IN THE HIGH COURT OF SINDH AT KARACHI

SUIT No. 2249 / 2016

Plaintiff:	**Indus Motor Company Limited through Mr. Hussain Ali Almani along with Ms. Benish Jawed Advocates.**
Defendants: No. 1 & 2.	**Pakistan through Secretary Finance and another through Mr. Kafeel Ahmed Abbasi, Deputy Attorney General.**
Defendants: No. 3 & 4.	**Commissioner Inland Revenue & another through Dr. Shah Nawaz Memon Advocate.**

SUIT NO. 2467 / 2016

Plaintiff:	**Byco Oil Pakistan Limited through Mr. Ahmed Hussain Advocate.**
Defendant: No. 1.	**Pakistan through Secretary Revenue Division through Mr. Kafeel Ahmed Abbasi, Deputy Attorney General.**
Defendants: No. 2 & 3.	**Commissioner Inland Revenue & another through Dr. Shah Nawaz Memon Advocate.**

SUIT NO. 35 / 2018

Plaintiff:	**National Foods Limited through Mr. Hyder Ali Khan along with Mr. Sami-ur- Rehman Khan Advocates.**
Defendant: No. 1.	**Pakistan through Secretary Revenue through Mr. Kafeel Ahmed Abbasi, Deputy Attorney General.**
Defendants: No. 2 & 3.	**Commissioner Inland Revenue & another through Mr. Ameer Bakhsh Metlo Advocate.**

Date of hearing:	**24.09.2019, 15.10.2019 & 05.11.2019.**
Date of order:	**13.12.2019.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. In all three Suits, the Plaintiffs are aggrieved by notice(s) issued under Section 25 of the Sales Tax Act, 1990 ("**1990 Act**") and Section 45 and 46 of the Federal Excise Act, 2005, ("**2005 Act**") whereby, they have been selected for audit for the relevant period(s). Since only a legal issue is involved and parties do

not wish to lead any evidence, the Suits have been finally heard along with listed applications on the legal issues under Order 14 Rule 2 CPC.

2. At the very outset I may state, and this is without any disrespect to any of the learned Counsel, that their arguments have been noted and recorded in this judgment collectively for ease, convenience and to avoid overlapping, if any. They have contended that the impugned notice(s) have been issued by the Commissioner, Inland Revenue in violation of Section 25 of the 1990 Act and Sections 45 and 46 of the 2005 Act; that the notice(s) have been issued without assigning any reasons for having selected the Plaintiffs for the purposes of conducting audit; that the impugned notice(s) have been followed by another notice of the same date authorizing the Deputy Commissioner, Inland Revenue to conduct the audit; that as per settled law, and notwithstanding the fact that Section 25 of the 1990 Act and Section 46 of the 2005 Act do not specifically provide for assigning any reasons for selecting a taxpayer for conducting an audit; it is to be read in all such provisions; that the use of the words "as and when required" in s.25 ibid, mandates that a selection for audit can only be made or ordered, if needed, and for that, reasons on the basis of which the audit is being conducted have to be recorded; hence, reasons must be assigned while making such selection for audit; that in terms of Section 72B of the 1990 Act, even when the audit is to be conducted on the orders of FBR, the same is governed under a policy of FBR and is done either on random balloting basis or on the basis of certain parameters set by FBR, and therefore, the Commissioner's discretion for selecting a person for the purposes of audit is not unfettered; that this bench in the case reported as ***Wateen Telecom Ltd. through Authorized Attorney V. Sindh through The Secretary of Ministry of Finance Government of Sindh, Karachi and 2 others*** **(2019 PTD 1030)** has already considered the entire case law and as to in what manner, the discretion has to be exercised by an officer and is a complete answer to the issue in hand, and therefore, may be followed in the case of the Plaintiffs as well; that sub-section (1) of Section 25 ibid provides the mechanism and manner in which access to records can be asked for, whereas, in these matters both sub-sections (1) & (2) have been invoked simultaneously, and separate notices have been issued on the same date; that sub-section (1) of Section 25 cannot be made redundant by simultaneously invoking sub-section (2) of Section 25 of the 1990 Act; that the officers must act and proceed within the mandate of law and not otherwise; that though there are judgments to the effect that a mere notice of audit is not an adverse action / order; however, the mode and manner in which a taxpayer is being selected for audit can always be impugned if it is against the mandate of law; that the judgment of the Hon'ble Supreme Court in the case of ***Commissioner of Inland Revenue Sialkot and others v. Messrs Allah Din Steel and Rolling Mills and others (*****2018 SCMR 1328)** is distinguishable on facts as in that

matter the issue originated from the learned Lahore High Court in respect of selection for audit under a random selection policy of FBR notified in terms of s.214-C of the Income Ordinance, 2001 (**"2001 Ordinance"**), and powers of a Commissioner either under s.177 of the 2001 Ordinance or under s.25 of the 1990 Act, and or for that matter under s.45 & 46 of the 2005 Act, were never under consideration; that if a person has been selected for audit contrary to law and without following a due process, then the same amounts to an adverse action, which is subject to challenge; that the Court is competent to see that whether the discretion so exercised by the Commissioner is properly structured or not; that a balance has to be created in empowering the Commissioner to exercise his discretion and for that reasons must be assigned; that even otherwise, in terms of Section 24-A of the General Clauses Act, 1897 no order is sustainable without assigning reasons; that the judgments relied upon by the Defendant's Counsel are distinguishable on facts; hence, the ratio of those judgments would not apply; that this Court is not bound by any obiter dicta / observation of the precedents, more so, when the very controversy before the Court is somewhat different in facts. In support they have relied upon the cases reported as ***Iqbal Hussain through Authorized Attorney V. Federation of Pakistan*** **(2010 PTD 2338),** ***Kohinoor Sugar Mills V. Federation of Pakistan and others (*****2018 P T D 821),** ***Commissioner of Income Tax and others V. Messrs Media Network and others (*****2006 P T D 2502),** ***Faisalabad Electric Supply Limited (FESCO) V. The Federation of Pakistan& others (*****PTCL 2019 CL 467),** ***The Federal Board of Revenue and others V. Messrs Chenone Stores ltd.*** **(2018 PTD 208),** ***Defence Housing Authority V. Commissioner Inland Revenue and others*** **(2015 PTD 2538),** ***Azee Securities (Pvt.) Ltd. through Authorized Officer V. Federation of Pakistan through Secretary of Finance, Revenue Division and 3 others*** **(2019 P T D 903),** ***Election Commission of Pakistan V. Asif Iqbal and others*** **(PLD 1992 SC 342)** ***Trustees of the Port of Karachi V. Muhammad Saleem*** **(1994 SCMR 2213),** ***Muhammad Mal Khan V. Allah Yar Khan*** **(2002 SCMR 235),** ***Pakistan Steel Mills Corporation (Pvt.) Limited through Corporate Secretary V. Karachi Water & Sewerage Board through Chief Executive and 2 others (2012 CLC 577)*** and ***Quinn V. Leathem*** **(1901 (A.C.) 495).**

3. Again without any disrespect, and for the reasons so assigned as above, contention of the Learned Counsel appearing on behalf of the Department are also not being noted and recorded separately. They have contended that under Section 25 of the 1990 Act and Section 46 of the 2005 Act no reasons are required to be recorded for selecting a person for audit; that this Court is not competent to add anything in to the statute; that mere selection of audit is not an adverse action; that now self-assessment scheme is in vogue and audit is a precondition; that the facts and law in the ***Wateen Telecom (supra)*** are distinguishable; that Section 25(1) and (2) of the 1990 Act, are to

be read as a whole and not separately; that powers of the Commissioner to select a person for audit are independent and cannot be linked with the selection of audit by FBR; that it is only a notice for producing documents for the purposes of audit and the Plaintiffs cannot be aggrieved by such a notice; that the words "as and when required" is to be understood to the effect that such audit can be conducted at any time; that the issuance of the two notices in question simultaneously is not illegal *per-se*; that when the legislature has consciously not provided for giving reasons, then the Court cannot add such words into the statute; nor can it be read into the law; that the impugned notices are issued after going through the returns filed by the taxpayers. In support they have relied upon the cases reported as ***Commissioner of Inland Revenue Sialkot and others v. Messrs Allah Din Steel and Rolling Mills and others*** **(2018 SCMR 1328)** and ***Pakistan Petroleum Limited through Authorized Officer V. Pakistan through Secretary Finance and 4 others*** **(2016 PTD 2664).**

4. Learned Deputy Attorney General has referred to the provisions of Section 177 of the 2001 Ordinance, and has contended that where needed and intended, the legislature has provided within the statute that reasons are to be assigned; therefore, the Plaintiffs have no case insofar as the provisions of Section 25 of the 1990 Act and Section 46 of the 2005 Act are concerned; that even after conducting audit a proper notice has to be issued under Section 11 of the 1990 Act; hence, adverse order is yet to be passed; that the Plaintiffs have come before the Court prematurely and be directed to respond to the notices issued by the Department.

5. I have heard all the learned Counsel as well as learned DAG and perused the record. Since only a legal controversy is involved, on 05.03.2019 with the consent of all, the following legal issues were settled for adjudication of the entire Suit under Order 14 Rule 2 CPC and the same reads as under:-

i. Whether under section 25 of the Sales Tax Act 1990 and section 45 and 46 of the Federal Excise Act 2005, the Defendant No.3 can select a taxpayer for an audit without providing any reasons for the selection?

ii. Whether Letter dated 26.08.2016, issued by Defendant No.3 to Defendant No.4, amounts to selection of Plaintiff's case for audit in terms of Section 25 of the Sales Tax Act, 1990 and Sections 45 and 46 of the Federal Excise Act 2005 and can through such letter the audit be conducted of any "subsequent unaudited period"?

iii. Whether the Impugned Notice violates the principles of due process and the law laid down by the superior courts?

iv. What should the decree be?

6. The Plaintiffs in all these Suits are registered under the 1990 Act or for that matter under the 2005 Act, and are regularly filing their monthly tax returns with FBR. To that extent there appears to be no dispute. They are presently aggrieved by the impugned notices issued to them under s.25 of the 1990 Act and s.45 & 46 of the 2005 Act, whereby they have been selected for audit and have been further directed to submit requisite documents. In some cases the notices are only in respect of the 1990 Act and in some, in addition, also under s.45 & 46 of the 2005 Act. For ease and to have a better understanding, one notice each under both the Act issued to the Plaintiff in Suit No.2249 of 2016 are reproduced hereunder;

No.CIR/Z-I/LTU/2015-16/102 Dated August 26, 2016

To

The Principal Officer,
M/s. Indus Motors Company Limited,
NWS/1/P-1, Port Qasim Authority,
Karachi.

Subject: AUDIT UNDER SECTION 25 OF THE SALES TAX ACT, 1990 AND SECTION 45 & 46 OF THE FEDERAL EXCISE ACT, 2005 FOR THE PERIOD FROM 01.07.2014 TO 30.06.2015 –INTIMATION REGARDING

Thank you for filing of Sales Tax Returns for the period from 01.07.2014 to 30.06.2015.

2. The case of your company has been examined and found fit to be proceeded for audit of your Sales Tax & Federal Excise affairs under section 25 of the Sales Tax Act 1990 & under section 45 & 46 of the Federal Excise Act, 2005 for the period 01.06.2014 to 30.6.2015. Therefore, in exercise of powers conferred upon me under Section 25 of the Sales Tax Act, 1990 and under Section 45 & 46 of Federal Excise Act, 2005, you are hereby called upon to produce all books of accounts and other relevant record. The concerned officer of Inland Revenue shall soon be in correspondence with you in this connection.

Sd/-
(DR. SHAFQUAT HUSSAIN KEHAR)
Commissioner Inland Revenue

Copy to:

1. The DCIR, Audit Unit-2, Audit Range-A, Zone-I, LTU, Karachi.

(DR. SHAFQUAT HUSSAIN KEHAR)
Commissioner Inland Revenue

No.CIR/Z-I/LTU/2015-16/103 Dated August 26, 2016

To

The Deputy Commissioner Inland Revenue,
Audit Unit-02, Zone-I,
Large Taxpayers Unit,

Karachi.

Subject: AUDIT UNDER SECTION 26 OF THE SALES TAX ACT, 1990 AND SECTION 45 & 46 OF THE FEDERAL EXCISE ACT, 2005 IN THE CASE OF M/S INDUS MOTORS COMPANY LIMITED, FOR THE PERIOD FROM JULY, 2014 TO JUNE, 2015.

In exercise of powers conferred upon me under section 25 of the Sales Tax Act 1990 & under section 45 & 46 of the Federal Excise Act, 2005 you are hereby authorized to proceed and finalize the Audit of the above registered person for the period July, 2014 to June, 2015 and any other subsequent unaudited period. An intimation letter has been issued to the registered person for the same vide letter dated 26.08.2016 (copy enclosed).

Sd/-
(DR. SHAFQUAT HUSSAIN KEHAR)
Commissioner Inland Revenue

Copy to:

1. The Audit Commissioner, Audit Range-A, Zone-I, Large Taxpayers Unit, Karachi along with above referred letter for supervising the finalization of the said case.
2. The Principal Officer, M/s. Indus Motor Company Limited, Karachi.

Sd/-
(DR. SHAFQUAT HUSSAIN KEHAR)
Commissioner Inland Revenue

7. Perusal of the above notice(s) issued by the Commissioner and addressed to the Plaintiff in terms of s.25 of the 1990 Act and s.45 & 46 of the 2005 Act reflects that insofar as the Plaintiffs case is concerned, it is stated that "*the case of your company has been examined and* ***found fit to be proceeded for audit*** *of your Sales Tax and Federal Excise affairs"*. The conclusion drawn by the learned Commissioner is, that case has been examined and needs to be audited. At the very outset it may be observed that the impugned notice has been issued without mentioning any of the sub-sections, whereas, all sub-sections of s.25 contemplate different situations. Similar is the position under s.45 & 46 of the 2005 Act. In terms of s.25 (1) ibid it is only the access to records being maintained by the Tax payer which can be called for, and does not speak of any authority to order or conduct audit. It is only in sub-section (2) that an authority has been conferred upon the Commissioner to authorize an officer of Inland Revenue to conduct audit; but that can only be done on the basis of the record obtained in terms of sub-section (1) of s.25 ibid. Similar or more or less identical is the case under s.45 & 46 of the 2005 Act. However, this is not the case here. It is rather the inverse, as the Commissioner in his impugned notice has stated that case has already been examined and found fit for audit. This Court is at a loss, rather bemused and perplexed to take note of this finding and observations of the learned Commissioner. There does not

seems to be any application of an independent mind by the Commissioner while issuing the notice in question. It appears that it has been issued with a preset mind that since he is authorized to conduct audit, it has to be done as he has selected the Plaintiff for such purposes. And it is on this ground that the precise case has been set up on behalf of the Plaintiffs through their respective Counsel, that the impugned notices for selecting the Plaintiffs for audit by respective Commissioners under Section 25 of the 1990 Act and Section 45 & 46 of the 2005 Act are notices which have been issued without any application of mind, are stereotyped in nature, illegal, unlawful and cannot be acted upon any further. Further, according to them these impugned notices of selection do not contain any reasons and are merely premised on the whim and desire of the respective Commissioners of Inland Revenue. Their further case is that since the selection, if any, is without assigning reasons, then at least it has to be done by some structured exercise of discretion which according to them is lacking in the impugned notices. Before proceeding further, it would be advantageous to refer to the relevant provisions of Section 25 of the 1990 Act, and Section 45 & 46 of the 2005 Act.

> **"[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.]
>
> [(2) The officer of Inland Revenue authorized by the Commissioner, ***on the basis of the record, obtained under sub-section (1), may, once in a year, conduct audit***:
>
> [(3)] ………………
>
> [(4) ***]
>
> [(4A) ***]
>
> [(5) ………………..
>
> ---
>
> **Federal Excise Act, 2005.**
>
> **45. Access to records and posting of excise staff, 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 the [officer of Inland Revenue] 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 such officer to have access and use of any machine on which such data is kept and shall facilitate such officer to retrieve whole or part of such data in such manner and to such extent as may be required by him.
>
> (2) ……………………
>
> **46. [***] Audit.—** (1) The [officer of Inland Revenue] authorized by the Board [or the 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.

(2) ……..

[(2A) ……

(3) ………

[(4) ……...

[(5) ……..

(6) ………

(7) ……..

(8) …….

(9) ……

(10) ……

8. Perusal of the aforesaid provision of Section 25 of the 1990 Act reflects that a person who is required to maintain any record or documents under this Act or any other law shall, "***as and when required***" by the 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 of the same to the officer of Inland Revenue authorized by the Commissioner and use of any machine on which such data is kept. The interpretation which has been sought on behalf of the Plaintiffs is, that the use of the words "***as and when required***" is not without any purpose. According to them "***as and when required***" is to be read as to recording reasons or at least coming to a conclusion as to why access to record is needed and the audit may or may not be conducted and for that the selection of a taxpayer cannot be done without such conclusion. However, I am not really impressed with such line of argument inasmuch as sub-section (1) of s.25 does not speak or refers to any conduct of audit of a tax payer. It is only in respect of the authority of the Commissioner for having access to record "***as and when required***" and this cannot be interpreted so as to require the Commissioner to give reasons while asking for the record from the tax-payer. The words "***as and when required***" is dependent on something happening in future. It is contingent in nature, and after going through the tax-returns, the Commissioner is fully competent to apply his mind that the time has come for him; and it is this point of time when the true intent of the words "***as and when required***" can be applied and invoked. On this stage he can say that he needs to have access to the record(s). To that extent I am of the view that a tax-payer cannot deny access to the record as required to be maintained under s.25 (1) of the 1990 Act, and the Commissioner's powers cannot be curtailed or circumscribed with recording of

reasons for such purposes. Similar is the position in respect of s.45 of the 2005 Act. However, this is only confined and to the extent of a proper understanding and interpretation of sub-section (1) of s.25 of the 1990 Act, or s.45 (1) of the 2005 Act as the case may be. And the matter does not end here. As noted in the above discussion, the Commissioner has not mentioned or specified as to under which sub-section of s.25 (the mentioning of sub-section of s.45 of the 2005 Act is not relevant) the impugned notice(s) have been issued, but it appears that he has resorted to at least sub-sections (1) and (2) simultaneously and this is what, was precisely argued by the respective learned Counsel appearing on behalf of the Department as well as learned DAG. However, to me this is not the correct approach. Sub-section (1) of s.25 is only in respect of having access to the record and no more. On the other hand once the record has been furnished, the Commissioner can then authorize an officer of Inland Revenue to conduct audit on the basis of that record as referred to in sub-section(1) of s.25 of the 1990 Act. Therefore, there does not seems to be any justification to issue two (2) notices simultaneously; one for submitting of record [presumably under sub-section (1)]; and second, [again presumably under sub-section (2)], asking / authorizing the officer of Inland Revenue to conduct audit of a tax-payer. This contention of the defendants does not appear to correct. In my view, the use of the words in sub-section (2) of s.25 ibid "The officer of Inland Revenue ***authorized by the Commissioner, on the*** **basis of the record**, ***obtained under sub-section (1), may, once in a year, conduct audit*** is not without reasoning and substance. It is there to delegate powers for conducting audit; but only ***on the basis of the record so obtained in terms of sub-section (1) of s.25 ibid***. Therefore, the Commissioner can only invoke the provision of sub-section (2) when he himself has obtained the record, seen it and made up his mind that the sales tax affairs of such and such tax-payer are to be audited. Similarly in the case of 2005 Act, first he has to have access to record in terms of s.45 (1) and then can have resort to s.46 ibid after going through the record so obtained and take a decision after applying his mind to conduct an audit. He has to at least make up his independent mind and that cannot be done without assigning reasons, howsoever brief they may be.

9. It is also relevant to note and as rightly contended by the learned Counsel for the Plaintiffs that subsection (1) and subsection (2) of Section 25 ibid are distinct and separate and subsection (2) can only be invoked once the exercise as contemplated in subsection (1) has been completed. Subsection (2) provides that the officer of Inland Revenue authorized by the Commissioner on the basis of their record obtained under subsection (1) may once in a year conduct audit of the taxpayer. It means that though an officer of Inland Revenue can conduct audit once he was authorized by the Commissioner; but only on the basis of the record and such an opinion to proceed with the audit can only be formed by the Commissioner once he has gone through the record

obtained under Section 25(1) of the 1990 Act. It is for the reason as he can only act further ***"on the basis of record"*** so obtained under s.25 (1) ibid and then delegate his authority to the officer of Inland Revenue for proceeding any further in terms of subsection (2) of s.25 of the 1990 Act. Similarly, in terms of s.45 of the 2005 Act, he can have access to record, and then in terms of s.46(1) once in a year, after giving advance notice in writing, conduct audit of the ***records and documents***. Reference to the record and documents here, in my opinion is to the record to which access have been made under s.45(1). Now in all these cases, it is strange that on the very same date two separate notices were issued; one by the Commissioner Inland Revenue by exercising powers under Section 25 along with s.45 & 46 of the 2005 Act; and the second by the Officer of the Inland Revenue so authorized by the Commissioner under the same provisions. This issuance of two simultaneous notices is not reconcilable when both these provisions are read in juxtaposition. A notice under subsection (2) of s.25 cannot be issued on the very date when a notice under subsection (1) is issued for selection of a taxpayer (notwithstanding that fact that under sub-section (1) it is only the authority to have access to record) for the purpose of conducting audit of its Sales Tax affairs. Commissioner after having access and going through the record and only on the basis of the said record can authorize an officer of Inland Revenue to act any further. Once he has issued a notice under subsection (1) and has not yet received the documents so requested or demanded; he cannot invoke and exercise his powers under subsection (2) of s.25 ibid, until and unless he has gone through the record so obtained. In these circumstances, apparently issuance of both these notices on the very same date appears to be unlawful and an illegality. He can only do so in a seriatim. First a notice for access to records under sub-section (1) has to be issued, and once the record is obtained, only then he can have resort to sub-section (2) of s.25 of the 1990 Act, for selecting and ordering audit of the a tax-payer, after going through the record so obtained, and that can only be done by an independent application of mind and after recording of reasons for doing so. More or less similar is the situation under s.45 of the 2005 Act, where under, access can be had to the record; and thereafter, if needed in terms of s.46 ibid an audit could be ordered on the basis of the record and again after recording reasons for doing so.

10. This issue in somewhat similar circumstances while dealing with almost *pari-materia* provisions of the Sindh Sales Tax on Services Act, 2011 ("**2011 Act**"), came for discussion before this very bench in the case of ***Wateen Telecom Ltd. (supra)***, very heavily relied upon by the learned Counsel for the Plaintiffs. On the other hand Defendant's Counsel have argued that a different Act was being considered by the Court; hence, the said judgment is not relevant or applicable. In my view the contention of the Defendants Counsel is not correct. However, before proceeding any further, it

would be advantageous to refer to the relevant corresponding provisions for having access to record and audit under the 2011 Act, which is contained in Section 28 and the relevant portions reads as under;

> **"28. Audit Proceedings:** (1) An officer of the SRB, not below the rank of (Auditor 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 (Auditor 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.
>
> (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.
>
> (Provided that the officer of the SRB may, with the permission of the Commissioner, conduct the audit in the place of business or the office of the registered person directing him to produce the records and documents in such premises as indicated in the notice.)
>
> (3) …….
>
> (4) …….
>
> (5) …….
>
> (6) ……….

11. In terms of the above provision an audit could be conducted when it has been decided by the Officer of Sindh Revenue Board to do so. And such a decision was required to be taken on the basis of the Return of the tax-payer. After going through the entire provision and the case law on the subject as well as the respective rival arguments of both sides, it was held that Section 28 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 a taxpayer once in a year. It was further held that Section 28 ibid have two parts; one, whereby an audit could be conducted on the basis of the tax return submitted by the taxpayer; and second an audit could be conducted on the basis of records obtained under subsection (2) of Section 27 ibid. It was further held that in that case the first part was applicable and the officer could only make a decision to conduct audit on the basis of the return furnished by the taxpayer, and therefore, before making an appropriate decision to conduct audit on the basis of the return, the officer has to assign reasons. In Section 28 ibid also there is also no specific provision to give or record reasons for conducting an audit; however, this bench went on to hold that,

notwithstanding the fact that such express words have not been provided so; it is not that the officer has unfettered discretion to select any person for audit on his choice and desire. It was held that if a decision is being made to conduct audit on the basis of the tax return (here on the basis of record), the officer has to assign reasons for doing so. Almost similar is the situation in s.25 of the 1990 Act. First the Commissioner has power to call for and have access to record, as the case may be, and once such record has been furnished; then the Commissioner can make up his mind on the basis of that *very record* to conduct audit and even delegate the powers of conducting audit to an officer of Inland Revenue. This making up of mind is most crucial and to my understanding can only be made workable when the Commissioner records reasons for doing so. The relevant findings in the ***Wateen Telecom Ltd (Supra)*** reads as under:-

> 7……."Admittedly, the impugned notice does not discloses 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……..” **[Emphasis supplied]**

12. After going through the above judgment I am of the view that the ratio of the same is fully applicable in these cases, notwithstanding that the provisions are not exactly the same; but in any case require the authorized officer to make a decision regarding audit of a taxpayer after going through the returns / record; hence, such a decision must be passed with reasons and not merely on the ground that law empowers him to do so. Here in these Suits, there appears to be no application of mind; nor the Commissioner has acted in the manner as mandated in law; and therefore, the issuance of notice(s) asking for record and at the same time authorizing the officer to conduct audit of the Plaintiffs on the same date, does not seems to be justified and lawful.

13. In this very judgment discussion has also been made in respect of exercise of powers by an Officer of a tax collecting authority as to the discretion in such matters and reliance was placed on the judgment of the Hon’ble Supreme Court reported as ***Commissioner Inland Revenue V. Pakistan Beverages Limited*** **(2018 SCMR 1544),** wherein it was held that such powers are not unbridled and without any limit or a restriction. In Para 9 of ***Wateen Telecom (supra)*** I have discussed this judgment of the

Hon'ble Supreme Court wherein the Hon’ble Supreme Court had the occasion to examine the exercise of discretion by the tax officials under s.40B of the 1990 Act, under which 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 could 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 the Commissioner while 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 repelled such contention of the Commissioner and went on to hold that Law recognizes no such thing as an unfettered discretion and all discretionary powers, especially that as conferred by a 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 interpretation of the Hon'ble Supreme Court is clear regarding exercise of discretion in a matter, where, though the law does not put 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. It was held that though s.40B delegates powers to monitor production, sale and stock positions; however, the monitoring can only be for some object, ground, or purpose that is legitimately and lawfully within the contemplation of the 1990 Act, and the proviso identifies that situations; but in any case the monitoring is not intended to be indefinite. The crux of the judgment lies in the fact that exercise of discretion cannot be left at the whim and desire of either the Board or the Commissioner. The findings of the Hon'ble Supreme Court which is directly relevant for the present issue is an 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.

14. The question of selecting a person for audit or otherwise has been a bone of contention between the taxpayers and the department and there is a long series of Judgments by the High Courts as well as the Hon'ble Supreme Court on this subject. It has been a consistent view of most of the Courts in these Judgments that a selection for audit is *per-se* not an adverse order and cannot be a matter of grievance ordinarily. However, there is an exception to it. And the Plaintiffs case is premised on that exception that such selection, should first be in accordance with law, and on this basis their argument is that the Court must examine the distinguishing features of the Judgments which have been relied upon by the Counsel for Defendants. Their case is that all these Judgments including by this Court as well as the learned Lahore High

Court and the Hon'ble Supreme Court are to be considered and applied after examining the peculiar facts involved in these cases individually. Insofar as the Plaintiffs case is concerned, besides making attempt to distinguish these Judgments, they have also placed reliance on the case reported as ***Wateem Telecom Limited (supra)*** and have argued that the ratio of this case, though in the context of another statute, but applies fully, as this bench has come to a conclusion that before selection for audit under the 2011 Act, the officer has to assign reasons, notwithstanding the fact that such words were also not available in Section 28 ibid. I have already dealt with this judgment hereinabove and given my view. The Defendant's Counsel have placed reliance on a judgment of the Hon'ble Supreme Court reported as ***Commissioner of Inland Revenue Sialkot and others v. Messrs Allah Din Steel and Rolling Mills and others*** **(2018 SCMR 1328)** as according to them the Hon'ble Supreme Court has put the controversy at naught by holding that even in random selection, there is no procedural defect or error, and therefore, the Plaintiffs have no case. They have also placed reliance on the case reported as ***Pakistan Petroleum Limited (supra)*** again authored by this bench and have contended that the same goes against the Plaintiffs and therefore, the present Suits are liable to be dismissed, whereas, according to them, this bench is bound by its earlier view.

15. Before proceeding further, I may observe that insofar as the case of ***Pakistan Petroleum Limited (Supra)*** is concerned, it needs to be appreciated that in that case the Plaintiffs had impugned a notice under Section 177 of the 2001 Ordinance for conducting an audit of the Income Tax affairs of the Plaintiffs and the precise arguments of the Plaintiffs' Counsel was, that though reasons have been provided by the Commissioner in the impugned notice as required in law; however, in view of the dicta laid down by the Islamabad High Court in the case reported as ***Pakistan Telecommunication Company Ltd. v. Federation of Pakistan*** **(2016 PTD 1484)**, the Commissioner was required to decide the objections of the Plaintiff against the very reasons so assigned for selection of the Plaintiffs case, and once such an order has been passed by the Commissioner, the order was further justiciable. After going through the facts and case law relied upon by the respective Counsel, this bench came to the conclusion that the contention of the Plaintiffs Counsel is incorrect. This bench was of the view that the only requirement as contemplated under Section 177 ibid was to assign reasons, whether the Plaintiff is satisfied with such reasons or not; and would not ipso-facto render such selection as invalid, and the Plaintiff must get his accounts / tax returns audited by the Commissioner. To that extent it appears that the controversy in that case was altogether different and my view is still the same that, if the concerned officer has assigned reasons for coming to the conclusion that the case of a particular tax-payer is to be audited, then the tax-payer cannot agitate any further and contend that

the reasons are not correct and an audit can only be conducted if the reasons are satisfactory. To me this appears to be too far-fetched and I still hold the same view. It is also noteworthy that while deciding the said case I had disagreed with the view as laid down by the Islamabad High Court in the case of ***Pakistan Telecommunication (supra)***, (see-Para-9) on which much stress has now been laid by the Department's Counsel. While reproducing the said Para-9, I have highlighted the said portion and would like to clarify that firstly; the issue in that case was never in relation to the 1990 Act, or the 2005 Act, and therefore, any observation(s) would be of no relevance when the entire judgment is read and referred to as a binding precedent; secondly, and without prejudice, and as rightly contended by the Plaintiffs' Counsel, such observation is at the most an *obiter-dicta* and not a binding precedent. Para 9 of ***Pakistan Petroleum Limited (Supra)*** reads as under:-

> 9. The learned Counsel for the plaintiff has forcefully relied upon the case of PTCL (supra) by contending that in that case a larger bench of the Islamabad High Court has dealt with the provisions of section 177 of the Ordinance, 2001, section 25 of the Sales Tax Act, 1990 and section 46 of the Federal Excise Act 2005 and after setting aside the judgment of the learned Single Judge (whereby, the petitions were dismissed) has directed the relevant Commissioners to afford an opportunity of hearing to the appellants before proceeding to conduct audit pursuant to the Impugned Notices and the respective Commissioners shall pass speaking order(s) prior to conducting the audit. At the very outset, I may observe that insofar as the case of PTCL (supra) is concerned, the facts of that case including the contents of the notices impugned therein, appears to be somewhat different than the present case of the plaintiff. Though in the entire Judgment the Impugned Notice dated 23.4.2013 has not been reproduced (but discussed at Para-32), however, on directions, the learned Counsel for the plaintiff has placed the same on record through his written synopsis, which reflects that it was in fact a notice for conducting audit under section 25 of the Sales Tax Act, 1990 and section 46 of the Federal Excise Act, 2005 and was not a notice under section 177 of the Ordinance, 2001. ***Perusal of the said notice further reflects that the same had in fact no reasons, whereas, even otherwise section 25 of the Sales Tax Act, 1990 and section 46 of the Federal Excise Act, 2005 does not require that reasons were to be assigned while issuing any such notices.*** In the circumstances it is difficult to comprehend the discussion in the said judgment vis-a-vis the notice issued in terms of section 177 ibid and assigning of reasons and its justification. The entire discussion is in relation to the provisions of section 177 of the Ordinance, 2001, whereas, the notice (as placed on record) was issued in terms of section 25 of the Sales Tax Act, 1990 and section 46 of the Federal Excise Act, 2005, which are not analogous to section 177 ibid. In fact the learned Islamabad-High Court was dealing with a number of petitions challenging notices under section 177 of the Ordinance, 2001, section 25 of the Sales Tax Act, 1990 and section 46 of the Federal Excise Act, 2005, and perhaps for this reason much emphasis has been laid on the provision of section 177 of the Ordinance, 2001, which provides for giving reasons before issuance of any notice for auditing the Tax affairs. On the other hand there is no mandatory requirement for stating any reasons under the Sales Tax Act, 1990 and the Federal Excise Act, 2005. Whereas, the learned Islamabad High Court has gone to an extent whereby the Commissioners have been directed to afford opportunity of proper hearing to the taxpayers and thereafter pass a speaking order on their objections, to which with profound respect I am unable to agree with. Notwithstanding that even otherwise the dicta laid down by the learned Islamabad High Court is persuasive in nature

> and not a binding precedent on me. Insofar as the notice impugned in the instant Suit is concerned, it sufficiently provides for valid reasons as the plaintiff has been confronted with various discrepancies in its return and therefore, it cannot be said that the Impugned Notice is without any valid reasons. The plaintiff has been provided an opportunity of satisfying the defendants that such discrepancies are not justified and the plaintiff has paid the tax and filed the return in accordance with law.

16. Therefore, it is clear that this bench though came to the conclusion that the Plaintiffs is not entitled for any injunctive relief; however, the precise controversy in that case was altogether different and distinct as compared to the present case and therefore, any other observations in the said order, has in fact no relevance to the present dispute in hand.

17. The Defendant's Counsel have laid much stress on Hon'ble Supreme Court's judgment in the case of ***Commissioner of Inland Revenue v. Messrs Allah Din Steel and Rolling Mills (Supra),*** as according to them this judgment has now settled the controversy insofar as the selection and conduct of audit in tax matters is concerned. They have further contended that now a tax-payer cannot challenge any selection for the purposes of audit of his tax affairs. On the other hand Plaintiff's Counsel have argued that again the facts and controversy in that case must first be examined so as to apply the ratio of the said judgment. For that it is imperative to appreciate and examine that in essence, what was the actual controversy before the Hon'ble Supreme Court in that case. It is not in dispute that the judgment pertains to the 2001 Ordinance, and is not in respect of the 1990 Act or the 2005 Act; though there is, at some places, mentioning of these two Act. Secondly, the controversy was in relation to the selection of taxpayers for audit purpose by *FBR* and not by the *Commissioner* Inland Revenue. It was never a case of selection by the Commissioner, nor the provision of law presently under consideration has any similarity; viz. a viz. the exercise of discretion. Now it is not in dispute that FBR has an independent power to make selection of tax payers for the purposes of audit. Under the 2001 Ordinance it is provided in s.214C and under the 1990 Act in s.72B. It could be done by FBR either on random basis or on parametric. In the case of ***Allah Din Steel (Supra)*** it was this selection which was the bone of contention between the parties. The Appeals before the Hon'ble Supreme Court emanated from challenge before the learned Lahore High Court of the Audit Policy 2015 issued by FBR, whereby, the taxpayers were selected for audit through a random ballot. A learned Single Bench partly allowed the petitions to the extent that selection for audit on random basis by the Board was upheld; however, certain directions and observations were made which were to be followed by FBR while implementing the audit policy. The taxpayers as well as the Commissioner Inland Revenue, both were aggrieved by the said judgment and filed Intra Court Appeals and a learned Division

Bench dismissed the Appeals of the taxpayers and partly allowed the Appeals of Commissioner to the extent that the cut-off date for completion of audit given in the judgment of the Single Bench was modified. Again both parties were aggrieved by the judgment of the learned Division Bench in Intra-court appeals and impugned the same before the Hon'ble Supreme Court. It is in that context that the relevant findings of the Hon'ble Supreme Court are to be applied in the present case. Though it has been settled by the Hon'ble Supreme Court that mere selection for audit does not cause an actionable injury to the taxpayer; however, it has not been held that even if the selection process is illegal, arbitrary or unconstitutional, the Court cannot interfere and examine as to such illegality and arbitrary exercise of powers. As noted earlier, the issue was not in respect of selection of a tax-payers affairs for audit by any individual (i.e. Commissioner). This in my view is the crucial and elemental difference in the facts of the present case as against the case before the Hon'ble Supreme Court, and has to be reckoned as the guiding principle in applying the ratio of the that case and its binding effect. So in order that a decision on a question of law is binding within the meaning of Articles 198 and 201 of the Constitution it is not enough that a legal proposition follows logically from it; that question must have been actually decided[1]. I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what is actually decides[2]. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it[3].

18. The Hon'ble Supreme Court in the case of ***Allah Din (Supra)*** has been pleased to hold that power to select for audit clearly vests in FBR and the objection that the entire body of taxpayers must be included in the ballot is misconceived and based upon an erroneous and incorrect reading and understanding of law and it was further held that the only exception in such cases would be *mala fides* and blatant discrimination which has neither been alleged nor evident from the facts, circumstances and record before us. The observation at Para 12 of the said judgment is also relevant and reads as under;

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[1] Trustees of the Port of Karachi v Muhammad Saleem (1994 SCMR 2213)

[2] Quinn v Leathem [19010 AC 495 also followed in [1994 SCMR 2213] & [2012 CLC 577]

[3] State of Orissa v Sudhansu Sekhar Misra & others [AIR 1968 SC 647] by following Quin v Leathem.

> 12. We find that the process of balloting was conducted from amongst a pool of persons objectively determined by the Board in accordance with a transparent policy, uniformly applied in accordance with law. The process was undertaken through an automated computer aided selection process. Nothing has been placed on record that may even remotely indicate that there was any bias, arbitrariness or partiality on the part of the Board or that certain sets or classes of Taxpayers were targeted to the exclusion of others. We therefore do not subscribe to or agree with the argument of the learned counsel for the Taxpayers that there was any legal or procedural defect or error in the process of random selection undertaken by the Board.

19. Therefore, the question that if any legal or procedural defect or error in the process of selection is made out, then it leaves a window open for the tax-payer to challenge the same, and if a case is made out then the Court can take notice of the same and examine as to whether the selection for audit was in conformity with law, as may be relevant or not. However, this room or window is no more open, at least in cases of random selection of tax-payers by FBR, as this has been settled by the Hon'ble Supreme Court in the referred judgment.

20. It would also not be out of place to mention that the different methods and provisions for selection for audit are also recognized by the Hon'ble Supreme Court in that very judgment. It was the case of the tax-payers that the learned Lahore High Court had not followed the spirit of its earlier judgment in the ***DHA Case*** which was also in respect of challenge to selection for audit. The Hon'ble Supreme Court observed at Para 13 that the ***DHA Case*** was in respect of parametric selection for audit and had therefore proceeded on a totally different set of facts and circumstances. The Hon'ble Supreme Court has itself recognized this difference in selection methods for the purposes of audit; hence, the contention of the Defendant's Counsel that the ratio of the said judgment applies in respect of all selections for audit does not seems to be correct and justified. In fact even while upholding powers of FBR to select tax-payers for audit under s.214C of the Ordinance, 2001, the Hon'ble Supreme Court has recognized the difference in *Random* and *Parametric* selection by FBR. It was observed that;

> 13. "..........*Random and parametric selection* are two different methods of selection and the principles and rules applicable to one cannot be applied to the other. As such, the said judgment is not strictly applicable or relevant to the present case. The cases before us arise out of random ballot which as the term suggests is a random selection out of a broad class of taxpayers and is not risk based......"

21. When one reads the judgment of the Hon'ble Supreme Court further, it reflects that the precise reason for such conclusion was for the reason that the selection by FBR is not *per-se* on individual basis, and is rather based on random selection through a computer ballot; or on the basis of certain parameters which are notified by FBR. In both these situations one cannot say that the criteria, either for random selection or

under parametric is pointed towards selecting any one taxpayer. A tax-payer can't plead discrimination in such cases. It has always been applied to a certain category of taxpayers and therefore, it cannot be said that any unfair discretion has been exercised in making such selection. And precisely this is what the Hon'ble Supreme Court was dealing with and the findings in that judgment are to be read and applied as a precedent depending on the peculiar facts of the case in hand. On the other hand, when the powers of the Commissioner under the 1990 Act or the 2005 Act are examined in juxtaposition to the powers of FBR under Section 72B of the 1990 Act, then one can easily come to a conclusion that the powers of the Commissioner appear to be on a very higher pedestal (if no fetters are attached to it) as against what FBR has. In my view the intent of legislature could not be stretched to suggest that a Commissioner enjoys more powers than FBR. Under the FBR Act as well as all Federal Taxing Laws FBR enjoys a supervisory authority upon these Commissioners. Reference in this regard may be made to s.214 of the 2001 Ordinance, s.72 of the 1990 Act, and s.42 of the 2005 Act. The Hon'ble Supreme Court in this very judgment has also made certain observations which are relevant and needs to be appreciated in that there was only a bald allegation against selection on random basis, and as already noted this can't be a case of a tax-payer to challenge such selection as it is not against any particular individual; but for a large number of people. In that very particular case it was held, that law and due course must not be ignored, whereas, it has been further held that the taxpayer should not be allowed to be pestered and dragged indefinitely through unending process of scrutiny and audit of accounts as this would have disastrous and negative impact on business. It has been further held that that conduct of audit must be even handed, impartial and in a transparent manner and that such audit must not be used as a tool to abuse or misuse such authority.

22. Therefore, I am of the view that since the very facts and law under which the judgment in the case of ***Commissioner of Inland Revenue v. Messrs Allah Din Steel and Rolling Mills (Supra),*** was delivered by the Hon'ble Supreme Court, were materially different and distinguishable, the same does not apply in the present cases which are premised on a differently worded provision of law; hence would not be applicable as contended by all the learned Counsel for the Defendants.

23. After the above discussion specially my findings in respect of powers of Commissioner under s.25(1) to have access to record and document, it needs to be appreciated that the issues settled in these cases vide order dated 5.3.2019 require to be re-framed as provided under Order 14 Rule 5 and they are re-settled as follows;

(i) Whether under s.25(1) of the 1990 Act, ("the Commissioner") and under s.45 of the 2005 Act, ("the Officer of Inland Revenue") can have access to records or documents without assigning any reasons?

(ii) Whether under s.25(2) of the 1990 Act, and under s.46 of the 2005 Act, the Commissioner can select a tax-payer for the purposes of conducting audit of its Sales Tax and Federal Excise affairs without assigning any reasons?

(iii) Whether the Commissioner can exercise powers under s.25(1) and (2) of the 1990 Act, and under section 45(1) and s.46(1) of the 2005 Act, simultaneously at the same time for having access to record / documents and so also selecting and ordering audit of a tax-payer?

(iv) What should the decree be?

Issue No.(i):	Affirmative
Issue No.(ii):	Negative
Issue No.(iii):	Negative
Issue No.(iv):	Answered accordingly

24. In view of hereinabove facts and circumstances of the case and the discussion made thereon, Issue No.(i) is answered in the affirmative, in favor of the Defendants; Issue No.(ii) in Negative, in favor of the Plaintiff(s); Issue No.(iii) in negative, in favor of the Plaintiffs and Issue No.(iv) by holding that the notice impugned in question have been issued without lawful authority and cannot be acted further, and are accordingly set-aside; however, the Defendants, if needed and advised, can proceed further in view of answer to Issue No.(i) as above. Suit(s) are decreed accordingly. Office to prepare decree.

Dated: 13.12.2019

J U D G E

ARSHAD/