

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Adnan Iqbal Chaudhry

SET-I

- 1-3. Suit No. 850/2020 to Suit No. 852/2020, Dewan Sugar Mills Ltd. v. Federation of Pakistan and others.
- 4-6. Suit No. 853/2020 to Suit No. 855/2020, Ansari Sugar Mills Ltd. v. Federation of Pakistan and others
- 7-8. Suit No. 866/2020 and Suit No. 867/2020, Sakrand Sugar Mills Ltd. v. Federation of Pakistan and others
- 9-11. Suit No. 871/2020 to Suit No. 873/2020, Bawany Sugar Mills Ltd. v. Federation of Pakistan and others
- 12-13. Suit No. 874/2020 and Suit No. 875/2020, Mirpur Khas Sugar Mills Ltd. v. Federation of Pakistan and others
- 14-15. Suit No. 880/2020 and Suit No. 882/2020, New Dadu Sugar Mills (Pvt.) Ltd. v. Federation of Pakistan and others.
- 16-18. Suit No. 883/2020 to Suit No. 885/2020, Tando Allayar Sugar Mills (Pvt.) Ltd. v. Federation of Pakistan and others
- 19-21. Suit No. 902/2020 to Suit No. 904/2020, Deharki Sugar Mills (Pvt.) Ltd. v. Federation of Pakistan and others.
- 22-23. Suit No. 905/2020 and Suit No. 906/2020, Shahmurad Sugar Mills Ltd. v. Federation of Pakistan and others.
- 24-25. Suit No. 907/2020 and Suit No. 908/2020, Al-Noor Sugar Mills Ltd. v. Federation of Pakistan and others.
26. Suit No. 921/2020, Digri Sugar Mills Ltd. v. Federation of Pakistan and others.
27. Suit No. 923/2020, Hamza Sugar Mills Ltd. v. Federation of Pakistan and others.
28. Suit No. 931/2020, Sanghar Sugar Mills Ltd. v. Federation of Pakistan and others.
29. Suit No. 932/2020, Tharparkar Sugar Mills Ltd. v. Federation of Pakistan and others.

30. Suit No. 939/2020, Darya Khan Sugar Mills Ltd. v. Federation of Pakistan and others.
31. Suit No. 946/2020, Baba Farid Sugar Mills Ltd. v. Federation of Pakistan and others.
- 32-33. Suit No. 949/2020 and Suit No. 950/2020, Faran Sugar Mills Ltd. v. Federation of Pakistan and others.
34. Suit No. 1076/2020, Abdullah Shah Ghazi Sugar Mills Ltd. v. Federation of Pakistan and others.
- 35-36. Suit No. 1113/2020 and Suit No. 1114/2020, Mehran Sugar Mills Ltd. v. Federation of Pakistan and others.
- 37-38. Suit No. 1115/2020 and Suit No. 1116/2020, Sindh Abadgar's Sugar Mills Ltd. v. Federation of Pakistan and others.
- 39-40. Suit No. 1117/2020 and Suit No. 1118/2020, Al Abbas Sugar Mills Ltd. v. Federation of Pakistan and others.
- 41-42. Suit No. 1391/2020 and Suit No. 1392/2020, Habib Sugar Mills Ltd. v. Federation of Pakistan and others.
43. Suit No. 1394/2020, Sindh Abadgar's Sugar Mills Ltd. v. Federation of Pakistan and others.

SET-II

44. Suit No. 896/2019, Shirazi Trading Company (Pvt.) Ltd. v. Pakistan and others.
45. Suit No. 335/2020, Lotte Kolson (Pvt.) Ltd. v. Federation of Pakistan and others.
- 46-48. Suit No. 868/2020 to Suit No. 870/2020, Bandhi Sugar Mills (Pvt.) Ltd. v. Federation of Pakistan and others.
- 49-52. Suit No. 886/2020 to Suit No. 889/2020, Khoski Sugar Mills (Pvt.) Ltd. v. Federation of Pakistan and others.
53. Suit No. 929/2020, Khairpur Sugar Mills Ltd. v. Federation of Pakistan and others.
54. Suit No. 930/2020, Kiran Sugar Mills Ltd. v. Federation of Pakistan and others.
- 55-59. Suit No. 969/2020 to Suit No. 973/2020, Larr Sugar Mills Ltd. v. Federation of Pakistan and others.

60. Suit No. 1290/2020, Gul Metals v. Federation of Pakistan and others.
61. Suit No. 1515/2020, King Chemicals Corporation v. Federation of Pakistan and others.
62. Suit No. 1536/2020, Food Corp. (Pvt) Ltd. v. Federation of Pakistan and others.
63. Suit No. 1817/2020, National Refinery Ltd. v. Pakistan and others.

SET-III

64. Suit No. 1232/2020, Darya Khan Sugar Mills Ltd. v. Federation of Pakistan and others.
65. Suit No. 1258/2020, Deharki Sugar Mills (Pvt.) Ltd. v. Federation of Pakistan and others.
66. Suit No. 1259/2020, Faran Sugar Mills Ltd. v. Federation of Pakistan and others.
67. Suit No. 1260/2020 , Sindh Abadgar's Sugar Mills Ltd. v. Federation of Pakistan and others.
68. Suit No. 1261/2020, Bawany Sugar Mills Ltd. v. Federation of Pakistan and others.
69. Suit No. 1268/2020, Dewan Sugar Mills Ltd. v. Federation of Pakistan and others.
70. Suit No. 1277/2020, Shahmurad Sugar Mills Ltd. v. Federation of Pakistan and others.
71. Suit No. 1283/2020, Mehran Sugar Mills Ltd. v. Federation of Pakistan and others.
72. Suit No. 1284/2020, Al-Noor Sugar Mills Ltd. v. Federation of Pakistan and others.
73. Suit No. 1366/2020, Sanghar Sugar Mills Ltd. v. Federation of Pakistan and others.
74. Suit No. 1372/2020, Digri Sugar Mills Ltd. v. Federation of Pakistan and others.
75. Suit No. 1393/2020, Habib Sugar Mills Ltd. v. Federation of Pakistan and others.

For the Plaintiffs : M/s. Abdul Sattar Pirzada,
Mamoon N. Chaudhry, Qazi Umair

Ali, Ali Almani, Faheem Ahmed Bhayo, Muhammad Din Qazi Waleed Sher Dil, Zain Azad, Abdul Rahim Lakhani, Abdul Jabbar, Muhammad Bilal, Shariq A. Razzaq, Advocates.

For the Defendants : M/s. Ameer Bakhsh Metlo (assisted by Chand Bibi and Faiz Ali) Muhammad Aqeel Qureshi, Dr. Shahnawaz, Imran Ali Mithani, Junaid Ali Mithani, Mohsin Ali Mithani, Muhammad Aslam, Advocates and Anwar Kamal, Assistant Attorney General.

Dates of hearing : 23-02-2021, 08-03-2021 & 15-03-2021

Date of decision : 09-08-2021

JUDGMENT

Adnan Iqbal Chaudhry J. - The Plaintiffs in all of the listed suits, most of whom are sugar mills, have impugned notices issued by the Commissioner Inland Revenue, some under section 25 of the Sales Tax Act, 1990, and some both under section 25 of the Sales Tax Act and section 46 of the Federal Excise Act, 2005, informing the Plaintiffs that they have been selected for audit for various tax periods, and calling upon them to produce record and documents for the purposes of audit. The Plaintiffs have also impugned the consequent follow-up notices issued by the Additional Commissioner, Deputy Commissioner or the Assistant Commissioner Inland Revenue, listing the record and documents required of the Plaintiffs for the purposes of audit. The Plaintiffs pray that the impugned notices be declared unlawful, and that the Defendants, who are, or who regulate tax authorities, be restrained from acting upon the impugned notices. Since the cause of action of all these suits was the same, and all of them raised the same questions of law, all suits were heard together, and I proceed to decide them by this common judgment.

2. The suits listed as Set-I and Set-II, impugn notices issued only under section 25 of the Sales Tax Act, 1990. In Set-I, the impugned notices issued by the Commissioner Inland Revenue are identical to each other, having been issued by the same officer on 02-07-2020, allegedly “on the scrutiny of sales tax returns”. In Set-II, the impugned notices issued by the Commissioner Inland Revenue are similar to each other, issued on various dates in July 2020, but these do not state to have been issued on a scrutiny of sales tax returns, rather the Plaintiffs are simply informed that they have been selected for audit in exercise of powers under section 25 of the Sales Tax Act, 1990. However, none of the impugned notices assign reasons for selecting the Plaintiffs for audit.

A sample of the impugned notice issued by the Commissioner Inland Revenue in the suits of Set-I is as follows:

“Dated: 02-07-2020

No. SUGAR CASES/AUDIT-25/TY-2017/ZONE-II/LTU/2020

M/s. Sugar Mills Limited,

.....

Karachi.

National Tax Number -

SUBJECT: AUDIT UNDER SECTION 25 OF THE SALES TAX ACT, 1990 FOR THE PERIOD FROM OCT-2015 TO SEP-2016 [TAX YEAR 2017] - INTIMATION REGARDING.

Please refer to the subject noted above.

2. *On the basis of scrutiny of the sale tax returns filed by you and in exercise of powers conferred under Section 25 of the Sales Tax Act, 1990, your case is selected for audit for the tax period Oct-2015 to Sep-2016. Accordingly, you are called upon to provide all books of account and other relevant record to the Deputy Commissioner Inland Revenue, Audit Unit-04, Zone-II, LTU, Karachi, who has been directed to conduct audit in the light of relevant provisions of the Sales Tax Act, 1990.*

3. *In view of above, you are requested to co-operate with the above officer to conduct the audit in a smooth and orderly manner so that the process gets completed as early as possible. However, if you face any problem during audit, you may directly contact the undersigned or the Additional Commissioner Inland Revenue, Audit Range-B, Zone-II, LTU, Karachi and we on our part will make every effort to help you out.*

(-sd/-)

Commissioner Inland Revenue”

A sample of the impugned notice issued by the Commissioner Inland Revenue in the suits of Set-II is as follows:

“C.No.Jud-I/CIR/Z-II/LTU-II/2020/27

Dated: 10/07/2020

M/s. Sugar Mills (Pvt) Limited,

.....

Karachi.

SUBJECT: SELECTION FOR AUDIT UNDER SECTION 25 OF THE SALES TAX ACT, 1990, FOR THE TAX PERIOD OCTOBER - 2018 TO SEPTEMBER - 2019 - INTIMATION REGARDING

Dear Taxpayer,

In exercise of powers conferred upon the undersigned by virtue of Section 25 of the Sales Tax Act, 1990, your case is hereby selected for audit of sales tax affairs for the period mentioned above.

2. *You are therefore, called upon to submit the record maintained under the Sales Tax Act, 1990, including Books of Accounts for the subject tax periods, so that the audit of your Sales Tax affairs may be processed in accordance with law.*

3. *The concerned Deputy Commissioner-IR, holding jurisdiction over your case will communicate with you under the provisions of the Sales Tax Act, 1990, accordingly. You are requested to extend your cooperation with regard to submission of required information / record promptly. It is also assured and reiterated that the audit proceedings would be closed if your Sales Tax affairs are found in order.*

(-sd-)

Commissioner Inland Revenue”

3. The suits listed as Set-III, impugn notices both under section 25 of the Sales Tax Act, 1990 and section 46 of the Federal Excise Act, 2005 issued between July 2020 and September 2020. In some cases a common notice has been issued under both provisions, and in some cases the notices are separate. In these suits, the impugned notices issued by the Commissioner Inland Revenue are similar to each other and allege to have been issued “on the scrutiny of sales tax returns”. However, these notices too do not assign reasons for selecting the Plaintiffs for audit. A sample of the impugned notice issued by the Commissioner in the suits of Set-III is as follows:

“Dated: 30-07-2020

No. SUGAR CASES/AUDIT-25&46/TY-2016/AUDIT-1/LTU/2020

M/s.,

.....
Karachi.
National Tax Number -

SUBJECT: AUDIT UNDER SECTION 25 OF THE SALES TAX ACT, 1990 AND SECTION 46 OF THE FEDERAL EXCISE ACT, 2005 FOR THE PERIOD FROM OCT-2014 TO SEP-2015 [TAX YEAR 2016] – INTIMATION REGARDING.

Please refer to the subject noted above.

2. *On the basis of scrutiny of the sales tax returns filed by you and in exercise of powers conferred under section 25 of the Sales Tax Act, 1990 and section 46 of the Federal Excise Act, 2005, your case is selected for audit for the tax period Oct-2014 to Sep-2015. Accordingly, you are called upon to provide all books of account and other relevant record to the Additional Commissioner Inland Revenue, Audit Unit-E, Audit-I, LTU, Karachi, who has been directed to conduct audit in the light of relevant provisions of the Sales Tax Act, 1990.*

3. *In view of above, you are requested to co-operate with the above officer to conduct the audit in a smooth and orderly manner so that the process gets completed as early as possible. However, if you face any problem during audit, you may directly contact the undersigned or the Additional commissioner Inland Revenue, Audit-I, LTU, Karachi and we on our part will make every effort to help you out.*

(-sd-)
Commissioner Inland Revenue”

4. At the hearing for settlement of issues, the suits raised issues of law only, and thus, with the consent of learned counsel on both sides, the suits were heard for final judgment in view of Order XV Rule 3 CPC. The core legal issues were settled vide order dated 23-02-2021. However, given the number of suits and the number of counsel involved, all learned counsel were permitted to raise ancillary legal issues during the course of arguments with an opportunity to the opposing/other counsel to rebut. These ancillary legal issues, and a question to the maintainability of the suits, are recorded in the orders dated 15-10-2020 and 08-03-2021. The issues on which learned counsel made submissions were as follows:

- (i) Whether suits are maintainable to challenge the impugned audit notices ?
- (ii) Whether the impugned notices constitute a selection for audit and not merely a call to submit record ? If so, whether that is contrary to the scheme of section 25 of the Sales Tax Act, 1990

and sections 45 and 46 of the Federal Excise Act, 2005 ? (The latter part of the issue is added under Order XIV Rule 5 CPC in view of the arguments made).

- (iii) Whether under section 25(2) of the Sales Tax Act, 1990, the Commissioner can select a taxpayer for the purposes of conducting audit without assigning any reasons ?
- (iv) Whether under section 46 of the Federal Excise Act, 2005, the Commissioner can select a taxpayer for the purposes of conducting audit without assigning any reasons ?
- (v) Whether the selection for audit the second time within a period of three years was prohibited under the erstwhile proviso to section 25(2) of the Sales Tax Act, 1990 ? If so, to what effect? (This issue arises in some of the suits, not all).
- (vi) What should the decree be ?

The Sales Tax Act, 1990 is hereinafter also referred to as the 'STA'; the Federal Excise Act, 2005 as the 'FEA'; and the Commissioner Inland Revenue acting under section 25 of the Sales Tax Act, and the officer of Inland Revenue or the Commissioner acting under sections 45 and 46 of the Federal Excise Act, are hereinafter referred to as '**the Commissioner**'.

5. The case of all Plaintiffs is essentially that the impugned notices calling upon the Plaintiffs to produce record and at the same time selecting them for audit, are contrary to the scheme of section 25 STA and sections 45 and 46 FEA; and that the failure to provide reasons in the impugned notices for selecting the Plaintiffs for audit is also contrary to said provisions, arbitrary, and amounts to a roving and fishing inquiry into the tax affairs of the Plaintiffs. On behalf of the Plaintiffs, arguments were lead by Mr. Sattar Pirzada Advocate, who represented the majority of the Plaintiffs. Mr. Pirzada placed reliance primarily on the case of *Indus Motor Company Ltd. v. Federation of Pakistan* (2020 PTD 297) decided by a learned single Judge of this Court whereby similar suits were decreed after holding *inter alia* that while calling upon a tax-payer to produce record under section 25(1) STA or under section 45(1)

FEA, the Commissioner cannot simultaneously select the taxpayer for audit under the separate provisions of section 25(2) STA and section 46(1) FEA; and that, if and when a notice does issue under section 25(2) STA or under section 46(1) FEA selecting a person for audit, the Commissioner is required to assign reasons. Mr. Pirzada submitted that the notices impugned in these suits are similar to the ones impugned in the case of *Indus Motor*, and hence should meet the same fate. He further submitted that the impugned notices were *ex facie malafide* and arbitrary, having been issued mechanically on or about the same time to all sugar mills of Sindh, and at a time when all sugar mills were under probe by the Federal Government for alleged cartelization.

6. Mr. Ali Almani, learned counsel for some of the Plaintiffs, added that under section 25 STA the Commissioner does not have the power to make a random selection for audit, which power vests only with the FBR under section 72B STA. Learned counsel drew attention to the case of *Pakistan Telecommunication Company Ltd. v. Federation of Pakistan* (2016 PTD 1484), where a Full Bench of the Islamabad High Court had also held that while selecting a person for audit under section 25 STA and section 46 FEA, the Commissioner is required to assign reasons, *albeit* in doing so, the Islamabad High Court had interpreted the said provisions differently. Mr. Almani submitted that in his suits the additional ground was that the impugned audit notices had selected the Plaintiffs for audit for a second time within a period of three years, which was prohibited by the erstwhile third proviso to section 25(2) STA. In that regard, he also placed reliance on *Faisalabad Electric Supply Company Ltd. v. The Federation of Pakistan* (PTCL 2019 CL. 467). Learned counsel also cited *Shahnawaz (Pvt.) Ltd. v. Pakistan* (2011 PTD 1558) to submit that a tax-payer has a vested right in the statute as applicable to a particular tax year, and therefore the said proviso was attracted to the relevant tax year notwithstanding the date of selection for audit.

Mr. Mohammad Fahim Bhayo, learned counsel for some of the Plaintiffs submitted that where the tax Department has proceeded to select the Plaintiffs for audit for consecutive tax years in one go, which included tax year 2018, that too was prohibited by the erstwhile third proviso to section 25(2) STA; and that the selection for audit for consecutive tax years also defeats the very purpose of self assessment.

All other learned counsel representing the Plaintiffs adopted one or more of the arguments made above.

7. On behalf of the tax Department, arguments were lead by Mr. Ameer Bux Metlo Advocate. He submitted that audit was the most effective tool to assess the veracity of the tax return filed under the self-assessment regime; that selection for audit was not an adverse order and not actionable as held by the Supreme Court in *Commissioner of Inland Revenue, Sialkot v. Allah Din Steel and Rolling Mills* (2018 SCMR 1328); that if any order adverse to the Plaintiffs is passed after the audit, they are provided remedies under the STA and FEA respectively; that in *Deputy Commissioner of Income Tax Faisalabad v. Punjab Beverage Company (Pvt.) Ltd.* (2007 PTD 1347) the Supreme Court had deprecated the tendency of by-passing the remedy provided under the tax statute; and therefore, he submitted that the suits are not maintainable. Learned counsel then submitted that the impugned notices were not arbitrary but were issued after examining the tax returns filed by the Plaintiffs; that while section 177(1) of the Income Tax Ordinance, 2001 mandates the giving of reasons while calling upon the tax-payer to submit record for audit, such stipulation does not exist in section 25 STA, and the reason was that, unlike income tax, sales tax is not out of the pocket of the tax payer. Learned counsel relied on *Pfizer Pakistan Ltd. v. Deputy Commissioner* (2016 PTD 1429) to submit that the Commissioner retains the power to select a person for audit. He submitted that selection for audit was not a separate exercise, but the calling of record under section 25(1) STA and under section 45(1) FEA implies that the person is being selected for audit; that the interpretation of

section 25 STA and sections 45 and 46 FEA in the case of *Indus Motor* does not take into account the fact that given its volume, the scrutiny of the record after calling for its production and thereafter selecting a tax payer for audit, would practically be impossible for a Commissioner. As regards the erstwhile third proviso to section 25(2) STA under which an audit could be conducted one in three years, Mr. Metlo submitted that said proviso could not take away the power of the Commissioner to conduct audit once in a year as provided in section 25(2) itself; and that in any case, the Plaintiffs were selected for audit after the omission of the proviso by the Finance Act, 2019. Mr. Aqeel Qureshi, learned counsel for the Department added that the Explanation clause to section 25 STA makes clear that the power of the Commissioner to select a person for audit was uninhibited. Learned counsel for the tax Department submitted that since *Indus Motor* was by a single Bench of this Court, it was not binding on another single Bench, and urged this Bench to take an independent rather different view. Other learned counsel representing the tax Department, and the Assistant Attorney General adopted the same arguments.

8. Learned counsel were heard and the relevant provisions were examined with their able assistance. The relevant provisions of section 25 of the Sales Tax Act, 1990 read as follows:

“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 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 sub-section, 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.

(2A) For the purpose of sub-section (2) of section 25, the Commissioner may conduct audit proceedings electronically through video links, or any other facility as prescribed by the Board. [inserted by Finance Act, 2020]

(3) After completion of the audit under this section or any other provision of this Act, 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 11.

(5)

Explanation.- For the purpose of sections 25, 38, 38A, 38B and 45A and for removal of doubt, it is declared that the powers of the Board, Commissioner or officer of Inland Revenue under these sections are independent of the powers of the Board under section 72B and nothing contained in section 72B restricts the powers of the Board, Commissioner or officer of Inland Revenue to have access to premises, stocks, accounts, records, etc. under these sections or to conduct audit under these sections."

The relevant provisions of sections 45 and 46 of the Federal Excise Act, 2005 are :

"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.

.....
.....

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) 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 officer of Inland Revenue, not below the rank of Assistant Commissioner, to conduct audit at any time in a year.

(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.

.....
.....”

Issue (i): *Whether suits are maintainable to challenge the impugned audit notices ?*

9. The first ground urged by learned counsel for the tax Department as against the maintainability of the suits was that the Supreme Court had observed in *Commissioner of Inland Revenue, Sialkot v. Allah Din Steel and Rolling Mills* (2018 SCMR 1328) that a mere selection for audit is not actionable. It appears that such observation is being read by learned counsel out of context. Firstly, the case of *Allah Din Steel* was dealing primarily with audit selection by the FBR *via* a random computer ballot under section 214C of the Income Tax Ordinance, section 72B STA and section 42B FEA, which mode of audit selection by design, filters the element of pick and choose¹. Secondly, and more importantly, the observation that a mere selection for audit is not actionable, was made for an audit selection that was otherwise lawful, in that, it was categorically stated by the Supreme Court that a case of *malafides* and blatant discrimination was an exception. In the same vein it was observed that when section 177(1) of the Income Tax Ordinance, 2001 requires the Commissioner to give reasons for audit selection, that had provided the tax-payer with a safeguard. In contrast, the challenge in these suits is to an audit selection not by computer ballot, but by the Commissioner under section 25 STA and section 46 FEA, and the challenge is not to a ‘mere selection’ for audit, but to the omission of reasons while selecting for audit. Thus, in my humble view, the case of *Allah Din Steel* does not come in the way of these suits.

10. Though in one of the written statements on behalf of the tax Department it had pleaded that the suits were barred by the ouster of jurisdiction clause in section 51(1) STA and section 41(1) FEA, that ground was not urged at the time of arguments, presumably because it has since been held by the Supreme Court in *Searle IV*

¹ See Rule 44A of the Sales Tax Rules, 2006 and Rule 73A of the Federal Excise Rules, 2005.

Solution v. Federation of Pakistan (2018 SCMR 1444) that the words 'civil court' in such ouster clauses do not include the High Court of Sindh at Karachi exercising jurisdiction in civil suits. There is nonetheless the question of an 'implied bar' to jurisdiction within the meaning of section 9 CPC, arising as a consequence of special law which envisages jurisdiction by a special forum. Thus, the second objection urged against the maintainability of the suits was essentially that the suits are impliedly barred when an appeal is provided to the Plaintiffs under the STA and FEA if and when an order is passed against them under section 25(3) read with section 11 STA, and/or under section 46(2A) read with section 14 FEA, i.e., after the audit is conducted.

11. The contours of a statutory provision that expressly or impliedly bars the jurisdiction of civil courts, are by now well defined. To quote from *Abbasia Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus* (PLD 1997 SC 3):

"It is a well-settled principle of interpretation that the provision contained in a statute ousting the jurisdiction of Courts of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to. It is also well-settled law that where the jurisdiction of the civil court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the civil court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or the action taken by the authority or tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal; and (d) that in passing the order or taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the tribunal would not be immune from being challenged before a civil court. As a necessary corollary, it follows that where the authority or the tribunal acts in violation of the provisions of the statutes which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or mala fide or passed in violation of the principles of natural justice, such an order could be challenged before the civil court in spite of a provision in the statute barring the jurisdiction of civil court."

Therefore, the implied bar to the jurisdiction of this Court to entertain these suits can be circumvented if the Plaintiffs demonstrate that the suits attract one or more of the exceptions to the ouster of jurisdiction laid down in *Abbasia Cooperative Bank*.² Having said that, all of these suits have been pitched on the recognized exception that the impugned notices being devoid of reasons, are in violation of the provisions under which those are purportedly issued. That issue is being examined *infra*. If the answer to that issue is in the negative, then the suits are not maintainable, and the Plaintiffs will have to go through the mechanism provided in the STA and/or the FEA. However, if the answer to that issue is in the affirmative, then the suits are maintainable, for then the Plaintiffs succeed in circumventing the implied bar to jurisdiction. Issue (i) is answered accordingly.

Issue (ii): Whether the impugned notices constitute a selection for audit and not merely a call to submit record? If so, whether that is contrary to the scheme of section 25 of the Sales Tax Act, 1990 and sections 45 and 46 of the Federal Excise Act, 2005?

12. Though the word 'select' for purposes of audit does not find mention in section 25 STA and section 46 FEA, and for that matter, had also been omitted from section 177(1) of the Income Tax Ordinance, 2001, learned counsel on both sides accept the position that when the Commissioner under the STA and/or the FEA calls upon the tax-payer to produce record expressly for the purposes of audit, that for all intents and purposes is a 'selection' for audit. The impugned notices (reproduced above) manifest that these are not merely a call to produce record, but at the same time the tax-payer is also being 'selected' for audit. That much is not disputed by learned counsel for the tax Department. The question is, under section 25 STA and sections 45 and 46 FEA, could the Commissioner call for the record of the tax-payer and simultaneously select him for audit? Per learned counsel for the Plaintiffs, and as per the case of *Indus*

² Also see *Adamjee Insurance Company Ltd. v. The Assistant Collector (P&A)* (2021 PTD 281).

Motor Company Ltd. v. Federation of Pakistan (2020 PTD 297) relied upon by them, the Commissioner could not do so. That conclusion is drawn from the words “on the basis of the record, obtained under subsection (1)” appearing in section 25(2) STA, and the words “records and documents” appearing in section 46(1) FEA. The rationale per *Indus Motor* is that since an audit notice under section 25(2) STA and section 46(1) FEA can issue only after the record of the tax-payer has been first obtained under section 25(1) STA and section 45(1) FEA and has been examined by the Commissioner, it follows that a person cannot be selected for audit at the time of calling for the record, and that, for the mere calling of the record the assigning of reasons is not required. With that rationale and finding, and to that extent, I am humbly unable to agree with *Indus Motor*, and this is with the greatest admiration for the learned author Judge.

13. Given that the audit of the tax affairs of the tax-payer is a recognized mechanism to check the veracity of the self-assessment made by the tax-payer, the provisions relating to audit, which are essentially machinery provisions, have to be interpreted liberally and in a manner that facilitate the audit.³ In my view, sub-sections (1) and (2) of section 25 STA have to be construed *ex visceribus actus*, which means that every part of the statute should be construed with reference to the context and the other provisions of the statute.⁴ When so done, it becomes apparent that for the purposes of audit, sub-sections (1) and (2) of section 25 STA complement each other. In my view, the words “on the basis of the record, obtained under subsection (1)” appearing in section 25(2)

³ *Commissioner of Income Tax v. Eli Lilly Pakistan (Pvt.) Ltd.* (2009 SCMR 1279).

⁴ “A statute is to be read as to whole- It was resolved in the case of *Lincoln College* (1595) 3 Co. Rep. 58 that the good expositor of an Act of Parliament should ‘make construction on all the parts together, and not of one part only by itself.’ Every clause of a statute is to ‘be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute.’ (Per Lord Davey in *Canada Sugar Refining Co., Ltd. v. R*: 1898 AC 735).” – *Maxwell on Interpretation of Statutes*.

Also see *Punjab Beverages (Pvt.) Ltd. Chandigarh v. Suresh Chand* (AIR 1978 Supreme Court 995).

STA are only stipulating that the officer of Inland Revenue authorized by the Commissioner will 'conduct' the audit on the basis of the record obtained under section 25(1), and not that the selection for audit in all cases can only be after obtaining such record. Similarly, for the purposes of an audit, sections 45(1) and 46(1) FEA are also to be construed *ex visceribus actus*, and it is apparent that section 46(1) is only stipulating that the audit will be "of the records and documents of any person registered under the Act", and not that selection for audit in all cases can only be after obtaining the record of the registered person. An interpretation to the contrary would mean that even if a scrutiny of the tax returns of the tax-payer, or some other document(s) available to the Commissioner give compelling ground for audit, a scenario not difficult to imagine, the Commissioner would still be required to first call for the tax-payer's record by one notice, obtain the same, and then after its scrutiny, issue another notice selecting him for audit. Such interpretation would hardly facilitate the audit. More eminently, the interpretation that reasons need not be assigned in the mere calling of the record, and that selection for audit can only be made after calling, obtaining and examining the record of the tax-payer, does not contemplate that such a scheme would amount to a fishing inquiry, where the Commissioner could call for all or any record maintained under the law with the hope of finding some material to charge the taxpayer with, an act held by the Supreme Court to be unlawful in *Assistant Director, Intelligence and Investigation, Karachi v. B. R. Herman* (PLD 1992 SC 485).

The above discussion is obviously not to say that a notice cannot issue only to call record under section 25(1) STA or section 45(1) FEA without audit selection. It may well be that the Commissioner requires the tax-payer to produce certain record or documents to explain or substantiate an entry in his tax return without selecting him for audit at that stage.

14. In my view, the Commissioner under the STA and the FEA has a certain discretion to select a person for audit. How that

discretion is regulated, is an aspect that I discuss under issues (iii) and (iv) below. For reasons discussed in para 13 above, I do not see why a notice cannot issue simultaneously under sub-sections (1) and (2) of section 25 STA, and similarly under sections 45(1) and 46(1) FEA, i.e., for selecting a registered person for audit while requiring him to produce his record for said purpose. Now, whether in doing so the Commissioner is obliged to give reasons, that is a question distinct, and one that is adverted to under the issues below.

The first part of issue (ii) stands answered in the affirmative, while the latter part in answered in the negative.

Issue (iii): Whether under section 25(2) of the Sales Tax Act, 1990, the Commissioner can select a taxpayer for the purposes of conducting audit without assigning any reasons ?

Issue (iv): Whether under section 46 of the Federal Excise Act, 2005, the Commissioner can select a taxpayer for the purposes of conducting audit without assigning any reason ?

15. Unlike section 177(1) of the Income Tax Ordinance, 2001, neither section 25 STA nor section 46 FEA expressly require the giving of reasons while calling upon the tax-payer to produce his record and documents for purposes of audit. Therefore, the case-law that deals specifically with an audit under section 177(1) of the Income Tax Ordinance, 2001 may not be entirely relevant to the issues above. The two cases that deal directly with the issues above are *Indus Motor* (2020 PTD 297) decided by this Court, and *Pakistan Telecommunication Company Ltd. v. Federation of Pakistan* (2016 PTD 1484) decided by a Full Bench of the Islamabad High Court. Both cases go on to hold that the giving of reasons for selecting a person for audit is implicit in section 25 STA and in section 46 FEA, *albeit* in doing so, both the learned Benches have interpreted said provisions differently. The view taken in *Indus Motor* is that the words “on the basis of the record, obtained under subsection (1)” appearing in section 25(2) STA, and the words “records and documents” appearing in section 46(1) FEA show the scheme is that the

Commissioner is first required to call and obtain the tax-payer's record under section 25(1) STA and/or under section 45(1) FEA, and apply his mind to such record before selecting the tax-payer for audit under section 25(2) STA and/or under section 46(1) FEA; and consequently, the giving of reasons for audit selection is implicit in said provisions. Whereas, the view taken by the Islamabad High Court in the case of *PTCL* is that though the power to select for audit is implicit in section 25 STA and in section 46 FEA, the words "as and when required" appearing in section 25(1) STA envisage that before calling upon the tax-payer to produce record under such provision, the Commissioner has to apply his mind before selecting a tax-payer for audit, and therefore, the giving of reasons for the same were implicit in said provision. As regards section 46(1) FEA, it was held in *PTCL* that the words "after giving advance notice in writing" appearing in section 46(1) FEA envisage the giving of reasons for selecting a person for audit.

16. Though *Indus Motors* and *PTCL* differ as to the stage when selection for audit is made, both cases go on to recognize in their own way that the Commissioner acting under section 25 STA and section 46 FEA exercises a discretionary power, but one which cannot be unfettered or arbitrary. Having also observed in para 14 above that the Commissioner acting under section 25 STA and section 46 FEA has a certain discretion to select a person for audit, I am of the view that the answer to issues (iii) and (iv) primarily lies in stating how the law regulates the exercise of like discretionary powers.

17. Section 24A of the General Clauses Act, 1897 stipulates :

"24A. Exercise of power under enactments.-- (1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.

(2) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be for issuing the direction and shall

provide a copy of the order or as the case may be, the direction to the person affected prejudicially.”

Thus, section 24A of the General Clauses Act mandates that where a statute confers power on an authority to make any order or give any direction, not only shall such power be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment; but also that the authority making the order or issuing the direction shall, so far as necessary or appropriate, give reasons therefor. The application of section 24A in regulating discretionary powers is best illustrated by the following cases.

In *Muhammad Amin Muhammad Bashir Ltd. v Government of Pakistan* (2015 SCMR 630), the erstwhile section 25-B of the Customs Act, 1969 was in question which authorized the Central Board of Revenue to fix the price of imported goods at such rate ‘as it deemed fit’ by overriding section 25, which at the time provided the fixation of the value of imported or exported goods at normal value. The Supreme Court held:

“9. It follows therefore that notwithstanding the very wide language used in section 25B the powers exercisable by the CBR thereunder are to be limited and constrained by section 25 which is the substantive section of law for the fixation of prices. The CBR does not have, and cannot be allowed to have, unfettered discretion. The exercise of any discretionary power must be rational and have a nexus with the objective of the underlying legislation. Arbitrariness is the antithesis of the rule of law. The legislature, when it confers a wide ranging power, must be deemed to have assumed that the power will be, firstly, exercised in good faith, secondly, for the advancement of the objects of the legislation, and, thirdly in a reasonable manner. Section 24A of the General Clauses Act, 1897, reiterates the principle that statutory power is to be exercised "reasonably, fairly, justly and for the advancement of the purposes of the enactment" and further clarifies that an executive authority must give reasons for its decision. Any action by an executive authority which is violative of these principles is liable to be struck down. No other view is permissible.

10. In the well known case of *Amanulla Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others* (PLD 1990 SC 1092) this Court laid down the principle of structured discretion.

"Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Tax by Kenneth Culp Davis (page 94) that the structuring of discretion only means regularizing it, organizing it, producing order in it so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, in our context, the wide worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalize it and regulate it and regulate it by Rules, or Policy statements or precedents, the Courts have to intervene more often, than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times."

The above passage was cited with approval in *Abid Hasan v. PIAC* (2005 SCMR 25) and further reliance was placed on a related passage at p. 35 which reads as under:--

"14. In his Treatise 'Discretionary Powers' which is Legal Study of Official Discretion D.J. Galligan has acknowledged that the general principles that discretionary decisions should be made according to rational reasons means; (a) that there be findings of primary facts based on good evidence, and (b) that decisions about the facts be made for reasons which serve purposes of the statute in an intelligible and reasonable manner". According to the celebrated author, the actions which do not meet these threshold requirements are arbitrary, and may be considered a misuse of power. (Emphasis provided)."

11. It will be noted that the decision in the case of Amanullah Khan has laid down, within the span of a few sentences, important principles for structuring discretion. The cited passage takes cognizance of the fact that where no rules have been framed to regulate the exercise of discretionary powers, executive authorities have erroneously construed this to be an enhancement of the statutory power conferred on them.

This practice has been deprecated. The necessary consequence flowing from this erroneous view has also been set out namely, that where the authorities fail to regulate their discretion by the framing of rules, or policy statements or precedents, it becomes mandatory for the courts to intervene in order to maintain the requisite balance for the exercise of statutory power."

In *Khalid Humayun v. The NAB through DG Quetta* (PLD 2017 SC 194), the Supreme Court held that the discretion vested in the

Chairman NAB under section 25(b) of the NAO, 1999 to approve a plea bargain, was structured by the very provision; it was neither absolute, nor unfettered nor arbitrary; and that “.... even if section 25(b) of the NAB Ordinance had not curtailed his discretion, by making it dependent on the facts and circumstances of the case, then too the Chairman's discretion would be circumscribed by section 24A of the General Clauses Act, 1897.....”.

18. The principles that emerge from the cases of *Muhammad Amin Muhammad Bashir Ltd.* and *Khalid Humayun* are: firstly, that where a statute confers upon an authority a wide-worded discretion, but the statute or the rules made thereunder do not regulate the exercise of such discretion, that is not to be taken as enhancing the discretion of the authority, for such a power is always intended to be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment. And secondly, even if the statute or the rules made thereunder do not expressly regulate the exercise of the discretion so conferred, such discretion is nonetheless circumscribed by section 24A of the General Clauses Act, 1897. Applying those principles to the issues under discussion, even if the provisions of section 25 STA and section 46 FEA do not expressly require the giving of reasons while selecting a person for audit, such requirement has to be read into said provisions by virtue sub-section (2) of section 24A of the General Clauses Act, 1897, failing which there will be nothing to show if the selection for audit has been made reasonably, fairly, justly and for the advancement of the purposes of the statute. Therefore, the argument of the tax Department that no reasons were required to be given in the impugned notices, is misconceived. As regards the extent of the reasons required to be given in the absence of an express rule made in that regard, that too is provided for in sub-section (2) of section 24A of the General Clauses Act, viz., that the extent of the reasons shall be “so far as necessary or appropriate”. Since the impugned notices do not provide any reasons at all, I do not delve in to discuss what would constitute reasons that are “so far as necessary or appropriate”.

19. Having said the above, I am also of the view that the giving of reasons by the Commissioner for selecting a person for audit is nonetheless implied in section 25 STA and section 45 read with section 46 FEA. It is implicit in the very act of calling upon the registered person to produce his record or documents. That aspect is best explained by the case of *Assistant Director, Intelligence and Investigation, Karachi v. B. R. Herman* (PLD 1992 SC 485). There, the notice impugned by the exporter was one under section 26 of the Customs Act, 1969 which empowered the customs officer to require the exporter *inter alia*, to furnish such information relating to the goods as may be necessary for determining *inter alia* the legality or illegality of the importation or exportation of such goods. However, the impugned notice required the exporter only to produce documents without alleging any illegality committed by the exporter i.e., without disclosing any reason for calling the documents. The Supreme Court held :

“4. The authority can only for specific purposes of determining the legality or illegality call for such information as required by section 26. The authorized officer can call upon any importer or exporter to furnish information in case where such determination is required. 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 documents are required will be in violation of the principles of natural justice and may be struck down as illegal and without jurisdiction.”

Therefore, since the calling of the record from the tax-payer can only be with a certain purpose, be that audit or otherwise, it is implicit that reasons will be provided to enable the tax-payer to respond adequately.

20. To conclude, the Commissioner acting under section 25 STA and/or under section 46 FEA while selecting a registered person for audit, is required by law to assign reasons. Issues (iii) and (iv) are answered in the affirmative.

[It is to be noted that by the amendments brought to the Sales Tax Rules, 2006 *vide* SRO 1338(I)/2020 dated 16-12-2020, the procedure for 'e-audit' in Rule 44AC now categorically provides that in issuing notice under section 25(1) STA, the Commissioner shall specify the reasons for selection for audit.]

Issue (v): Whether the selection for audit the second time within a period of three years was prohibited under the erstwhile proviso to section 25(2) of the Sales Tax Act, 1990? If so, to what effect?

21. The above issue has been raised additionally by the Plaintiffs of some of the suits to challenge the notices issued under section 25 STA. Most of these Plaintiffs have been selected for audit for tax periods which include the period from 01-07-2018 to 01-07-2019, during which period sub-section (2) of section 25 STA was qualified by a proviso⁵ stipulating that audit shall be conducted only once in every three years. Though the majority of these Plaintiffs were selected for audit after the omission of the said proviso and also do not demonstrate when and how they were previously selected for audit, nonetheless, their contention is that the proviso would also be attracted if the selection for audit is for tax year 2018. The argument advanced is that a taxpayer has a vested right in the statute as it stood in relation to a 'tax year' as articulated by a learned Division Bench of this Court in the case of *Shahnawaz (Pvt.) Ltd. v. Pakistan* (2011 PTD 1558), a case in relation to selection for audit under the Income Tax Ordinance, 2001. Though it has yet to be seen whether rights determined under the scheme of income tax payable for a 'tax

⁵ The proviso was inserted by Finance Act, 2018, which, except for certain other provisions, came into force on 01-07-2018, but was then omitted on 01-07-2019 by the Finance Act, 2019.

year' can also apply to sales tax for a 'tax period', I do not see the need to delve into such a question in these suits after having concluded that the impugned notices cannot be sustained for want of reasons. The Plaintiffs may raise the point of the said proviso if and when the need subsequently arises.

Issue (vi): What should the decree be ?

22. Having answered the issues as above, the suits are decreed to the extent and in terms that follow.

The suits of Set-I and Set-II are decreed by declaring that the impugned notice(s) issued by the Commissioner Inland Revenue to the Plaintiff under section 25 of the Sales Tax Act, 1990 selecting the Plaintiff for audit, is/are unlawful for failing to disclose reasons. Consequently, the said notices, so also the subsequent follow-up notice(s) issued by the Additional Commissioner, Deputy Commissioner, or the Assistant Commissioner Inland Revenue (also impugned), are of no legal effect.

The suits of Set-III are decreed by declaring that the impugned notice(s) issued by the Commissioner Inland Revenue to the Plaintiff under section 25 of the Sales Tax Act, 1990 and/or under section 46 of the Federal Excise Act, 2005 selecting the Plaintiff for audit, is/are unlawful for failing to disclose reasons. Consequently, the said notices, so also the subsequent follow-up notice(s) issued by the Additional Commissioner, Deputy Commissioner, or the Assistant Commissioner Inland Revenue (also impugned), are of no legal effect.

All suits, of Set-I, Set-II and Set-III are also decreed by restraining the Defendants from acting upon the impugned notices mentioned above.

The office shall draw up a decree in each suit accordingly.

JUDGE

Karachi
Dated: 09-08-2021