

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.1458 of 2018

DATE

ORDER WITH SIGNATURE OF JUDGE

Plaintiff: **Wateen Telecom Limited**
Through Mr. Hussain Ali Almani,
Advocate.

Sindh Revenue Board: **Through Mr. Malik Naeem Iqbal a/w**
M/s. Malik Altaf Javed, Shamshad
Ahmed, Ayaz Sarwar Jamali, Advocates
and Syed Zain-ul-Abidin, Deputy
Commissioner, SRB.

Defendant No.1: **Ms. Rukshanda Waheed, State Counsel.**

For hearing of CMA No.10327/2018.

Date of Hearing: **07.08.2018 & 04.09.2018**

Date of Order: **09.11.2018**

ORDER

Muhammad Junaid Ghaffar J. This is a Suit for Declaration & Permanent Injunction and the Plaintiff is primarily aggrieved by its selection for audit for the tax year 2014 and the notice issued thereon. Through listed application, the Plaintiff seeks a restraining order against the Defendants from proceeding any further on the basis of impugned Notice dated 25.06.2018.

2. Precisely the facts, as stated, are that Plaintiff is a Company having its business at Lahore, Karachi and Islamabad and is engaged in providing services in telecommunication, including but not limited to, Internet Services, Data Services, Voice Services, VPN Services, Optical Fiber Cable Services, LDI Services, Gpon (Internet

Services), Hosted Data Centre (HDC) Services and Managed Capacity Services. It is the case of the Plaintiff that being registered with Sindh Revenue Board since 05.07.2012 under the head of telecommunication services satellite based (HS Code: 9812.2500), the Plaintiff has been charging tax on these services and depositing it with the Defendants under the Sindh Sales Tax on Service Act, 2011 (**Sindh Act**); whereas, in terms of the Sindh Act, the impugned Notice dated 25.06.2018 has been issued whereby the Plaintiff has been selected for audit and for which Defendant has no authority to issue such notice without assigning proper reasons.

3. Learned Counsel for the Plaintiff has read out the provisions of Section 28 of the Sindh Act and has contended that it does not confer any unfettered discretion or powers to the officer concerned for selecting any taxpayer to conduct audit without assigning proper reasons for doing so. According to the learned Counsel the Commissioner concerned is bound to, and must give reasons for selecting a taxpayer for conducting audit. He has next contended that if this is permitted, then this would lead to pure harassment at the hands of the officials concerned, as then in every other case, a taxpayer will be selected for audit, and this cannot be permitted under the Act. He has further contended that Subsection (1) of Section 28 (ibid) itself provides that an audit can only be conducted on the basis of Return submitted by a registered person; or the record obtained under Section 27(2), and therefore, it is provided in the Sindh Act within itself, that selection can only be based once the officer has plausible reasons after going through the record, that audit is needed. According to him in terms of the provisions of Section 28 (ibid), the Officer must review the tax returns on record,

apply his mind and then decide whether or not a taxpayer is to be selected for an audit. According to him there must be a conscious decision after applying an independent mind to the effect that the record requires and he has sufficient reasons to conduct audit proceedings, and these reasons must be recorded in the Notice itself, whereby, a taxpayer is being selected. Learned Counsel has submitted that it cannot be done whimsically or arbitrarily, by the Officer concerned without providing any justification to that effect. Learned Counsel has also referred to various other Federal Tax Laws including Section 25 of the Sales Tax Act, 1990, Section 46 of the Federal Excise Act 2005 and Section 177 of the Income Ordinance 2001 and has contended that though these provisions of the Federal Tax Laws are not verbatim or identical to the Sindh Act; but are similar and serve the same purpose and that it seeks to balance the rights of the tax authority to ensure compliance with all Tax Laws. According to him while Section 177 of the Income Tax Ordinance specifically requires the Commissioner to provide reasons for selecting a taxpayer for audit; however, Section 25 of the Sales Tax Act, 1990 and Section 46 of the Federal Excise Act 2005 do not explicitly provide for such a requirement but the Courts have interpreted both these Sections to the effect that any notice for selection of audit without assigning reasons is invalid. In support of his contention he has relied upon the cases of ***Muneer Bhimjee v. Islam Republic of Pakistan* (2005 PTD 1974)**, ***Pakistan Telecommunication Company Limited v. Federation of Pakistan* (2016 PTD 1484)**, ***Kohinoor Sugar Mills v. Federation of Pakistan* (2018 PTD 821)**, ***Commissioner of Inland Revenue v. Allah Din Steel and Rolling Mills* (2018 SCMR 1328)**, ***Pakistan Petroleum Limited v. Pakistan* (2016 PTD 2664)**,

Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport (1998 SMR 2268).

4. On the other hand, Mr. Naeem Iqbal, learned Counsel for the Defendants has contended that reliance placed on the judgments rendered pursuant to the provisions of Federal Tax Laws is misconceived inasmuch as Section 28 of the Sindh Act is independent as well as differently worded; hence the ratio of these Judgments is of no help. Learned Counsel has contended that Section 28 of the Sindh Act does not require that a Commissioner, before issuing notice for selecting a taxpayer to conduct audit, must assign reasons; whereas, the provisions itself provides a complete mechanism to proceed further. Per learned Counsel since the provision is not only independent; but caters to the grievance now being agitated; hence instant Suit appears to be premature in nature as no adverse proceedings have commenced. According to the learned Counsel, in terms of Sub-sections (3) & (4) of Section 28 of the Sindh Act, once a Preliminary audit has been conducted, an audit observation is to be issued for which a proper notice is given and the registered person has the right to respond to such audit observations and it is only after the failure of the taxpayer to satisfy that further proceedings take place; therefore, according to the learned Counsel since the provision is independent with further procedure, the Plaintiff may respond to the audit notice and appear before the department.

5. I have heard both the learned Counsel and perused the record. The plaintiff is a registered person with Defendant No.2 and is filing its Tax Returns in respect of rendering services. The filing of

Returns and payment of Sales Tax on such services is not in dispute, whereas, the Plaintiff is aggrieved by issuance of Notice dated 25.06.2018 for conducting audit under Section 28 (2) of the Sindh Act, which reads as under:-

“Principal Officer/Chief Financial Officer,
M/s. Wateen Telecom Limited, S2397565, main Walton Road,
Opp. Bab-e-Pakistan, Lahore City.

SUBJECT: NOTICE FOR AUDIT UNDER SECTION 28(2) OF THE SINDH SALES TAX ON SERVICES ACT 2011.

As you are aware Sindh Sales Tax on Services (SSTS) is levied, charged and collected from the SRB Registered Person in self-assessment mode, under the Sindh Sales Tax on Services Act, 2011 ('Act') read with Sindh Sales Tax on Services Rules 2011 ('Rules'). Under Section 28(1) of the Act, an officer of the Sindh Revenue board, not below the rank of an Assistant Commissioner, is empowered to conduct **Audit** of a registered person's records, once in a year, Objective of the audit is to ascertain/verify the tax liability of the R.P during the year, and further to evaluate R.P's general adherence to other attending provisions of law such as those concerning invoicing and book-keeping, maintenance of record, return-filing, deduction/payment of withholding tax (where applicable) etc.

2. M/s. Wateen Telecom Limited- SNTN S2397565 ('R.P') is a valued taxpayer of SRB, rendering taxable Services of 'Telecom' falling under tariff-heading 9812.2500 of the Second Schedule to the Act. Therefore, in exercise of the powers conferred under section 28(1) *ibid*, the R.P has been selected for audit for the tax-periods **July-13 to June-14.** Accordingly, R.P is required in terms of Section 28(2) *ibid*, to produce the documents/record for audit purposes as prescribed *vide* Rule 29 of the Sindh Sale Tax on Services Rules, 2011 (listed attached herewith as **Annexure-A**) which forms an integral part of this notice.

3. It may be noted that requisite records listed *vide* Annexure-A is the bare minimum/general records for audit. Additional/sector specific records, if any, shall be required from you later on, on need basis. It is further clarified that the record called up herein includes and covers all records whether in printed / soft-data form or available in any other electromagnetic medium.

4. Accordingly, are requested to make the requisite record available at your registered business premises **latest by 20/07/2018** and intimate the undersigned accordingly, upon which the designated audit team shall visit your premises to conduct the audit on **23.07.2018.**

5. You may also appoint a suitable liaison officer / focal person to coordinate with the undersigned in this regard, and intimate his name/contact detail to the undersigned at the earliest.

6. Please note that no request for extension to the above-noted dates shall be entertained under any circumstances and defiance in this regard shall be dealt appropriately with under law.

7. Please expedite response. In case of any query, please feel free to contact the undersigned on the contact details given below.

Enc: (a.a.)

(Sunil Kumar)
Deputy Commissioner/Head of Audit”

6. Perusal of the aforesaid notice reflects that the same has been issued in terms of Section 28(2) of the Sindh Act, whereas, it further provides that after making the requisite record available, the same is to be intimated to the Deputy Commissioner, upon which a designated Audit Team will visit the premises of the Plaintiff to conduct such audit. There are two aspects of this notice, which are to be considered by this Court. Firstly, as to whether it is a valid notice within the contemplation of the Sindh Act read with the precedents of the Courts on this subject and could be sustained permitting audit of the Plaintiff without assigning any reasons thereof. The second aspect is that whether such an audit, if any, can be conducted at the very premises of the Plaintiff through a designated Audit Team deputed by the Deputy Commissioner. It would be advantageous to refer to the provisions of Section 28 of the Sindh Act and so also similar provisions of audit under the Income Tax Ordinance, 2001, Sales Tax Act, 1990 and Federal Excise Act, 2005, in a comparative manner and they read as under:

Sindh Sales Tax on Services Act 2011	Income Tax Ordinance 2001	Sales Tax Act 1990	Federal Excise Act 2005
<p>28. Audit Proceedings— (1) An officer of the SRB, not below the rank of Assistant Commissioner SRB, may, on the basis of the return submitted by a registered person or the records obtained under sub-section (2) of section 27 conduct an audit of such person once in a year. Provided that in case the Commissioner SRB has any information showing that such registered person is involved in tax fraud or evasion of tax, he may authorize an officer of the SRB, not below the rank of Assistant Commissioner SRB, to conduct an inquiry or investigation under section 48 which may or may not be in addition to any audit carried out for the same period.</p> <p>(2) Where the officer of the SRB decides to conduct an audit under subsection (1), he shall issue a notice of audit to the person informing him of the audit proceedings and direct him to produce any records or documents which such officer may require for conducting the audit.</p>	<p>177. Audit—(1) The Commissioner may call for any record or documents including books of accounts maintained under this Ordinance or any there law for the time being in force for conducting audit of the income tax affairs of the person and where such record or documents have been kept on electronic data, the person shall allow access to the Commissioner or the officer authorized by the Commissioner for use of machine and software on which such data is kept and the Commissioner or the officer may have access to the required information and data and duly attested hard copies of such information or data for the purpose of investigation and proceedings under this Ordinance in respect of such person or any other person:</p> <p>Provided that—</p> <p>(a) the Commissioner may, after recording reasons in writing call for record or documents including books of accounts of the taxpayer; and</p> <p>(b) the reasons shall be communicated to the taxpayer while calling record or documents including books of accounts of the taxpayer: Provided further that the Commissioner shall not call for record or documents of the taxpayer after expiry of six years from the end of the tax year to which they relate.</p>	<p>25. Access to record, documents, etc.—(1) A person who is required to maintain any record or documents under this Act or any other law shall, as and when required by Commissioner, produce record or documents which are in his possession or control or in the possession or control of his agent; and where such record or documents have been kept on electronic data, he shall allow access to the officer of Inland Revenue authorized by the Commissioner and use of any machine on which such data is kept.</p> <p>(2) The officer of Inland Revenue authorized by the Commissioner, on the basis of the record, obtained under subsection (1), may, once in a year, conduct audit: Provided that in case the Commissioner has information or sufficient evidence showing that such registered person is involved in tax fraud or evasion of tax, he may authorize an officer of Inland Revenue, not below the rank of Assistant Commissioner, to conduct an inquiry or investigation under section 38: Provided further that nothing in this subsection, shall bar the officer of Inland Revenue from conducting audit of the records of the registered person if the same were earlier audited by the office of the Auditor-General of Pakistan.</p>	<p>46. Audit— (1) The officer of Inland Revenue authorized by the Board 1 or Chief Commissioner by designation may, once in a year, after giving advance notice in writing, conduct audit of the records and documents of any person registered under this Act</p> <p>(2) In case the Commissioner has information or sufficient evidence showing that such registered person is involved in fraud or evasion of duty, he may authorize a Federal Excise Officer, not below the rank of Assistant Commissioner to conduct audit at any time in a year.</p> <p>(2A) After completion of the audit under this section or any other provision of law, the officer of Inland Revenue may, after obtaining the registered person's explanation on all the issues raised in the audit shall pass an order under section 14, imposing the amount of duty as per law, charging default surcharge, imposing penalty and recovery of any amount erroneously refunded.</p>

7. Perusal of Section 28 *ibid*, reflects that this empowers an Officer of Sindh Revenue Board not below the rank of Assistant Commissioner, who may on the basis of the Return submitted by a registered person; or the records obtained under Subsection (2) of Section 27 conduct an audit of such taxpayer once in a year. This subsection has two parts. One is that an audit can be conducted on the basis of the Tax Return submitted by the Taxpayer. The second is, that an audit could also be conducted on the basis of records obtained under Subsection (2) of Section 27. Insofar as the present notice is concerned, it does not disclose that any record was obtained under Section 27 (*ibid*), therefore, this matter is only confined to the first part i.e conduct of audit on the basis of Return submitted by the Plaintiff. Insofar as the Proviso to Subsection (1) is concerned that is not relevant for the present purposes. Coming to Subsection (2), it reflects that when the Officer of Sindh Revenue Board has decided to conduct an audit under Subsection (1), he shall issue a notice of audit to the person informing him of the audit proceedings and direct him to produce any records or documents, which such officer may require for conducting the audit. When the aforesaid provisions are read together with the impugned notice, it appears that the Deputy Commissioner has issued the same under Subsection (2) of Section 28 (*ibid*). This resultantly means that the Deputy Commissioner has decided to conduct an audit under subsection (1) of Section 28 and through impugned notice, he has asked for relevant record to be made available. Therefore, firstly it is to be examined that his decision for deciding to conduct audit is in line with the provisions of Subsection (1) of Section 28 or not. And as noted earlier, it is only on (and must be based on) the basis of the Return furnished by the Taxpayer, as admittedly no documents have

been obtained under Section 27(2) *ibid*. Now the pivotal question is, that whether without assigning any reasons, the Deputy Commissioner on mere examination of the Return, can make a decision for such audit. Admittedly, the impugned notice does not disclose any reasons of whatsoever nature (rather it not even the case of the defendants that any such reasons are required), and it only states that he is empowered under Subsection (1) to conduct audit, whereas, the objective of the audit is to ascertain/verify the tax liability of the registered person during the year and further to evaluate registered persons general adherence to other attending provisions of law, such as those concerning Invoices and Book keeping, maintenance of record, Return filing, deduction/payment of withholding tax where applicable etc. This observation in the impugned notice does not amounts to giving any reasons for selecting the Plaintiff for audit. Though as contended on behalf of the Defendants, the very provision itself does not provide that specific reasons are to be assigned; however, otherwise it clearly provides that the audit can only be conducted on the basis of the Return submitted by the registered person, which is relevant in this matter. And secondly, he has to decide to conduct an audit, and how could he decide without forming an opinion to that effect is what is to be seen and examined. It is not clear that after examining the Returns (presumably) what transpired in the mind of the Deputy Commissioner to conduct such an audit. This has not been stated so in the impugned notice. And this is the crux of the matter, that on mere examination of the Return (it is also not clear that whether such Return were even otherwise examined as the notice is silent on this as well), can an audit be conducted without giving reasons. As per the mandate of law, the Deputy Commissioner has to examine the Return at least tentatively and

then to make a decision that for such and such reasons there is some defect or lacuna in filing of the Returns and payment of the taxes accordingly, which requires conduct of an audit. The reasons are more so mandatory, as in terms of sub-section (2) of Section 28 *ibid*, a decision of audit is to be taken, and a decision without reasons is in fact no decision in the eyes of law. This apparently is lacking in this case and appears to be a case of exercising discretionary powers. Now it is settled law that while exercising discretionary powers, it is not that an officer 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 would be permitted to pick and choose the person for conducting audit and resultantly would lead to harassment as well. It is settled law that while exercising discretion the authority should not act arbitrarily, unreasonably and in complete disregard of 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).

Coming to the notice in this case, it appears that it is not even

disclosing or saying that on examination of Return a need for conducting an audit has arisen. It is but natural that the legislature while enacting this provision has in clear words said that audit can be conducted on the basis of Return. Now it is circumscribed within the provision itself that for this at least some explanation has to be given to the Plaintiff. And this is what is meant by reasons, if differently worded so to say. The selection is not to be made only, by and with the discretion of the Officer. He must have some reasons to justify his selection and issuance of notice for this. And for this reason alone in the other Federal Tax Laws, an inbuilt mechanism of computer ballot has been provided, and that is only to curtail such whimsical exercise of powers while selecting a tax-payer for audit. This can never be the intent of the Legislature specially in tax matters 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 will not entail that if any officer while examining any 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 seek and call the entire record and conduct audit of such allegedly delinquent 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.

8. It is also important to note that under the Sales Tax Act, 1990 and the Federal Excise Act, 2005, though there is no specific requirement for recording reasons while selecting a person for audit; but it has been the consistent view of the Courts that even in such situations, the Officer concerned cannot be conferred with unfettered discretion. The concerned officer has to and must apply his mind before issuing any notice or selecting a person for audit. He does not have unguided powers to call anybody for conducting audit. His powers are circumscribed with the doctrine of acting reasonably, justly and fairly and not whimsically, and these doctrines are well known in our jurisprudence. The comparative chart reproduced hereinabove gives a clear picture as to the provisions of audit under the Sindh Act and the Federal Tax Laws, (barring the Income Tax Ordinance, 2001, wherein, the law itself provide for recording reasons), and it could be seen that under the Sales Tax Act, 1990, and Federal Excise Act, 2005, no such expressive provision for recording reasons has been provided, however, the issue that

whether reasons are to be recorded or not in the cases pertaining to the Sales Tax Act, 1990 and Federal Excise Act 2005 came for discussion before the Islamabad High Court in the case of **PTCL (supra)** and a Full Bench of the learned Islamabad High Court has been pleased to observe as under:-

“Section 25 empowers the Commissioner to direct a person to produce the specified records, documents etc 'as and when required'. The expression 'as and when required' is crucial. The said expression limits the powers conferred under the provision. The Commissioner has to take a conscious decision, after application of mind, in the context of as and when the latter would require a person to produce the records etc. for audit. The Commissioner's powers are, therefore, neither unguided nor unfettered. The Commissioner cannot pick and choose arbitrarily or capriciously. The language of section 25 unambiguously shows that the power to select is exclusively vested in the Commissioner and the selection is to be made as and when the latter requires such a person to produce the record etc. It is settled law that a person vested with power under a statute is obliged to exercise the same 'reasonably, fairly, justly and for the purposes of the enactment'. Moreover, a person making an order under powers conferred by any enactment shall, so far as necessary or appropriate, 'give reasons for making the order'. Reliance is placed on *Mohammad Ashraf Tiwana and others v. Pakistan and others* 2013 SCMR 1159. It is, therefore, implicit in the expression 'as and when required' to give reasons having regard to the object and purpose of section 25. The reasons ought to reflect the criterion determined by the Commissioner for selecting a person from amongst the taxpayers within his jurisdiction.

...However, in exercising powers conferred under section 25, it is the statutory duty of the Commissioner to select a person for audit and give reasons based on the principles as have been discussed above in the context of reasons required to be recorded in writing by the Commissioner under the proviso to section 177 (1) of the Ordinance of 2001.”

“A plain reading of section 46 shows that the Board as well as the Commissioner are empowered to conduct audit of the record and documents of any person registered under the Act of 2005 once a year after giving advance notice in writing. The requirement of giving advance notice in writing obviously includes giving reasons for the selection of a person for audit. This power, if exercised by the Commissioner, is not dependent on a pre-selection to be made by the Board under section 42B. However, the notice in writing required to be given in advance under section 46 has to give reasons, and thus the principles already discussed in the context of section 177 of the Ordinance of 2001 or section 25 of the Act of 1990 shall apply.

We have perused the notices which had been impugned in petitions relating to appeals listed in Annexure B. Either they do not disclose the reasons based on a criterion determined by the Commissioner or no reason has been mentioned. However, the relevant Commissioner shall afford an opportunity of hearing to each appellant and thereafter pass a speaking order in the light of the principles and law discussed above.”

9. The Hon’ble Supreme Court in a very recent judgment reported as ***Commissioner Inland Revenue v Pakistan Beverages Limited*** (2018 SCMR 1544) 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 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 his 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. The Hon'ble Supreme Court came to the following conclusion which is directly relevant for the present issue.

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.

10. The above interpretation of the Hon'ble Supreme Court is clear regarding exercise of discretion in a matter, where, though the law does not puts any fetters, but is not unbridled and without any limit or restriction. It has to be reasonable and within certain restrictions or limits. This observation fully applies to the facts of this case as well as the law regarding exercising discretion.

11. As to the second point that whether such audit can be conducted through a designated Team within the premises of the taxpayer, it may be observed that there is nothing in the Sindh Act, more so, in Section 28, nor any assistance has been provided on behalf of the Defendants that the audit could be conducted in this manner. It is to be appreciated that visit of a designated Team of audit to the office of a Company / tax payer can never be an act of good gesture, whereas, the Company in running of its business affairs would never like to have a designated Audit Team / Persons in its Office for a number of dates conducting audit of its tax accounts and other material and thereby disturbing the entire business operation. This Court fails to understand as to how this mode and manner of audit has been attempted to be achieved without any support or authority under the Act. This appears to be completely without jurisdiction and authority. It is also noteworthy to observe that the purpose of conducting an audit is that whether a registered person is a compliant tax-payer as required under the law or not; whether the tax records have been maintained and are

as per the requirement of law, and further, this has not resulted in any evasion or short payment of tax. This is the primary and only specific reason for conducting an audit. Now such audits can and must easily be conducted by the department on the basis of the record called for and summoned. It is not that such audit can only be effectively conducted if it is done at the premises of the registered person. There may be certain exceptions, which otherwise, are to be dealt with on case to case basis, but there can't be a generalized order for conducting audit in all cases at the office or premises of the registered person. The law even caters that if any data or record is on digital media or computer, the same can be prepared and submitted in soft copies, or hard copies of the same can also be provided. Therefore, there appears to be no justifiable reason, nor any such reason has been made out, so as to permit the conduct of audit on the premises or office of the tax-payer. At least not in this case.

12. In view of hereinabove facts, circumstances and discussion, it can be safely concluded that firstly, the Officer of Sindh Revenue Board, while exercising powers under Section 28 *ibid*, is mandatorily required to give reasons after examining the Tax Returns of a tax-payer, and before deciding that he intends to conduct Audit of the registered person. The reasons may or not be satisfying the requirement and or the wishes of a tax-payer, but they should at least be made after a tentative assessment and examination of the tax-payers returns. Though there are also judgments to the effect that such reasons are also justiciable and the tax-payer can even object to such reasoning and is also entitled to passing of an order on such objections, with further remedy, but with utmost respect and humility at my command, I have myself disagreed with such

decisions. See ***Pakistan Petroleum Limited v. Pakistan (2016 PTD 2664)***. As to the other aspect of the matter there is no exception that under the Sindh Act, the concept of conducting audit of a registered person at its office premises or from where the business is being run, is an alien concept and nowhere such power or authority has been provided; hence no audit in such manner can be conducted.

13. The upshot of the above discussion is that plaintiff has made out a prima facie case for indulgence, and therefore, impugned notice dated 25.6.2018 is hereby suspended till final decision of this Suit. The Application for injunction is allowed. However, the defendant / Sindh Revenue Board is at liberty to issue a fresh notice after assigning proper and cogent reasons for conducting audit, and to proceed further in accordance with law, but such audit cannot be conducted at or within the office or business premises of the registered person.

14. Application bearing CMA No.10327/2018 is allowed in the above terms.

Dated: 09.11.2018

Judge