income Tax*** reported as **2002 PTD 2169**, ***Messrs Pirani Engineering through Chief financial Officer v. Federation Board of Revenue and 2 others*** reported as **2009 PTD 809**, ***Messrs Imperial Builders through Manager v. Province of Punjab through Secretary Legal Government and another*** reported as **2009 PTD 744**, ***Kundan Bibi and others v. Walayat Hussain, Controller of Estate Duty, Government of Pakistan and another*** reported as **1976 (34) Tax 219 Lahore**, ***Commissioner Inland Revenue Zone-I, RTO, Hyderabad v. Messrs Hyderabad Electric Supply (HESCO) Hyderabad*** reported as **2014 PTD 951** and **Taj International (Pvt.) Ltd. and**

others v. Federation Board of Revenue and others reported as **2014 PTD 1807.**

5. Learned Assistant Attorney General has argued that the Plaintiffs have not challenged the vires of Section 175 of the Ordinance, 2001, and Section 40B of the 1990 Act, for that matter, whereas, the impugned action has been taken in accordance with law. According to him the provision of Section 40B does not stipulate assigning of any reason; however, in view of the latest pronouncement of the Hon'ble Supreme Court in the case of ***Pakistan Beverage Limited (Supra)***, a certain time frame for monitoring purposes is inevitable, being binding in nature. He further submits that the process of natural justice has been adhered to, whereas, there is no violation of Article 10A and Article 18 of the Constitution as contended.

6. I have heard all the learned Counsel and perused the record. In Suit No. 200/019, the Plaintiff is aggrieved by the authorization of officers to have access under Section 175 of the Ordinance 2001 dated 30.01.2019 issued by the Director Intelligence. A similar type of notice is also impugned in the connected Suit. Similarly, the said Defendant has also issued an authorization on the same date under Section 38 of the 1990 Act, which states that the same has been issued in exercise of powers conferred vide S.R.O.1301(I)/2018 and S.R.O.1302(I)/2018 both dated 29.10.2018, whereas, the third impugned letter (only in Suit No.200/2019) is also of the same date issued by Second Secretary addressed to the Chief Commissioner Inland Revenue in terms of Section 40B of the 1990 Act, whereafter in compliance thereof, Commissioner has posted his officers for monitoring. I would be dealing with all three impugned notices separately in this order, one by one, as to their validity and being in accordance with law or otherwise. It would be advantageous first to refer to notice dated 30.01.2019 issued under Section 175 of the Ordinance 2001, which reads as under:-

Government of Pakistan
Directorate of Intelligence & Investigation
(Inland Revenue), Karachi

C.No.Dir/S.175/I&I-IR/Agha/2018-19/790

Dated 30.01.2019

The Principal Officer,
M/s Agha Steel Industries Private Limited,
Plot No. N.W.I.Z/1/P-133, (SP-6)D-2,
Port Qasim Authority, Bin Qasim Town, Malir,
Karachi.

SUBJECT: **AUTHORIZATION OF OFFICERS TO HAVE ACCESS UNDER SECTION 175 OF THE INCOME TAX ORDINANCE, 2001.**

In exercise of powers conferred upon the undersigned vide notification No. 115(I)/2015 dated 09.02.2015, the following officers / officials, of this Directorate having jurisdiction, are authorized under Section 175 of the Income Tax Ordinance, 2001 to have access to the premises, (either declared as mentioned above or any other where record is kept) accounts, documents or computer, and to impound or to take extracts or copy of such material and / or examine and prepare notes, details of inventory and its valuation or computer disk or information from hard disk or inventory of any article found at anyplace of M/s. Agha Steel Industries Private Limited (NTN-7383402-0) or the earlier AOP (NTN-3922640-9) maintained by them and / or by any other person in its behalf.

S. No.	Name	Designation
1	-----	-----
2	-----	-----
3	-----	-----
4	-----	-----
5	-----	-----
6	-----	-----
7	-----	-----
8	-----	-----

2. The officers authorized shall handover a copy of inventory of goods and material to the person(s) available on premises and / or put / affix on the conspicuous place in case of refusal of such person(s) to receive or accept. In the later situation, may also send such copy through registered / courier service as early as possible. ***The officers may keep in mind the enquiry / investigation relating to tax issues only.***

3. The report of the official activity must be communicated to the undersigned during the very next working day.

(Abdul Rahim Bullo)
Director

7. Perusal of the above purported authorization reflects that it has been issued by the Director of Intelligence in terms of powers conferred upon him vide SRO 115(I)/2015 dated 9.2.2015. Besides this there is nothing in the authorization as to why it has been issued and whether the same has been done on the basis of any information or directions or for that matter, in respect of any pending proceedings. It is completely silent in all respects, except the last line of Par-2 thereof, in which the officers have been directed to ***keep in mind the enquiry / investigation relating to tax issues only.*** Now what does this means and what inference is to drawn from this is not clear. Nor the learned Counsel representing the Director Intelligence made any effort to assist the Court in this regard. Are

the officers so authorized do indulge in anything else? If not, then why they have been asked to confine themselves to the enquiry and investigation relating to tax issues only. And what enquiry? Nothing has been brought on record to this effect. Rather, the Court kept on asking about any pending proceedings against the Plaintiffs, but no such material was placed before the Court; nor any such plea was even raised. To this Court, it only appears to be a letter prepared generally for all such acts of authorization of officers, without any application of a prudent mind and examination of relevant facts of the case by the Officers. Insofar as Section 175 of the Ordinance 2001, is concerned the same reads as under:-

“175. Power to enter and search premises.(1) In order to enforce any provision of this Ordinance (including for the purpose of making an audit of a taxpayer or a survey of persons liable to tax), the Commissioner or any officer authorized in writing by the Commissioner for the purposes of this section –

- (a) shall, at all times and without prior notice, have full and free access to any premises, place, accounts, documents or computer;
- (b) may stamp, or make an extract or copy of any accounts, documents or computer-stored information to which access is obtained under clause (a);
- (c) may impound any accounts or documents and retain them for so long as may be necessary for examination or for the purposes of prosecution;
- (d) may, where a hard copy or computer disk of information stored on a computer is not made available, impound and retain the computer for as long as is necessary to copy the information required; and
- (e) may make an inventory of any articles found in any premises or place to which access is obtained under clause (a).

(2) The Commissioner may authorize any valuer or expert to enter any premises and perform any task assigned to him by the Commissioner.

(3) The occupier of any premises or place to which access is sought under sub-section (1) shall provide all reasonable facilities and assistance for the effective exercise of the right of access.

(4) Any accounts, documents or computer impounded and retained under subsection (1) shall be signed for by the Commissioner or an authorized officer.

(5) A person whose accounts, documents or computer have been impounded and retained under sub-section (1) may examine them and make extracts or copies from them during regular office hours under such supervision as the Commissioner may determine.

(6) Where any accounts, documents or computer impounded and retained under sub-section (1) are lost or destroyed while in the possession of the Commissioner, the Commissioner shall make reasonable compensation to the owner of the accounts, documents or computer for the loss or destruction.

(7) This section shall have effect notwithstanding any rule of law relating to privilege or the public interest in relation to access to premises or places, or the production of accounts, documents or computer-stored information.

(8) In this section, "occupier" in relation to any premises or place, means the owner, manager or any other responsible person on the premises or place."

8. Section 175 provides that to *enforce any provision* of this Ordinance, including for the purposes of *making an audit* of a taxpayer, or a survey of persons liable to tax, the Commissioner or any officer authorized in writing by the Commissioner for the purposes of this Section shall, at all times and without prior notice, have full and free access to any premises, place, accounts, documents or computer; and is further authorized to make an extract or copy of any accounts, or information stored in computer or may impound any accounts or documents and retain them and make an inventory of any articles found in any premises. Firstly it is to be noted that the provision itself confers powers on the *Commissioner* and nowhere provides that any other officer except the *Commissioner* or the one authorized by him can exercise these powers. The Directorate of Intelligence has been established in terms of Section 230 of the Ordinance, 2001, and in terms of Subsection (2)(b) thereof, the Board may by notification in the Official Gazette confer the powers of authorities specified in Section 207 upon the Director General and its officers, whereas, Section 207 notifies the Income Tax Authorities including Chief Commissioner, Commissioner and so on an so forth. It is to be noted that without going into the question that whether any powers can be exercised by Director Intelligence in this case under Section 175 of the Ordinance 2001, and whether by implication and through a Notification, the Director Intelligence can be called or termed as a Commissioner within itself, what is more pivotal for the present purposes for this Court is to first dilate upon the fact that whether, even the Commissioner himself in the given facts, can exercise such powers without first fulfilling the requirements as provided under Section 175 of the Ordinance 2001. If the Commissioner cannot, then on the same analogy, even the Director Intelligence is also barred from exercising such powers in vacuum, notwithstanding issuance of a Notification in terms of s.230 *ibid*. The heading of this Sections states "**Power to enter and search premises**", however, notwithstanding this, the Section itself

says that *in order to enforce any provisions of this Ordinance*, (including for the purposes of making an audit of a taxpayer or a survey of persons liable to tax) the authorized officers may have free access to any premises. This is of pivotal importance as even the Commissioner himself can only exercise such powers in order to *enforce any provisions of the Ordinance* and when read as a whole, it leads to the conclusion that this power can only be exercised when there are some pending proceedings against a taxpayer, and for one reason or the other, there is obstruction in the enforcement of such proceedings, and as a last measure, again to *enforce such proceedings* resort is to be made to enter and search the premises of the taxpayer. It is not that without pendency of any proceedings and just in a cursory manner, at the whim and desire of the Commissioner, the provisions of this Section can be invoked. There is a prerequisite that it can only be resorted to enforce any proceedings, hence; there must be some proceedings pending against the taxpayer, enforcement of which was being obstructed, and therefore now access and search of premises is inevitable. In fact the power under Section 175 of the Ordinance 2001 is ancillary in nature, and is not an independent function of itself; and this leads to the conclusion that firstly, there must be some pending proceedings; and secondly, the power is to be exercised by the Commissioner, who is otherwise competent and has jurisdiction in respect of pending proceedings against the taxpayer. Therefore, it can only be the same "Commissioner" or at least "a Commissioner", who can exercise such powers as this is available only for enforcement of other proceedings already pending with him. And as a natural corollary, these powers under Section 175 *ibid*, are only available for a Commissioner who is otherwise concerned or vested with powers of assessment, amendment in the assessment, conduct of audit etc. This appears to be a conscious act that the legislature has restricted such powers of access and raid with certain circumspection for enforcement of pending proceedings and not otherwise. It may also be relevant to note that while issuing SRO 115(I)/2015 dated 9.2.2015, which according to the Director Intelligence, confers powers upon him under s.175, FBR has only conferred powers of a handful of sections, and the only noticeable section viz a viz

relating to any payment of tax is of s.177 which relates to Audit. Though I am not sure whether the intention is that the Director of Intelligence, Inland Revenue has to conduct the Audit as well, which again is a specialized job of an Income Tax Officer; but nonetheless, since this power has been conferred through Notification, the inference which can be drawn is that no other power relating to s.121, 122 or 122-A, (which are powers of assessment and amendment of assessment orders) have been conferred; rather in my view consciously not conferred or provided for. What further inference can be drawn from this? Whether, the authority of exercising such powers by Director Intelligence under s.175 *ibid* are dependent on an approval by the concerned Commissioner, or maybe it is only there for assistance of the concerned Commissioner to carry out such exercise for enforcement of proceedings pending before him. To me it appears to be the latter. However, since this issue is not directly under scrutiny, nor was it argued, I leave it open to be dealt with in an appropriate case as and when the occasion arises. Having said that, one conclusion can be finally drawn that firstly, the powers under s.175 are only to be exercised in respect of enforcement of any provision of the Ordinance, 2001, and for that there must be some pending proceedings of which the enforcement has to be sought, and not for making a roving or a fishing expedition or to conduct investigation; and secondly, since, this power of entering and making a search is an extreme action intended to be taken against a taxpayer, infringing upon various Constitutional rights, including the right of privacy and liberty of a person, the same must be exercised in a manner that the rights of the taxpayer shall remain safeguarded, as these powers are coercive, and therefore, shall be exercised with care, circumspection and after a thoughtful decision.

9. A learned Single Judge of the Islamabad High Court in the case of ***K.K Oil and Ghee Mills (Pvt.) Ltd (supra)*** had the occasion to interpret the provisions of Section 175 (*ibid*) with respect to proceedings initiated under s.65-D and was pleased to hold as under:-

“7. The office of DG I&I was established under the Ordinance of 2001 by inserting Section 230 through the Finance Act 2012. The respondent No.3 is an officer of the rank of Director in the said organization. Subsection (2) of section 230 empowers the Board to specify the functions and jurisdiction of the officers and to confer upon them the powers vested in authorities specified in section 207. The functions and powers are conferred through the Notification published in the official gazette. Section 207(1) enumerates the Income Tax authorities. It is noted that officers of DG I&I are not included in clauses (a) to (I) of section 207(1) described as the Income Tax authorities. The provisions of the Ordinance of 2001, when read as a whole, clearly shows that powers and functions are exclusively vested in the Income Tax authorities mentioned in section 207. It is, therefore, obvious that the DG I&I and its officers have not been declared as Income Tax authorities and cannot perform functions or exercise powers under the provisions of the Ordinance of 2001, unless the same have been specified or conferred by the Board in the manner prescribed in section 230(2). The DG I&I or any of its officers do not have inherent powers under any provision of the Ordinance of 2001. Pursuant to the powers under subsection (2), the Board has issued the Notification. The officers specified in column No.2 of the Table given in the Notification have been conferred with the powers specified in column No.3 thereof. Column No.4 expressly mentions the powers and functions which may be exercised by the respective officers mentioned in column No.2. The jurisdiction has been specified in column No.5. The respondent No.3 is at serial No.2 of column No.2 and the powers and functions have been expressly mentioned in the corresponding part of column No.4. Column No.4 explicitly mentions the provisions in relation to which the powers of the Income Tax authorities have been conferred on the respondent No.3. In other words, the respondent No. 3 can exercise powers and perform functions of the Income Tax authorities which have been expressly specified in column No.4 of the Table. The respondent No. 3 can, therefore, perform functions and exercise powers of the Commissioner Income Tax vested under section 177 or section 181. Likewise, powers under sections 175, 176 etc. can be lawfully exercised within the scope of such provisions. However, the respondent No.3 has not been conferred with powers under sections 121, 122 122-A and many other provisions. The respondent No.3 is, therefore, not empowered to exercise powers, directly or indirectly, under any provision which has not been specified in the corresponding part in column No.4. It is noted that the power or jurisdiction under section 65-D, vested in the Commissioner, has not been conferred as the said provision is not specified in column No. 4 of the Notification. The powers of a Commissioner under section 175 of the Ordinance of 2001 are indeed conferred on the respondent No. 3 but the question arises as to whether it also empowers the latter to exercise powers under those provisions which are not specified in column No.4 e.g. the powers and functions of the Commissioner under section 65-D. It is, therefore, essential to examine sections 175 and 65-D in order to answer this question.

8. Section 175 contemplates the power to "enter and search premises". The powers have been expressly mentioned in clauses (a) to (e) of section 175(1). These powers can either be exercised by the Commissioner or any officer authorized in writing by the Commissioner. However, the powers enumerated can only be

exercised 'in order to enforce any provision of the Ordinance (including for the purpose of making an audit of a taxpayer or a survey of persons liable to tax)". *It is, therefore, axiomatic that the power under clauses (a) to (e) of section 175(1) cannot be exercised in a vacuum or independently. The respondent No.3, therefore, cannot claim full and free access to any premises, place, accounts, documents or computer unless some other provision is to be enforced and the latter is conferred with powers under such provision. As a corollary, the powers under section 175 can only be exercised in aid of some other power being enforced under the Ordinance of 2001.* The power under clause (b) of section 175(1) to stamp, or make an extract or copy of any accounts, documents or computer-stored information, or under clause (c) to impound any accounts or documents and retain them for so long as may be necessary for examination, or for the purposes of prosecution, cannot be exercised without being empowered under the provision which is being sought to be enforced. Subsection (3) of section 175 declares that the occupier of any premises or place to which access is sought under subsection (1) shall provide all reasonable facilities and assistance for the effective exercise of the right of access. Subsection (4) read with subsection (5) prescribes the procedure for impounding or retaining accounts, documents or computers in subsection (1) and the rights of a person from whom such items have been impounded and retained. *Section 175, when read as a whole, can by no stretch of the imaginations be construed or interpreted as vesting the power or jurisdiction to initiate and conduct investigations relating to any other provision of the Ordinance of 2001, As already noted above, the expression 'in order to enforce any provision of this Ordinance' is indeed crucial and obviously makes the powers enumerated under clauses (a) to (e) subservient thereto. The purpose or object of the powers enumerated under section 175 is to enable an officer conferred with powers under some other provision to enforce the same. Powers under section 175, therefore, have an explicit nexus with the enforcement of any provision of the Ordinance and its use is conditional thereto. The powers as such are ancillary powers, which can only be exercised for enforcing any other provision and not otherwise. It cannot be interpreted or construed as meaning that a person conferred with power under section 175 is empowered to exercise the same to conduct investigations or to exercise powers under other provisions in relation to which power has not been conferred. As an illustration the respondent No. 3, though conferred with powers under section 175, cannot use or invoke the same in order to enforce the powers vested in the Commissioner under sections 121, 122 or 65-D of the Ordinance of 2001 because the said powers are not specified in the corresponding part of column No.4 of the Table given in the Notification. The power under section 175 provides support in order to enforce another provision of the Ordinance of 2001.*

9. It may also be noted that the powers under clauses (a) to (e) of section 175(1) are definitely in the nature of encroaching upon, or may infringe the rights of privacy and liberty of a taxpayer. The powers, therefore, have to be exercised in such a manner that the rights of the taxpayer remain safeguarded. The powers are definitely coercive and consequently are to be exercised with great care and circumspection. The object for using the powers under section 175 is to enforce any other provision' of the Ordinance. Even if some other provision is sought to be enforced, the powers under section 175

cannot be readily resorted to. The person empowered under section 175 has to justify on the basis of sufficient reasons for exercising the powers to be sustainable in law. This is implicit in the expression 'in order to enforce any other provision' of the Ordinance of 2001. The Black's Law Dictionary, Sixth Edition defines 'Enforce' as meaning 'To put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine, to compel obedience to.' 'Enforcement' is defined as 'The act of putting something such as law into effect; the execution of a law; the carrying out of a mandate or command'. *The question of enforcing a provision in the context of the Ordinance of 2001 would arise if there is resistance or refusal on the part of the taxpayer to comply with a lawful order or direction passed by an authority empowered under any provision ibid. The resistance or refusal has to be of such a nature that there is no other choice left with the authority except to exercise powers under section 175 in order to enforce the provision under which powers are being exercised. If, therefore, a taxpayer refuses to provide documents to a Commissioner who is conducting an inquiry under subsection (4) of section 65-D, and the latter has exhausted all the other modes for seeking access to such documents, only then powers under section 175, if exercised, would be justified; otherwise it would amount to abuse of the powers conferred there under. The person, therefore, resorting to exercise the intrusive and coercive powers under section 175 of the Ordinance of 2001, inevitably having the effect of encroaching upon the rights of privacy and liberty, has to show that he or she had acted bona fide and on the basis of reasonable grounds in order to achieve the object for which the powers have been conferred. By no stretch of the imagination can the power under section 175 be used or justified to carry out a fishing or roving inquiry or without sufficient reasons. The powers can only be exercised if the authority is satisfied that some other provision cannot be enforced unless the powers under section 175 are resorted to, subject to the condition that such authority is also conferred with powers under the provision sought to be enforced.*

10. Similarly a learned Single Judge of the Lahore High Court in an unreported case of ***Khurram Shahzad v. Federation of Pakistan***, (WP No.14138/2019 dated 23.04.2019) had the occasion to interpret S.175, whereas, in that matter the department had even brought before the learned Judge, earlier notices issued to the Petitioner in terms of s.122(9) read with s.122(5) of the Ordinance, 2001; however, even existence of such notices was not appreciated as even such notices had failed to disclose the reasons for which the access to record was being sought, as they were in fact in relation to some other transaction for the tax year 2015, for which the Petitioner had already provided relevant information. It was held by the Court that the respondents have failed to justify such action in terms of s.175 ibid. The relevant observations are as under:-

“6. Section 175 of the Ordinance while granting power to Commissioner or any authorized officer by the Commissioner to enter and search premises without notice has to be seen in conjunction with the rights enjoyed by a taxpayer with reference to its premises and property and with the right of due process. *The purposes of this Section is to enable enforcement of any provision of the Ordinance, hence there must be a clear statement before the Commissioner of which provision of the Ordinance is to be enforced and the reasons for it without such an explicit statement, in writing this power under this Section can be abused. Therefore, in order to exercise the power under Section 175 of the Ordinance, the Respondents must record the reasons for initiating section under Section 175 of the Ordinance. The Commissioner has to justify with sufficient reason for exercising this power and while prior notice is not required under this Section, the Commissioner can if deemed necessary issue notice to the taxpayer.* Where prior notice is dispensed with as the statute allows it under Section 175(I)(a) of the Ordinance, the Commissioner must justify invoking Section 175 of the Ordinance in the order of authorization issued prior to entering and searching or confiscating documents or computers or files from the premises of a taxpayer. While interpreting Section 175(I)(a) to (e) of the Ordinance it can be seen that the provisions of Section 175(I)(a) to (e) of the Ordinance not only provide power to enter and search premises giving free access to the Commissioner to any premises, place, accounts, documents or computer but also gives the power to impound any account or document and retain them for as long as may be necessary for its examination or for the purposes of prosecution or to retain information required. *This by itself suggests that information required is necessary for some proceedings or prosecution or inquiry which is under way.* Hence the meaning given to Subsection (7) of Section 175 of the ordinance which provides that the Section shall have effect notwithstanding any rule of law relating to privilege or the public interest in relation to access to premises or places or the production of accounts, documents or computer stored information is not without due process. *Hence this power can only be exercised if the Commissioner is satisfied and has justified in writing that it is necessary to enter and search the premises, place, accounts, documents or computer of the taxpayer.*

7. In this case the Respondents have not been able to justify action under Section 175 of the ordinance. The authorization order does not provide for any reason and simply suggests that its for carrying out the objects of the said Section. This creates suspicion not only the intent but also the reasons for which entry and seizure has taken place. *The Respondents have repeatedly referred to **default in paying sales tax which for the purpose of Section 175 of the Ordinance is irrelevant** and it cannot be used as a reason to enter into the premises of a taxpayer.* Furthermore, the Respondents reliance on notice issued under Section 122(9) read with Section 122(5) of the Ordinance is also misleading as the said notice do not explain the reason for carrying out entry and search of the Petitioner’s business premises as in both the notices the allegations is with respect to some property which was not disclosed in the wealth tax return for the tax year 2015 for which the Petitioner has provided relevant information and for which proceedings were dropped. Therefore in this case, the Respondents have not been able to justify

the action taken under Section 175 of the Ordinance. Learned Counsel for the Respondents has not been able to satisfy the Court as to the compelling reasons to initiate proceedings under Section 175 of the Ordinance.”

11. There is also another aspect of the matter which also needs attention and must be dilated upon. Insofar as the exercise of powers under Section 175 of the Ordinance 2001 is concerned; as noted from the response of the department, it is their case that allegedly the Plaintiffs are involved in evasion of Sales Tax. However, it has not been alleged that either any income tax was evaded; or proceedings of any such nature were pending against them in respect of the alleged evasion of income tax. It needs to be appreciated that hypothetically there may be a presumption to the effect that any evasion or under payment of sales tax may also result in evasion or short payment of income tax but; this is not so simple and easy to correlate. There may be a situation that even evasion of sales tax does not necessarily results in evasion or short payment of income tax as both are being dealt with separately and have altogether different mechanisms to arrive at a taxable value. Income tax is a direct tax on the income of a person, whereas, sales tax is an indirect tax, levied and paid on the sale of goods, which ultimately is borne by the end consumer. There may be a case that a person has income; but is not liable to pay income tax for various reasons, including exemption, tax credit or for any other reason. Therefore, it would be safe to conclude that at least in this matter there was no occasion to conduct any raid or search of the premises under the provisions of 2001 Ordinance, as admittedly the department case is premised on the alleged evasion of sales tax. If the department had been successful in first establishing the alleged evasion of sales tax; then perhaps, but not necessarily, resort to the proceedings under Ordinance, 2001, could have been initiated. But as noted, not mandatorily. There is another aspect of the matter as well. The present Plaintiff is paying sales tax under the fixed Sales Tax regime introduced by the Special Procedure Rules, 2007, and therefore, in normal circumstances, even audits of such persons are exempted; hence any proceedings of the nature, which have

been initiated in this matter were again totally unwarranted. Nonetheless, insofar as proceedings under S.175 are concerned, there could not be any justification for having access to records when the departments own case is not in respect of Income Tax; but only alleged short payment of Sales Tax. Merely, may be as a coincidence, if powers both under S.175 of the Ordinance, 2001, and S.38 of the Sales Tax Act, 1990, vests with the department of Inland Revenue, it is not obligatory to invoke all such powers under both the laws simultaneously, without their being any nexus or relation thereto. If fact there is no such nexus, made out at least in the given facts in hand. It is also a known fact that against these search(s) and raid(s) time and again the tax payers have raised objections and have been appealing to the tax authorities to check the misuse of such powers by the officers of Inland Revenue Department. This has also been voiced by the Associations of Business community as well as Federation of Pakistan Chambers and Industry. And perhaps owing to such hue and cry FBR vide its letter dated 22.2.2017 issued certain directions. The said letter reads as under;

GOVERNMENT OF PAKISTAN
REVENUE DIVISION
FEDERAL BOARD OF REVENUE
(Inland Revenue Operations Wing)

C.No.3(22)S(IR-Operations)2017/22713-R Islamabad, the 22nd February, 2017

To

All Chief Commissioners Inland Revenue,
LTUs/CRTOs/RTOs.

SUBJECT: **CONDUCT OF RAID – POER TO ENTER AND SEARCH PREMISIES
U/S 175 OF THE INCOME TAX ORDIANCNE, 2001.**

This refers to the subject cited above.

2. I am directed to say that it has been desired by the Chairman FBR that henceforth action u/s 175 of Income Tax Ordinance 2001- (power to enter and search premises) shall be exercised after taking prior and written administrative approval of the concerned Chief Commissioner Inland Revenue. The request for approval shall contain reasons in this regard.

3. I am further directed to say that concerned CCIR, while according approval or otherwise as per merit of the case shall take Member (IR-Operations) in confidence so that uniformity in approach is maintained in such cases.

Sd/-
(Yousuf Hyder Shaikh)
Chief (Revenue & Operations)
Ph # 9203807

Copy to:

1. SO to SA to Prime Minister on Revenue / Minister of State.
2. SA to Chairman FBR.

Sd/-
(Sahda Kausar)

12. From perusal of the above it clearly reflects that henceforth the exercise of raid and search under Section 175 of the Ordinance 2001, shall be exercised after taking prior and written administrative approval of the concerned Chief Commissioner Inland Revenue, whereas, such request for permission shall contain reasons in this regard. It has been further directed that the concerned Chief Commissioner while according approval or otherwise as per merit of the case shall take Member (IR-Operations) in confidence so that uniformity in approach is maintained in such cases. Though I have not been assisted on this aspect in any manner on behalf of the Defendants; however, it appears to be an admitted position that such directions have not been followed in this case, whereas, in terms of s.214 of the Ordinance, 2001, all income tax authorities are required to observe and follow the orders, instructions and directions issued by the Board.

13. It may further be noted that in the repealed Income Tax Ordinance, 1979, a somewhat similar provision existed in s.146 which reads as under;

"146. Power to enter and search business premises.---The Inspecting Additional Commissioner or the Deputy Commissioner or any other officer authorised in this behalf by the Central Board of Revenue or if so authorised in writing by the Inspecting Additional Commissioner or the Deputy Commissioner to whom he is subordinate, an Inspector of Income-tax may, for the purpose of making any inquiry, enter the premises in which a person carries cut, or is believed to carry on, his business or profession, and may--

(a) search such premises and inspect any accounts or documents

(b) stamp such accounts or documents or take extracts or copies thereof;

(c) impound such accounts or documents and retain them for so long as may be necessary for examination thereof or for the purpose of prosecution; and (d) make any inventory of any articles found in such premises.

(2) The Director-General of Investigation and Intelligence, the Commissioner and the Inspecting Additional Commissioner may make any enquiry which they consider necessary as respects any person liable or believed to be liable to assessment under this Ordinance or require any such person to produce or cause to be produced any accounts or documents which they consider necessary, and shall have the same powers for the purpose of making any such

enquiry of requiring the production of accounts or documents under this Ordinance as the Deputy Commissioner has.

(3) Notwithstanding anything contained in this Ordinance, the Deputy Commissioner may, with the prior approval of the Commissioner, authorise any valuer to enter any place and inspect such accounts and documents as may be necessary to enable him to make a valuation of any asset for the purpose of section 67. "

14. A learned Single Judge of this Court in the case reported as ***Messrs Tri-Star Industries (Pvt) Limited v The Commissioner of Income Tax, Companies-I, Karachi (1998 PTD 3923)*** had the occasion to interpret the same. In that case, in a similar fashion a raid was conducted and the entire record of the Plaintiff was seized which was challenged before this Court. The learned Judge was pleased to grant an injunction in favor of the Plaintiff by observing that the prerequisites to invoke s.146 were not fulfilled; hence, the entire action was without lawful authority and jurisdiction. The relevant observations are as under;

12. There are certain prerequisites to invoke section 146 of the Ordinance, 1979. Firstly, there must be an authorised officer including Inspecting Additional Commissioner or a Deputy Commissioner or any other officer duly authorised in this behalf by the Central Board of Revenue or an Inspector of Income-tax, if authorised in writing by the Inspecting Additional Commissioner or the Deputy Commissioner, such authorised person is permitted to enter the premises where a person carries on his business. The second requirement is that the entry and search of a business premises must be for the purpose of making an inquiry. The powers so conferred on the officers of the Income-tax Department, as mentioned above, is to search business premises and to inspect any book of accounts or documents; secondly, to stamp such accounts or to take extracts or copies thereof; thirdly, to impound such documents or accounts and to retain them for a limited period which may be necessary for examination or for the purpose of prosecution and lastly, to make an inventory of articles found in such premises. After these powers conferred on Income Tax Authorities by virtue of section 146 are examined, I am unable to subscribe to the views of Mr Awan that for such purpose, the Income Tax Department is competent to remove each and every books of accounts, documents and other record pertaining to the business transactions, vouchers, computers and diskettes etc This is not the spirit of section 146. In my humble view, prior to removing any books of accounts or documents from a business premises there should be an inquiry pending against such person, and, secondly, before impounding any accounts or documents, there should be an element of satisfaction of the concerned authority that such records and documents are necessary for making any person or company liable to assessment; or for reopening of an assessment order or that there exists a case of concealment. This provision does not authorise the Income Tax

Department to remove entire business record of a company and thereafter to fish grounds from such record to make an assessee subject to reopening of a case or make such assessee liable for concealment. To further illustrate this view, I would like to quote a passage from the Circular Letter No.4(40) WIVI/86, dated March 20, 1988, as incorporated in the book 'S. A. Salam's Complete Income-tax Law, 6th Edition, 1995, Volume-I, Lahore' at page 410. It reads as follows:---

"According to the provisions of subsection (1) of section 146 of the Income Tax Ordinance, 1979 read with C.B.R.'s Circular No. 10 of 1979, the Income-tax Officer or an Income-tax Inspector can enter and search business premises of an assessee for the purpose of making an inquiry after obtaining prior permission of the Inspecting Assistant Commissioner. While granting permission, the I.A.C. is expected to use his discretion in a judicious manner and satisfy himself that such entry and search of the business premises is necessary. Therefore, on each occasion, facts and circumstances of the matter necessitating an inquiry should be carefully examined before the required permission is granted by the Inspecting Assistant Commissioner.

2. A case has come to notice of the Federal Ombudsman, where this was not done; he has taken serious adverse notice of lapse. While action in that particular case is in hand, separately, this is to advise you specifically to ensure, through all possible means at your command, that the powers under section 146(1) are not exercised arbitrarily but judiciously; anyone not doing so or not preventing it, will render himself liable to serious adverse notice and consequential disciplinary action."

15. In view of hereinabove facts and the discussion made thereunder, it is clear that the impugned action in terms of s.175 ibid was neither justified, nor had any relevancy with the alleged short levy / payment of Sales Tax; hence, the same cannot be sustained and acted upon any further, and therefore, a case of an injunctive relief is made out.

16. The second notice under which the action has been taken is under Section 38 of the 1990, Act. Again these notices (in both Suits) were issued by the Director of Intelligence on 30.01.2019, being an authorization under Section 38 ibid, and were issued by exercising powers conferred upon him under SRO 1301(I)/2018 and 1302(I)/2018 both dated 29.10.2018. The Notice in one of the Suits (as both are identical) as well as the provisions of S.38 of the 1990 Act, reads as under:-

Government of Pakistan
Directorate of Intelligence & Investigation
(Inland Revenue), Karachi

C.No.Dir/S.175/I&I-IR/Agha/2018-19/790

Dated 30.01.2019

The Principal Officer,
M/s Agha Steel Industries Private Limited,
Plot No. N.W.I.Z/1/P-133, (SP-6)D-2,
Port Qasim Authority, Bin Qasim Town, Malir,
Karachi.

SUBJECT: **AUTHORIZATION UNDER SECTION 38 OF THE SALES TAX ACT 1990.**

In exercise of powers conferred upon the undersigned vide notification No. 115(I)/2018 & 1302(I)/2018 both dated 29.10.2018, the following officers / officials, of this Directorate to have access to the premises, stock, accounts and records of premises situated at 8/F, Block 6, PECHS, Karachi or any other premises of M/s. Agha Steel Industries Private Limited (NTN-7383402-0) or the earlier AOP (NTN-3922640-9) maintained by them and / or by any other person in its behalf under Section 38 of the Sales Tax Act, 1990.

S. No.	Name	Designation
1	-----	-----
2	-----	-----

2. It is informed that the proprietor / owner / Director or any other responsible person of your business concern should be present in the above mentioned premises to extend full cooperation in providing the relevant details / documents and facilitate the assigned officers / officials of this Directorate.

3. The report of the official activity must be communicated to the undersigned during the very next working day.

(Abdul Rahim Bullo)
Director

[38. Authorised officers to have access to premises, stocks, accounts and records – (1) Any officer authorised in this behalf by the Board ²[or the Commissioner ³[***]] shall have free access to business or manufacturing premises, registered office or any other place where any stocks, business records or documents required under this Act are kept or maintained belonging to any registered person or a person liable for registration or whose business activities are covered under this Act or who may be required for any inquiry or investigation in any tax fraud committed by him or his agent or any other person; and such officer may, at any time, inspect the goods, stocks, records, data, documents, correspondence, accounts and statements, utility bills, bank statements, information regarding nature and sources of funds or assets with which his business is financed, and any other records or documents, including those which are required under any of the Federal, Provincial or local laws maintained in any form or mode and may take into his custody such records, statements, diskettes, documents or any part thereof, in original or copies thereof in such form as the authorised officer may deem fit against a signed receipt.

(2) The registered person, his agent or any other person specified in sub-section (1) shall be bound to answer any question or furnish such information or explanation as may be asked by the authorised officer.

(3) The department of direct and indirect taxes or any other Government department, local bodies, autonomous bodies, corporations or such other institutions shall supply requisite information and render necessary assistance to the authorised officer in the course of inquiry or investigation under this section.]

17. The notice as above is a simple notice authorizing certain officers of the Directorate of Intelligence for having access to the premises and records of the Plaintiff in terms of s.38 of the 1990, Act. However, it is to be noted that the Notice is completely silent as to the reasons for such access. Whereas, S.38 *ibid*, confers authorization on officers to have access to premises, stocks, accounts and records and further provides that any officer authorized in this behalf by the Board or the Commissioner, shall have free access to a business or manufacturing premises, registered office or any other place, wherein, the stocks, business records or documents required under this Act, are kept or maintained. On a careful perusal of this provision it reflects that such access is relatable to four different categories of persons. The first one is that the record may be belonging to *any registered person, or a person liable for registration or whose business activities are covered under this Act, or who may be required for any inquiry or investigation in any tax fraud committed by him or his agent, or any other person.* The Plaintiffs in both Suits would fall into the category of *registered person* as the other category of person(s) do not apply to their case for the present purposes. In fact the other category which could apply to them as per department's case could be *who may be required for any inquiry or investigation in any tax fraud committed by him.* However, the department has not set up its case in this regard as they have admitted that at the time of initiating such action, there weren't any proceedings pending against them in any manner including allegation of tax fraud. The provision further provides that such officer may, at any time, inspect the goods, stocks, records, data, documents, correspondence, accounts and statements, utility bills, bank statements, information regarding nature and sources of funds or assets with which his business is financed, and any other records or documents, including those which are required under any of the Federal, Provincial or local laws maintained in any form or mode and may take into his custody such records, statements, diskettes, documents or any part thereof, in original or copies thereof in such form as the authorised officer may deem fit against a signed receipt. On an overall perusal of this Section it reflects that firstly it is not a

provision, which permits conducting a *search or a raid*. This has to be understood in clear terms that this is not a provision for a *search or a raid* of the premises. It only gives access to the authorized officer for the purposes as mentioned in the provision itself. However, as is reflected from the material on record read with the conduct of the Directorate of Intelligence, it appears to be a case whereby it has been used as a provision for conducting the *search or a raid* on the business premises of the Plaintiffs. The Plaintiffs have annexed certain photographs obtained from the CCTV footage, which clearly reflects that apparently the manner, in which, the officers went to the premises, it was intentionally a “*Search*” or a “*Raid*” conducted on the business premises. It needs to be appreciated that for such an act, an independent provision has been provided under Section 40 of the 1990 Act, which relates to searches under warrants and time and again the department and its officers, to avoid conducting a proper search as required under Section 40 of the 1990 Act after obtaining a warrant from the concerned Magistrate, and to avoid such obligation in law, take recourse to the provisions of Section 38 and conduct *search or a raid* on the business premises. Secondly, it also needs to be appreciated that this is only relatable for having access to the record in whatever manner it is being kept by the registered person. Therefore, if the department is in need of any access to the record, at least a prior notice first ought to have been served for providing the relevant record, as admittedly, the Plaintiffs in these matters are registered taxpayers and are filing their returns. If such request is refused by the taxpayer or not responded properly, then perhaps there could be a justification for the department to have recourse to Section 38 of the 1990 Act, and that too only for having access to the record and not otherwise. In this matter it is not the case of the department that any notice for such access to record was ever issued and was not responded to or refused, and therefore, they have taken recourse under Section 38 (*ibid*). Until such time this exercise of requesting information or record and its refusal is carried out, there appears to be no justifiable occasion for having access to record by invoking s.38 of the 1990, Act.

18. The provisions of Section 38 of the Sales Tax Act, 1990 have time and again come under scrutiny of various Courts of the Country including this Court, learned Lahore High Court as well as the Hon'ble Supreme Court. The first case in this series of cases is ***Federation of Pakistan through Secretary, Ministry of Finance, and 4 others v Master Enterprises (Pvt) Limited*** reported as **2003 PTD 1034**, wherein, a notice was issued to the taxpayer under Section 38 of the 1990 Act. However, after serving such notice, the department raided on the business premises of the Respondent and took away the record, which was challenged before the High Court of Sindh and the entire action of the department was held to be without lawful authority, which was then impugned by the department before the Hon'ble Supreme Court and the relevant observations of the Hon'ble Supreme Court are as under:-

“5. On the other hand, Mr. Abid S. Zuberi, learned, Advocate Supreme Court for the respondent vehemently controverted the above contentions and argued that the respondent had never indulged in the evasion of the tax but on the contrary, the audit of the record of the company, was conducted by the petitioners and no fraud or fault was ever noticed. As per notice under section 38, of the, Act, a team was constituted to scrutinize the record only and was not authorized to raid and seize the record, as such, it has travelled beyond its scope which is in clear violation of the law. He further contended that neither the search was made under provisions of sections 40 and 40-A of the Act nor any memorandum of seizure of the documents was ever prepared, therefore, the entire action is without lawful authority. He supported the impugned judgment and stressed that it being in accordance with law is not open to any exception.

6. We are in full agreement with the contentions raised at the bar by the learned counsel for the respondent. Admittedly, the provisions of sections 40 and 40-A of the Act have not been complied with by the petitioners while conducting raid and seizing the documents. It is expressly stipulated in the above provisions that all searches made under Act or the Rules shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898) (hereinafter referred to as the Code). Procedure regarding search has been laid down in sections 96, 98, 99-A and 100 of the Code whereby, firstly, a search warrant is to be obtained from the Illaqa Magistrate when search of the premises is to be made. In view of section 103 of the Code, it is mandatory to join two or more respectable inhabitants of the locality in which the place to be searched is situated to attend and witness the search and a list of all articles taken into possession shall be prepared and a copy thereof shall be delivered there and then. Though repeatedly called upon learned counsel for the petitioners failed to show from, record that the above provisions of law were strictly followed while seizing the record and sealing the premises of the respondent-company. As such, we do not find any cogent reason to interfere with the impugned judgment which is unexceptionable.”

19. In the case of ***Collector of Sales Tax and Central Excise (Enforcement) and another v Mega Tech (Pvt) Limited (2005 SCMR 1166)***, once again a similar controversy came before the Hon'ble Supreme Court against a Judgment of a Division bench of this Court, whereby, the Petitions were allowed and the conduct of raid under Section 40-A of the Act was held to be without lawful authority and jurisdiction. In this case the department had conducted a raid on the premises of the taxpayer by exercising powers under s.40A (since repealed), without following the procedure mandated under s.40 which required obtaining a search warrant from the concerned Magistrate. The Hon'ble Supreme Court has been pleased to interpret the relevant provisions including Sections 38, 40 and 40A of the 1990, Act and has been pleased to hold that before embarking upon a search in terms of s.40A, it was incumbent upon the department to first establish that it had some material as well as reason(s) to do so, and second, that its action is free from mala fides, whereas, the department must not bypass the mandatory provision of s.40 (to obtain a search warrant). The relevant findings are as under:-

“7. There can be no cavil with the proposition that an officer, duly authorized in this behalf can have free access to the business premises of a registered person. It is also not disputed that the officer, who inspected the premises, was duly authorized to inspect the goods, stocks etc., as contemplated by law. Nevertheless, from the language employed in sections 40 and 40-A reproduced hereinabove, the requirement of law appears to be that where an officer of sales tax has reason to believe that any document or things, which, in his opinion, may be relevant to any proceedings under the Act, are concealed or kept in any place and there is a danger of removal of such documents or records, he may, after obtaining a warrant from the Magistrate, enter that place and cause a search to be made at any time. The mandate of law as enunciated in subsection (2). seems to be that search authorized under the above provision of law shall be carried strictly in accordance with relevant provisions of the Code of Criminal Procedure, 1898. Such provisions are contained in sections 96 to 105 of the Code and need not be dilated upon as admittedly the petitioners did not invoke these important provisions of law while seizing the records of the respondent-Company. Petitioners, however, attempted to canvass of this Court that upon being asked by authorized officer and, after serving notice on Syed Anwar Ali, General Manager (Finance) of the respondent-Company with a request to provide all the sales tax records, he refused to provide the same on the premise that no record was available with them and when requested to allow access to the premises, he did not allow the same, therefore, Dr. Mubashir Baig, Deputy Collector Sales Tax, in

exercise of the powers of search, prepared a statement under section 40-A and directed his staff to search the premises for following reasons:

- (i) Non-availability of Magistrate;
- (ii) Possibility that records will be removed till the availability of Magistrate;
- (iii) Denial to allow search and also failure to provide sales tax record.

8. Statement prepared by this officer within the contemplation of section 40-A commences with the expression "whereas on the basis of credible information" that M/s. Mega Tech were involved in the evasion of sales tax, he along with the staff of sales tax, duly authorized by Collector of Sales Tax under section 38 of the Act, visited the premises. On a query by the Court, learned Deputy Attorney-General was obliged to concede that in fact on 21-9-2004 department had received an anonymous complaint against the respondent. It may, however, be observed that authorization from the Collector of Sales Tax was obtained on 23-9-2004, on which date the entire exercise was undertaken in the purported exercise of powers conferred under section 40-A of the Act. In the face of admitted position that there was no definite information much less credible report against the respondent alleging evasion of sales tax, it is hard to accept the statement of the petitioners that the authorized officer in fact acted on receipt of a credible information within the meaning of the term. On the other hand, there appears to be force in the reasons recorded by the High Court for declaring the impugned action without jurisdiction because the same was undertaken after the lapse of two days, which period in our opinion was adequate enough to obtain a search warrant from a Magistrate if the Department believed that complaint otherwise was true and genuine. Learned High Court appears to be justified in doubting the bona fides of the petitioners in bypassing the statutory provisions contained in section 40 of the Act and straightaway assuming extraordinary powers under section 40-A. **There may be no cavil with the submission that the authorized officer had full powers and authority to inspect the premises of the respondent-Company under section 38 of the Act with a view to satisfy himself that proper records under the provisions of the Act, rules and regulations were maintained, nevertheless, in law, he is expected to act fairly, justly and reasonably. It is difficult to believe that on being called upon to provide necessary records, General Manager (Finance) of the respondent-Company would point blank refuse to lay the same on the so-called premise that records were not maintained.** One would be justified in drawing this inference from the letters placed on record by the petitioners themselves relating to the audit for year 2002-2003 and the positive and prompt response made by Senior Manager (Accounts) of the respondent. One of such letters being letter dated 15-9-2004 latest in point of time enclosing therewith photocopies of the documents required by the Department vide letter dated 13-9-2004, is available at page 63 of the Paper Book. If the respondent-Company had fairly allowed the auditors of the Department to audit their monthly returns for the year 2002-2003 in 2004, we would be legally justified in holding that reasons recorded in the statement prepared by the authorized officer do not hold the ground. **Likewise, undue haste and anxiety with which authorized officer acted and impounded a large number of files, statements, computers, diskettes and CDs of the Company, prima facie, tends to lack bona fides and reasonable belief on the part of the departmental officers.** At any rate, it is not apparent from the statement prepared by the authorized officer that it

was his genuine belief that there was reasonable danger of removal of records, which may be relevant to any proceedings under the Act. In the absence of any strong belief to such effect, we are not inclined to agree with the submission that section 40-A confers unlimited and unbridled powers on the authorized officer to conduct search or to impound any kind of documents without any reasonable cause and without obtaining any search warrant from the Magistrate.

9. Reasonable belief of an officer must have direct nexus and material bearing on the strong circumstances for formation of such opinion. Indeed the legislature has used the expression 'reasonable belief' and not a mere suspicion in the mind of an authority with a view to authorise the search of premises without obtaining a search warrant from a Magistrate. Sections 40 & 40-A of the Act in our opinion appear to be neither overlapping nor in conflict with each other. While section 40 caters for search where a sales tax officer has reason to believe that any documents or things, which may be useful or relevant to any proceedings, he may enter the place and cause a search after obtaining search warrant from the Magistrate, section 40-A was enacted to meet an emergent situation where a sales tax officer has reason to believe that documents or things useful for or relevant to any proceedings under the Act, kept at any place are apprehended to be removed, he may proceed to make a search without obtaining any warrant. It would, however, appear that every word used by the Legislature must be given its true meaning and the provisions construed together in a harmonious manner. To our mind, it would not be legal and proper to apply one provision of law in isolation from the other provision as no surplusages or redundancy can be attributed to the legislative organ of the State.

10. Learned Judges of the High Court, after a threadbare and in-depth examination and analysis of the record have recorded a finding of fact that the only course available to the petitioner was, as contemplated under section 40 of the Act, thus, bypassing of such course and direct invocation of powers under section 40-A in the garb of access to the office premises of the respondent in terms of section 38 of the Act was not warranted by law. On careful consideration of the record and analyzing the submissions of the learned counsel for the parties, we are in complete agreement with the view taken by the High Court as, apparently, action taken by the petitioner-Department smacks of lack of bona fides and acting on personal whims.

20. A learned Single Judge of this Court in the case of **A.M.Z Spinning & Weaving Mills (supra)** also had the occasion to interpret the provisions of Section 38 of the 1990 Act, and has been pleased to observe that firstly before embarking upon and invoking the provisions of Section 38(ibid) for a visit or access to a business premises, the department must have reasonable cause to believe that such a visit is warranted and the same has to be more than a mere hunch or suspicion. The learned Judge has been pleased to circumscribe the act of the department in a certain manner before exercising powers under Section 38. It

has been held that if any action, which is in contravention of the limitations prescribed, will fall short of the requirement of acting fairly, justly and reasonably, and therefore, would be wholly illegal and void. The relevant findings are as under:-

“In the absence of the requisite authorization to conduct a search, all that an officer visiting the plaintiffs' premises could do on that day was to inspect the record and documents specified in section 38. Keeping in view the search provisions contained in sections 40 and 40A a visit under section 38 would per force be limited to inspecting only that record and those documents that were in plain sight or were voluntarily made available for inspection on request. In the absence of the section 40 or the section 40A authorization, the officer would not have had any power to search for any record or document or compel any person present in the premises at that time to disclose and make available for inspection any record or document sought by the officer. As far as the power under section 38 to take record and documents into custody is concerned, this can only extend to that record and those documents that the officer is permitted to inspect. To hold otherwise would render the provisions of sections 40 and 40A meaningless and expose persons such as the plaintiffs in these cases to unbridled invasion at any time of the officers' choosing.

In the first instance, and this is essential to the proper conduct of the inspection, the department must have reasonable cause for arriving at a determination that a particular premises ought to be visited for the purpose of carrying out a section 38 inspection. The department cannot use section 38 to enter into a given premises without reasonable cause and then look for or create cause to take record and documents into custody. Secondly, the officer must have prior authorization to carry out the inspection by the Board or by the Collector and must show it to the person present at the premises where the record and documents to be inspected are kept. Without reasonable cause and proper authorization the visit and all subsequent actions taken by the officer will be entirely illegal.”

Before embarking on section 38 visit to any premises the department must have reasonable cause to believe that such a visit is warranted. This has to be more than a mere hunch or suspicion and must also be recorded in writing. Since the purpose of a section 38 visit is to see that proper records under the Act, Rules and Regulations are maintained, reasonable cause for a visit could, for example, arise in a situation where a registered person has filed documents in the normal course which indicate that a particular record is not being maintained or that it is not being maintained in the required manner. The basis for the visit need not be shared with the person whose premises are to be visited but must be on the department's files for production in proceedings that may be instituted by the said person. The officer designated to conduct the visit must be authorized in that regard by the Board or the Collector and must produce a copy of the authorization before commencing the inspection. The visit must be confined to inspecting the record and documents that are in plain sight or those that are voluntarily made available for inspection by the person(s) present at the premises on request. Consequently, custody within the meaning of section 38 can only be taken of such record and documents that are in plain sight or those that have voluntarily been made available for inspection on request. The record and documents taken into custody must be against a receipt signed by the officer. The officer has no power under section 38 to compel the production of any record or document that is not in plain sight or that has not been voluntarily made available as above. Any record or document taken into custody under compulsion cannot be used for any purpose whatsoever by the department against the person from whose custody the record or document has been taken by an officer into his possession.

Any section 38 action that is in contravention of the foregoing will be an action that falls short of the requirement to act fairly, justly and reasonably and, therefore, wholly illegal and void. Permitting the department to benefit from such actions would be equally illegal.

In this view of the matter the question that naturally arises is whether probable cause for a search can arise during a section 38 visit and the answer is that it can, but must not be of the department's own creation. If it does, the provisions of sections 40 and 40A must be strictly complied with and the search and seizure procedure set out in Customs General Order 12 of 2002 must be followed in order to ensure that any action that is taken is fair and conforms to the principles of natural justice.”

21. A learned Single Judge of the learned Lahore High Court in the case of **Messrs Iqbal and Sons through Authorized Representative v. Federation of Pakistan through Secretary and 3 others** reported as **2017 PTD 590** has been pleased to interpret the limited scope and powers, which could be exercised by the department under Section 38 of the 1990, Act in the following terms:-

“14. The powers of the authorized officer under section 38 are simply to inspect the goods, stocks, records, data, documents, correspondence and any other record or documents kept by a person in the course of his business and for this purpose, the authorized officer shall have free access to business or manufacturing premises, registered office or any other place where any stocks, business records or documents are kept or maintained. Therefore, the power is only limited to inspection of such record as also taking that record into custody in original or in the form of copies. No other power is contemplated by section 38 to vest in the authorized officer. The person whose premises are sought to be inspected, is in turn, required to provide free access to the authorized officer and in case he fails to do so, that person shall be liable to be penalized and punished in terms of section 33 of the Act, 1990. To reiterate, the powers of the authorized officer do not travel beyond inspection of the record maintained by a person and cannot be stretched to be employed as a tool to harass that person or to use it as an element of intimidation for a collateral purpose.”

22. Therefore, in view of the above pronouncements of the Hon'ble Supreme Court as well as this Court and the learned Lahore High Court, it could be safely held that the department under the garb of a Notice under Section 38 of the 1990, Act, cannot conduct a *search or a raid* of the premises as for that purposes, the only recourse available is an action under Section 40 of the Act (ibid). What has happened in this case, is in fact a *search or a raid* of the premises under the garb of Section 38, which only permits to have access to the record and nothing beyond that. Since I have come to the conclusion that the very

validity of the act and action initiated under Section 38 is not proper and lawful, therefore, it is needless to give any finding on the issue that *“Whether the Directorate of Intelligence can exercise any powers and jurisdiction under Section 38, which only provides jurisdiction to the Board or the concerned Commissioner”*. Any such action even by the Board and the Commissioner, if initiated in the same manner, would have met the same fate; hence no further deliberation is needed on this aspect of the matter. Again on the basis of hereinabove facts and circumstances of the case a case for an injunctive relief is at least made out.

23. The third issue, which is only relevant in Suit No.200/2019, is in respect of Notice / letter issued under Section 40B of the 1990, Act. On the basis of a letter by Second Secretary, FBR, the Commissioner has deputed officers on the production facility of the said Plaintiff. The two Notices / letters as well s.40B reads as under:-

OFFICE OF THE
COMMISSIONER INLAND REVENUE
ZONE-III, LARGE TAX PAYERS UNIT-II, KARACHI

No.Jud—I/ZONE-III/LTU-II/2019/571

Date: 30.01.2019

SUBJECT: ACTION U/S 40B OF THE SALES TAX ACT, 1990.

In pursuance of the Federal Board of Revenue letter C.No. 1(77)STM/2018/13596-R dated 30.01.2019 (copy enclosed), action u/s 40B of the Sales Tax Act, 1990 is being initiated in your case to monitor production, sales and stock position, till further orders. Nine offices / officials have been posted at your business premises to complete the action. List of the offices is mentioned the FBR letter.

You are required to co-operate with the team in completion of their duties, as per the requirements of law.

(MUHAMMAD AZHAR ANSARI)
COMMISSIONER IR

Copy to the Chief Commissioner Inland Revenue, LTU-II, Karachi, with reference to his letter No. SO-III/2720 dated 30.01.2019.

(MUHAMMAD AZHAR ANSARI)
COMMISSIONER IR

GOVERNMENT OF PAKISTAN
REVENUE DIVISION
FEDERAL BOARD OF REVENUE
INLAND REVENUE

C.No.I(77)STM/2018/13596-R

Islamabad the 30th January 2019

Sub: **EXTRAORDINARY REPORT IN RESPECT OF M/S AGHA STEEL INDUSTRIES LIMITED STRN:32-77-8761-364-67**

I am directed to refer to the subject and to say that in exercise of powers conferred under Section 40B of the Sales Tax Act 1990, the following officers / officials of LTU-II, Karachi are posted to business premises of **M/s Agha Steel Industries Limited STRN:32-77-8761-364-67** to monitor production, sales and stock positions, till further orders:-

S. No.	Name	Designation
1	-----	-----
2	-----	-----
3	-----	-----
4	-----	-----
5	-----	-----
6	-----	-----
7	-----	-----
8	-----	-----
9	-----	-----

2. Report on outcome of the exercise may be furnished to the Board.

(KHALID MEHMOOD)
Second Secretary, STM IR (Operations)
Phone: 051-9208742
Fax: 051-9207

40B. Posting of ²[Inland Revenue] Officer.—Subject to such conditions and restrictions, as deemed fit to impose, the ²[Board], ³[* * *] may post Officer of ⁴[Inland Revenue] to the premises of registered person or class of such persons to monitor production, sale of taxable goods and the stock position: ⁵[.]
⁶[* * *]

24. Insofar as the exercise of powers conferred under Section 40B ibid is concerned, it provides that subject to such condition and restriction as deemed fit to impose, the Board may post officer of Inland Revenue to the premises of the registered person or class of such person to monitor the production, sales of taxable goods and stocks position. Purportedly, while exercising such powers a letter has been issued by a Second Secretary of FBR addressed to Commissioner, Inland Revenue to act further. At the very outset, it may be observed that the Commissioner Inland Revenue, who has been assigned the task to take such action under Section 40B (ibid) pursuant to the aforesaid purported permission or approval, while filing his comments, has referred un-amended provision(s) of Section 40B. Such response before the Court has been filed through some authorized person and not directly by the said

Commissioner. It is very unfortunate and reflects very badly upon the department that a person of the level of Commissioner, who has delegated his authority and powers to file written statement and comments in this matter to someone else; has relied upon an un-amended provision of the Act. If an officer of such level is unaware of the provisions under which, he is supposed to act, then what credibility could be attributed to his actions, which have been challenged as being without lawful authority and jurisdiction. Nothing more could be added except that abdication and entrustment of powers in this manner will only have more drastic and damaging effects, not only for the department in defending cases before the Courts; but so also on the individuals service record as well, if any adverse findings are recorded on such conduct of the officer concerned.

25. Adverting back, firstly, it needs to be appreciated that any action under Section 40B, now after amended provisions can only be taken by the Board. The Board is defined under Section 2(a) of the Federal Board of Revenue Act, 2007, whereas, in terms of Section 3 of the said Act, the establishment of Federal Board of Revenue has been provided and states that *it is hereby established a Board to be called the Federal Board of Revenue, which shall consist of not less than seven members to be appointed by the Federal Government.* Similarly under Section 8 of the said Act, delegation of functions and powers by the Board has been provided, which states that the Board may, subject to such conditions as deemed necessary, delegate any of its functions and powers to any Government Agency, Chairman or any Member or employee duly appointed under this Act. Now, the action, which can be initiated under Section 40B (ibid) has to be by the Board and not otherwise. Admittedly, nothing has been placed on record to the effect that any decision was taken by the Board to initiate such proceedings. What has been placed on record is a Letter issued by one Second Secretary, STM-IR (Operations), addressed to the Chief Commissioner Inland Revenue, Large Tax Payer Unit-II, Karachi having subject, *“extraordinary report in respect of the Plaintiff* and goes on further stating that, *I am directed to refer to the subject and to say that in exercise of powers conferred under Section 40B of the Sales Tax Act 1990, the following officers are posted to the business premises of*

the Plaintiff to monitor production, sales and stock positions till further orders. On a plain reading this appears to be only a communication by a Second Secretary to the Chief Commissioner, Inland Revenue, and it has not referred to any decision of the Board so taken under Section 40B (ibid). He has only been directed to refer to the subject (as above) without any express delegation or otherwise grant of approval by the Board in terms of s.40B. In fact the literal interpretation of the language employed leads to the conclusion that such powers have been exercised by the Second Secretary himself, without any approval or delegation of the same. Even after filing of this Suit, nothing has been placed on record through comments or otherwise to substantiate that whether any such meeting of the Members of the Board was conducted or for that matter any powers were delegated for taking and initiating action under Section 40B (ibid). The entire record is silent and apparently it does not seem to be a case, whereby, the Board had in fact actually exercised any such powers. Therefore, on this premise alone the action initiated under Section 40B of the Act can be termed as unlawful and without jurisdiction.

26. An objection was raised by the learned Counsel appearing on behalf of Commissioner Inland Revenue and the learned Assistant Attorney General that exercise of such powers is discretionary and is not circumscribed with any fetters or conditions; hence, no question of any illegality can come in their way. Though, there cannot be any cavil to this proposition; but again there is an exception to it as well. It appears admittedly to be a case of exercising discretionary powers as contended. Now it is settled law that while exercising discretionary powers, it is not that an officer or even the Board is conferred with unfettered discretion. It has to be guided by objective and workable standards with some level-headedness. It must not be based on short-sightedness or carelessness. It is always to be exercised in a judicious manner and keeping in mind the attending circumstances thereto. If this is not, then the Officer or the Board, as the case may be, would be permitted to pick and choose a tax-payer and resultantly could lead to harassment as well. It is settled law that while exercising discretion the authority should not act arbitrarily, unreasonably

and in complete disregard to the rules and regulations. The discretion to be exercised has to be judged and considered in the background of the facts and circumstances of each case. It must not be exercised on whims, caprices and mood of authorities. It is circumscribed by principles of justice and fairness and while exercising such discretion, the authority must take into consideration and advance aim and object of the enactment, rule or regulation under which it was authorized to act. It should not act in complete negation of the object of such law, whereas, pre-conditions imposed for exercise of discretion should be honored and respected as well. (See *Walayat Ali Amir v Pakistan International Airlines Corporation-1995 SCMR 650*). It is not conceivable that the intent of the Legislature specially in tax matters would be that a taxpayer is left to whims and desire of the tax collecting authority. It has been the consistent view of the Courts that in such matters, no discretion is left with the tax collecting agency, whereas, at the same time the tax payer is also required to be a compliant tax person. These two go together; however, this does entail that if any officer without any basis, material and examination of record, has come to a conclusion that some tax is short levied or not paid, he without any recourse to assigning any justifiable reasons, would be permitted to monitor the production and sales of a tax-payer. This amounts to a fishing and roving expedition which was deprecated by the Hon'ble Supreme Court way back in the year 1992 in the famous case reported as ***Assistant Director Intelligence and Investigation v B.R.Herman*** (PLD 1992 SC 485) while interpreting section 26 of the Customs Act, 1969, which in more or less similar terms, empowered the officer to call for and examine the record, in the following terms;

It cannot make a roving inquiry or issue a notice by merely shooting in the dark in the hope that it will be able to find out some material out of those documents and then charge the party of irregularity or illegality. The authority has to state and disclose in the notice, the purpose for which the party is required to produce those documents or supply information. Unless such purpose is specified in the notice, it will be a matter of anybody's guess and the accused party will be put to inquiry without any specific allegation or fact disclosed to him. It does not permit any authority to employ the provisions of section 26 to make indiscriminate, roving and fishing inquiry irrespective of the fact whether any determination of legality or illegality in import, export or funds with

which the goods were acquired is to be determined. Even in cases of suspicion of commission of illegality, details should be provided to the party-to enable him to have an opportunity to produce all the relevant documents and disclose information. Depending on the facts and circumstances of a case any notice without disclosing any fact or - particulars, for which information or document are required will be in violation of the principles of natural justice and may be struck down as illegal and without jurisdiction.

27. This exercise of discretion in respect of this very provision under discussion i.e. s.40B of the 1990, Act, came before the Hon'ble Supreme Court in a very recent judgment reported as ***Commissioner Inland Revenue v Pakistan Beverages Limited (2018 SCMR 1544)*** and the Hon'ble Supreme Court had the occasion to examine the exercise of discretion by the tax officials under the Sales Tax Act, 1990, and the discussion as well as the finding in that matter is of much relevance for this case. In that case, pursuant to (un-amended) section 40B of the Sales Tax Act, 1990, the concerned officer or Commissioner was authorized to post various officers at the factory premises of a registered person to monitor production. The issue was that for how much duration can such an officer is to be posted. Is it unlimited or is it time bound. The law was silent on the issue as to the exact duration for which the officer can be deputed by exercising such discretion. A Division Bench of this Court, came to the conclusion that monitoring of any premises cannot go forever, and there must be some time limit prescribed. The learned Division Bench restricted such time as a maximum of one year. However, the Commissioner was not satisfied and appealed before the Hon'ble Supreme Court contending that since the law does not provide any such time restriction, therefore, it is the discretion of the Officer to monitor the production as long as he thinks fit. However, the Hon'ble Supreme Court did not agree with this contention and went on to hold that law recognizes no such thing as an unfettered discretion and all discretionary powers, especially that as conferred by statute, must be exercised in terms of well-established principles of administrative law, which were of longstanding authority and had been developed, enunciated and articulated in many judgments of the Supreme Court. It was further held that discretionary statutory power could only be exercised on a ground or to achieve an object or purpose that was lawfully within the contemplation of the

statute. Though, the issue before the Hon'ble Supreme Court was in respect of exercise of discretion by the Commissioner and not the Board, but I am of the view that such findings would equally apply on the Board as well in terms of s.40B, The Hon'ble Supreme Court came to the following conclusion which is directly relevant for the present issue and reads as under:-

“4. We have considered the matter. Section 40B confers a discretionary power on the authorities named therein, being the Board or the Chief Commissioner or (in terms of the specific situations of sales tax evasion or tax fraud) a Commissioner of Inland Revenue. We begin by noting that it is well settled that the law recognizes no such thing as an unfettered discretion. All discretionary powers, especially that as conferred by statute, must be exercised in terms of well-established principles of administrative law, which are of longstanding authority and have been developed, enunciated and articulated in many judgments of this Court. There is no need to rehearse those principles here save only to note one aspect. This is that a discretionary statutory power can only be exercised on a ground or to achieve an object or purpose that is lawfully within the contemplation of the statute. Now, as correctly noted by the High Court, the power under section 40B has been granted to "monitor" the "production, sale of taxable goods and stock positions" of a registered person or class of such persons, by posting Inland Revenue officers at the relevant premises. But the monitoring can only be for some object, ground or purpose that is legitimately and lawfully within the contemplation of the 1990 Act. The proviso to the section itself identifies two such situations, namely sales tax evasion and tax fraud. Undoubtedly, there are others. But the monitoring is not intended to be indefinite. Indeed, this is clear from the very fact that power conferred is discretionary; the monitoring has not been made mandatory. Once the purpose has been served or object achieved or the ground stands exhausted, the monitoring must come to an end. However, it cannot be left to the unfettered discretion of the Board, the Chief Commissioner or the Commissioner (as the case may be) to determine when the purpose has been served or object achieved. Any such conclusion would run against the grain of the core principles that regulate the exercise of discretionary power. It is for this reason that the High Court concluded, again correctly, that the exercise of the power conferred by section 40B is time bound in the sense that some timeframe or period must be given in any order made under the section. Of course, it will always be open to the authority exercising the power to reassess the situation at or near the conclusion of the period. If there are legitimate grounds for extension, then a further period may be granted. And equally, it will be open to the concerned person to challenge any exercise of the statutory power or any extension in the period, in accordance with law. However, to contend, as was in effect done by learned counsel before us, that the period or timeframe is entirely at the discretion and will of the concerned authority, and that therefore any order made under the section need not contain any provision in this regard, is beyond the contemplation of law. We may note that this conclusion is not the addition of words to the section or the importation of an element that is not otherwise to be found therein. The conclusion arrived at by the High Court, and affirmed here, follows from the very nature of how discretionary power can be lawfully exercised. Any submission to contrary effect cannot be accepted. We are therefore, with respect, unable to agree with learned counsel that the observations made in the impugned

judgment, and especially its paragraph 7, require any reconsideration or interference by this Court.

5. Before concluding, two comments may be made. Firstly, in an earlier part of the impugned judgment, the learned High Court observed that the power of the Board or the Chief Commissioner is "unqualified". This statement, unless read in context, may cause some confusion. It is clear that what the High Court was concerned with was to contrast the power conferred on the Board or the Chief Commissioner on the one hand, and on the Commissioner in terms of the proviso on the other. As noted above, the Commissioner can act in only two situations and not otherwise. Neither the Board nor the Chief Commissioner is so constrained. It is only in contradistinction with the position of the Commissioner that the power of the former is "unqualified". The High Court must not be understood as having held that the Board or the Chief Commissioner has been conferred an unfettered discretion by the section. That would, for reasons already stated, be contrary to law. Secondly, although learned counsel referred to certain provisions of the 2005 Act, and section 45(2) thereof appears to be very similar to section 40B, we have refrained from any consideration of the former. The reason is that those provisions were not directly involved in the present case. It would, in the circumstances, be inappropriate to consider sections not specifically invoked by the authorities, even though they are to be found in a cognate statute.”

28. Lastly, an objection was raised by the Counsel for one of the defendants in respect of maintainability of these Suits on the premise that in view of the judgment of the Hon'ble Supreme Court in the case of **Searle Solutions (Supra)**, the Plaintiffs must be asked to deposit 50% of the disputed amount of tax with the department. However, it needs to be appreciated that this condition does not apply to the facts and circumstances of this case inasmuch as the Plaintiffs have not impugned any demand of tax; rather they have challenged the notices and actions, being without lawful authority and jurisdiction. Moreover, the amount of tax so stated in the written statement is also without any supporting demand, whereas, their case is that pursuant to the raid conducted on the basis of impugned notices, huge amount of tax is outstanding. This argument is entirely misconceived. Mere claim in the written statement and after passing of ad-interim orders to the effect that no coercive action be taken against the Plaintiffs, any such claim and calculation cannot be made basis to non-suit the Plaintiffs. Hence, this objection is overruled.

29. In view of hereinabove facts and circumstances of this case and the discussion as well as observations noted above, I am of the view that the Plaintiffs in both Suits have made out a case of grant of injunctive relief(s) in respect of the impugned notices issued under S.175 of the Ordinance, 2001, s.38 and s.40B of the 1990 Act, as a prima facie case exists in their favor, whereas, balance of convenience also lies in their favor and if the injunctive relief(s) is refused, they would suffer irreparable loss. Therefore, by means of short order(s) dated 10.04.2019 passed separately in both Suits in the following terms, the listed applications were allowed and these are the reasons thereof.

Suit No.200/2019

1. For reasons to be recorded later, this application is allowed in the following terms:-
 - i. The impugned Notice dated 30.01.2019 (pg:213) issued by Commissioner Inland Revenue under Section 40-B of the Sales Tax Act, 1990 as well as the Communication dated 30.01.2019 (pg:215) by the Second Secretary FBR to the Chief Commissioner Inland Revenue are hereby suspended till final disposal of this Suit, and as a consequence thereof, officers posted at the factory / office premises of the Plaintiff shall be removed forthwith. Further, no coercive action be taken against the Plaintiff including any recovery proceedings on the basis of these impugned notices, pending final adjudication of the Suit.
 - ii. The Defendants are further restrained from taking any coercive action including any Show Cause Notice or other recovery proceedings on the basis of Authorization dated 30.01.2019 (pg:183) under Section 175 of the Income Tax Ordinance and Authorization dated 30.01.2019 (pg:187) under Section 38 of the Sales Tax Act, 1990 pending final adjudication of the Suit.

Suit No.201/2019

For reasons to be recorded later, this application is allowed by restraining the Defendants from taking any coercive action including issuance of any Show Cause Notice or other recovery proceedings on the basis of

Authorization dated 30.01.2019 (pg:149) under Section 175 of the Income Tax Ordinance and Authorization dated 30.01.2019 (pg:153) under Section 38 of the Sales Tax Act, 1990 pending final adjudication of the Suit.

J U D G E

Ayaz P.S.