

IN THE HIGH COURT OF SINDH AT KARACHI***Constitutional Petition No. D – 6303 of 2016*****Present:****Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Khadim Hussian M. Shaikh**

1. *For hearing of Misc. No. 30522/2016.*
2. *For hearing of Main Case.*

**Date of hearing: 29.11.2016
Date of order: 29.11.2016**

Mr. Aqeel Ahmed Khan, advocate for the petitioner.

Mr. Mir Hussain, Standing Counsel.

Mr. Muhammad Aqeel Qureshi, advocate for the respondent
alongwith Amjad Ali, Deputy Commissioner, Inland Revenue,
R.T.O., Karachi.

O R D E R

AQEEL AHMED ABBASI, J.:- Through instant petition, the petitioner has impugned the acts of the respondents, who, according to learned counsel for the petitioner, raided the business premises of petitioner under the garb of authority vested in terms of Section 38 of Sales Tax Act, 1990, for the purposes of inspection of the business premises of a registered person. Per learned counsel, respondents during their visit have forcibly seized the account books, computers and other material, without issuing any proper Show Cause Notice to the petitioner as required under law, hence, acted in violation of law.

2. Notices were issued to the respondents, pursuant to which, Mr. Muhammad Aqeel Qureshi, advocate alongwith Deputy Commissioner (Inland Revenue), RTO, Karachi, namely, Mr. Amjad Ali, shown appearance and filed Vakalatnama and comments on behalf of respondents, copy whereof, has been supplied to the learned counsel for the petitioner. In the comments filed by respondents, the allegations as contained in the instant petition have been categorically denied and it has been stated that in view of certain information relating to “abnormal tax profile” of petitioner, proceedings have been initiated under Section

21, whereas, Notice under Section 11 of the Sales Tax Act, 1990, has also been issued to the petitioner. The Deputy Commissioner present in Court submits that the business premises was inspected in terms of Section 38 of Sales Tax Act, 1990, after due authorization by the concerned Commissioner, whereas, Notice under Section 38 of Sales Tax Act, 1990, was also served on the petitioner, and thereafter, an order of suspension of sales tax registration of the petitioner dated 11.11.2016 was issued, on the grounds that on physical verification of the stocks, it was observed that the input adjustment claimed by the petitioner does not correspond to the quantity of stock which was lying in the premises of the petitioner. Moreover, according to the affair of Inland Revenue, the petitioner has not submitted the explanation regarding the difference between the figures as declared in the sales tax return and the quantity found in the stock lying at the business premises of the petitioner at the time of visit by the respondents. It has been further submitted that Notice under Section 11 of the Sales Tax Act, 1990, has already been issued to the petitioner to explain his position in this regard, however, the same has not been responded by the petitioner.

3. Learned counsel for the petitioner in rebuttal submits that there is difference between the inspection under Section 38 of Sales Tax Act, 1990, and the search or raid, which has been provided under Section 40 of the Sales Tax Act, 1990. Per learned counsel, the officers of Inland Revenue, in the garb of purported authority vested under Section 38 of Sales Tax Act, 1990 have infact conducted raid and search of the business premises of the petitioner, who is a registered person under Sales Tax Act, however, without issuing any Show Cause Notice or obtaining warrant from the concerned Magistrate, hence, violated the provisions of Section 40 of the Sales Tax Act, 1990, as well as the provisions of Cr.P.C. relating to search or raid. It has been further contended by the learned counsel for the petitioner that the petitioner has never defaulted either in submitting sales tax returns, or making payment of his due sales tax liability, whereas, no proceedings were pending against the petitioner under the Sales Tax Act, 1990, when search and raid was conducted by respondents, therefore, the action

taken by the respondents was without any lawful authority. Per learned counsel, respondents, before taking any adverse action against the petitioner, could have issued Notice to the petitioner to furnish any information or to submit the documents relating to petitioner's tax affairs and in case of any denial or non-compliance by petitioner, appropriate action could have been taken as per law, instead of adopting coercive method and to create harassment. Per learned counsel, the respondents in the garb of authority under Section 38 of the Sale Tax Act, 1990, have in fact, raided the premises of the petitioner, seized the record, including computers etc. and simultaneously, the Sales Tax Registration of the petitioner has also been suspended, however, without issuing any Show Cause Notice in terms of Section 21(2) of the Sales Tax Act, 1990. It has been prayed that proceedings initiated by respondents may be declared as illegal and without any lawful authority, whereas, the Sales Tax Registration of the petitioner, may be directed to be restored.

4. We have heard the learned counsel for the parties, the departmental representative and the learned Standing Counsel, and have also examined the relevant provisions of Section 38 and Section 40 of Sales Tax Act, 1990, with their assistance. Record shows that the petitioner has challenged the action of the respondents, whereby, the Sales Tax Registration of the petitioner has been suspended, whereas, grievance regarding the visit of the official of respondents at the business premises of the petitioner in terms of Section 38 read with Section 40 of Sales Tax Act, 1990. It has been further contended that the respondents have collected the record, accounts and computers etc. without issuing any proper Show Cause Notice. However, from perusal from the comments filed on behalf of the respondents, the allegations of the petitioner as contained in the instant petition have denied and seriously disputed by the respondents, whereas, it has been submitted that no such search or raid was conducted by the respondents in terms of Section 40 of the Sales Tax Act, 1990. On the contrary, the respondent department, in view of the information and "abnormal tax profile of the petitioner" issued Notice under Section 38 of the Sales Tax Act, 1990, which according to respondents, was duly served at the time of visit of the official respondents at the premises of the petitioner,

whereafter, the relevant material and information was collected and taken into custody, receipt whereof, was also issued to the registered person in accordance with law. It further appears that the Sales Tax Registration of the petitioner has been suspended in view of the proceedings under Section 38 of the Sales Tax Act, 1990, however, nothing has been placed on record to show that a proper Show Cause Notice in terms of Section 21(2) of the Sales Tax Act, 1990 has been issued by the respondents. There is no cavil to the submissions made by the learned counsel for the petitioner that the provisions of Section 38 and 40 of the Sales Tax Act, 1990 cater to different situation. Bare reading of the two provisions of law, i.e. Sections 38 & 40 of the Sales Tax Act, 1990, makes it clear that both the sections cater for different situations. In terms of Section 38 of the Act, any officer authorized by the Board or the Commissioner as the case may be, has the authority to have free access to the business or manufacturing premises of registered person, and also possess the powers to take into custody such record, statements, documents, diskettes or any part thereof, in original or copies thereof in such form as the authorized officer may deem fit against a signed receipt. However, before invoking the provisions of section 38 of the Sales Tax for the purposes of visit to any business premises of the registered person, the department must have reasonable cause to believe that such a visit is warranted. This has to be more than a mere hunch or suspicion and must also be recorded in writing. The visit must be confined to inspecting the record and documents that are in plain sight or those that are voluntarily made available for inspection by the person(s) present at the premises on request. Consequently, custody within the meaning of section 38 can only be taken of such record and documents that are in plain sight or those that have voluntarily been made available for inspection on request. The record and documents taken into custody must be against a receipt signed by the officer. The officer has no power under section 38 to compel the production of any record or document that is not in plain sight or that has not been voluntarily made available as above. Any record or document taken into custody under compulsion cannot be used for any purpose whatsoever by the department against the person from whose custody the record or document has been

taken by an officer into his possession. Whereas, under section 40 of the Act, if the officer of respondent department, has “**reason to believe**” that it will be useful for or relevant to any proceedings then he may obtain search warrant from Magistrate and carry out search of “**any place**”. Such search shall be carried out in accordance with Criminal Procedure Code, 1898. What is necessary for the search under section 40 is that “a proceeding” under the Act is pending. Whereas, there is no such requirement of Notice under Section 38 of the Act, before proceeding under Section 40 of the Act. In the instant case, since the respondents have categorically denied the allegation of having conducted search or raid in terms of Section 40, therefore, we are not inclined to examine such disputed facts, while exercising constitutional jurisdiction under Article 199 of the Constitution. As regards the assertion of the petitioner regarding non-compliance of provision of Section 21 of the Sales Tax Act, 1990, by the respondents while suspending the Sales Tax Registration of the petitioner, we are of the view that since, the respondents have not placed on record any material, which could justify the suspension of Sales Tax Registration of the petitioner, without issuance of any Show Cause Notice or having confronted the petitioner with such material or allegations(s) of having issued fake invoices or committed tax fraud etc. by the respondents, therefore, we would direct the respondents to restore the Sales Tax Registration of the petitioner. However, in case of any violation of the provision of Sales Tax Act, 1990 by the petitioner, which may attract an action in terms of Section 21 of the Sales Tax Act, 1990 read with STGO No.35/2012 dated 30.06.2012, or proceedings in terms of Section 11 of the Sales Tax Act, 1990, petitioner may be issued proper Show Cause Notice and be given reasonable opportunity to explain their position, who shall submit proper response to such Show Cause Notice, whereafter, appropriate orders may be passed, however, strictly in accordance with law. It has been informed that during pendency of instant petition, petitioner company has reportedly been served with a Show Cause Notice under Section 11 of the Sales Tax Act, 1990, the petitioner shall submit response to such Show Cause Notice and may raise all such objections, as may be permissible under the fact and circumstances of the case, thereafter,

appropriate orders may be passed by the respondent, however, keeping in view the reply of the petitioner as well as relevant provisions of the Sales Tax Act, 1990.

Petition stands disposed of in the above terms alongwith listed application.

JUDGE

JUDGE

A.S.