

THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Adnan Iqbal Chaudhry

SET-I

1. Suit No. 2019/2015, A&Z Agro Industries (Pvt.) Ltd. v. Federation of Pakistan & others.
2. Suit No. 2218/2015, HSM Packages (Pvt.) Ltd. v. Federation of Pakistan & others.
3. Suit No. 09/2016, Aamir Board Factory v. Federation of Pakistan & others.
4. Suit No. 2031/2016, Jafferjees (Pvt.) Ltd. v. Federation of Pakistan & others.
5. Suit No. 450/2017, Opal Traders v. Federation of Pakistan & another.
6. Suit No. 1169/2018, Ghazi Brothers v. Federation of Pakistan & another.
7. Suit No. 1176/2018, Sajjad Ahmed Butt v. Federation of Pakistan & others.
8. Suit No. 2298/2018, Reliance Petrochemical Industries (Pvt.) Ltd. v. Federation of Pakistan & others.
9. Suit No. 213/2019, Dawn Convertec (Pvt.) Ltd. v. Federation of Pakistan.
10. Suit No. 1855/2019, Iqbal Garments v. Federation of Pakistan & others.

SET-II

11. Suit No. 2180/2015, Shamoan Sultan v. Pakistan & others.
12. Suit No. 2416/2015, Hill Park General Hospital & Trauma Centre (Pvt.) Ltd. v. Federation of Pakistan & others.
13. Suit No. Nil/2016, Dr. Zulfiqar H. Tunio v. Federation of Pakistan & another.
14. Suit No. 625/2016, National Medical Centre (Pvt.) Ltd. v. Federation of Pakistan & others.
15. Suit No. 669/2016, United King & others v. Federation of Pakistan & another.
16. Suit No. 856/2016, Saleem Zaki through legal heirs v. Federation of Pakistan & others.

17. Suit No. 1229/2016, Adam Sugar Mills Ltd. v. Federation of Pakistan & others.
18. Suit No. 2482 of 2016, Muhammad Asif Khan and others v. Federation of Pakistan & others.
19. Suit No. 508/2017, Farjan Khan v. Federation of Pakistan & others.
20. Suit No. 861/2017, Iqra University v. Federation of Pakistan & others.
21. Suit No. 140/2018, Aziz Hanif Soorty & another v. Federation of Pakistan & another.
22. Suit No. 348/2018, Khalil-ur-Rehman & another v. Federation of Pakistan & another.
23. Suit No. 2297/2018, Reliance Petrochemical Industries (Pvt.) Ltd. v. Federation of Pakistan & others.

SET-III

24. Suit No. 925/2016, Chase Up Shopping City & others v. Federation of Pakistan & another.
25. Suit No. 963/2016, Century Engineering Industries (Pvt.) Ltd. v. Federation of Pakistan & another.
26. Suit No. 1278/2016, Shalimar Food Products & others v. Federation of Pakistan & another.
27. Suit No. 1741/2016, Dalda Foods (Pvt.) Ltd. v. Federation of Pakistan & another.
28. Suit No. 1801/2016, Shamim Ur Rehman v. Federation of Pakistan & another.
29. Suit No. 1860/2016, Jade-E-Service Pakistan (Pvt.) Ltd. v. Federation of Pakistan & others.
30. Suit No. Nil/2016, Muhammad Ashraf v. Federation of Pakistan & another.
31. Suit No. 553/2017, Omega Industries v. Federation of Pakistan & others.
32. Suit No. 554/2017, Mega Corporation v. Federation of Pakistan & others.
33. Suit No. 605/2017, Sadaf Salman v. Federation of Pakistan & others.
34. Suit No. 2121/2018, Exide Pakistan Ltd. & others v. Pakistan & others.

For the Plaintiffs : M/s. Ovais Ali Shah, Umar Ilyas, Qazi Umair Ali, Fouzia Rasheed, Mamuna Nasreeen, Ahmed Hussain, Fazal Mehmood Sherwani, Iftikhar Hussain, Hanif Faisal Alam, Hyder Ali Khan, Sami-ur-Rehman, Hamza Waheed, Shaheer Roshan Shaikh, Naeem Suleman, Abdul Rahim Lakhani, Abdul Jabbar Mallah, Atta Muhammad Qureshi, Arshad Hussain Shahzad, Ghazanfar Ali Jatoi, Asadullah Shar [holds brief for Syed Hyder Imam Rizvi], Ghulam Hussain Shah, Muhammad Ameen Bandukhda, Makhdoom Hussam-ul-Haq, Jhanzeb [holds brief for Muhammad Nauman Jamali], Masood Ahmed [holds brief for Raja Qasit Nawaz].

For the Defendants : M/s. Ameer Bakhsh Metlo, Chand Bibi, Faiz Ali Metlo, Muhammad Aqeel Qurshi, Shakeel Ahmed, Syed Mohsin Imam Wasti, Irfan Mir Halepoto, Shahid Ali Qureshi, Zubair Hashim, Muhammad Taseer Khan, Manzar Hussain, Azam Nafees, Assistant Director I&I, Anwar Kamal, Assistant Attorney General for Pakistan.

Dates of hearing : 16-02-2021, 01-03-2021, 16-03-2021 and 31-08-2021.

Date of decision : 13-09-2021

JUDGMENT

Adnan Iqbal Chaudhry J. - The Plaintiffs in all these suits are registered persons under the Sales Tax Act, 1990, and taxpayers under the Income Tax Ordinance, 2001. All of them have primarily challenged a surprise search of their respective business premises, authorized and conducted in the majority of the suits by officers of the Directorate General (Intelligence & Investigation) Inland Revenue, purportedly in exercise of powers under section 38 of the Sales Tax Act, 1990 and/or section 175 of the Income Tax Ordinance, 2001, during which the said officers took into custody certain books, files, record, documents and computer hardware belonging to the

Plaintiffs. Since the cause of action of all these suits and the relief sought therein was similar, and all of them raised common questions of law, all suits were heard together, and I proceed to decide them by this common judgment.

The Sales Tax Act, 1990 is hereinafter referred to as the 'STA'; the Income Tax Ordinance, 2001 as the 'ITO'; the Directorate General (Intelligence & Investigation) Inland Revenue as 'DG I&I'; and the Commissioner Inland Revenue as the 'Commissioner'. A reference to the Director DG I&I includes the Additional Director DG I&I.

2. In the suits where search of the Plaintiffs' premises under section 38 STA and/or section 175 ITO was authorized by the Director DG I&I, the Authorization Letters, also impugned, were issued in exercise of powers under SRO 116(I)/2015 (or the superseding SRO 1301(I)/2018) and SRO 115(I)/2015, which SROs were issued by the FBR under section 30A STA and section 230 ITO respectively.

In the suits listed as Set-I, the Authorization Letters were issued only under section 38 STA. In the suits listed as Set-II, the Authorization Letters were issued only under section 175 ITO, except Suit No. 1229/2016 where the Authorization Letter was simultaneously issued also under Rule 62 of the Federal Excise Rules, 2006. In the suits listed as Set-III, separate Authorization Letters were issued simultaneously under section 38 STA and section 175 ITO, but the search was a common one. In Suit No. 1741/2016, the Authorization Letter was also titled under section 45 of the Federal Excise Act, 2005.

Samples of the Authorization Letters issued by the Director DG I&I are as follows:

"AUTHORIZATION U/S 38 OF THE SALES TAX ACT, 1990

In exercise of the powers conferred upon the undersigned vide Board's Notification bearing No. 116(1)/2015 dated 09-02-2015, the following officers of this Directorate having jurisdiction, are hereby authorized under Section 38 of the Sales Tax Act, 1990, to have access to the premises, stock, accounts, documents or computer or information from hard disk or inventory of any article found at the business place of JADE E-SERVICES PAKISTAN (PRIVATE) LIMITED, having STRN:

1700401211818, and other business concerns, located at 6th AND 12th FLOORS, DOLMEN EXECUTIVE TOWER, BLOCK-4, CLIFTON, KARACHI, maintained by it and / or by any other persons in his behalf.

S.No	Name of Officer	Designation
..
..

2. It is further informed that director or any other responsible person of your business concern / company should be present in the abovementioned business premises to extend full cooperation and assistance in providing the details / documents requisitioned by the team members and to facilitate the officers in discharge of their official responsibilities.

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

(- sd -)
DIRECTOR"

"AUTHORIZATION OF OFFICERS TO HAVE ACCESS UNDER SECTION 175 OF THE INCOME TAX ORDINANCE, 2001

In exercise of the powers conferred upon the undersigned vide Board's Notification bearing No. 115(1)/2015 dated 09-02-2015, the following officers of this Directorate having jurisdiction, are hereby authorized under Section 175 of the Income Tax Ordinance, 2001 to have access to the premises, accounts, documents or computer and to impound or to take extracts or copy of such material and / or examine and prepare notes, details of inventory and its valuation, or computer disk or information from hard disk or inventory of any article found at the business place of JADE E-SERVICES PAKISTAN (PRIVATE) LIMITED, having NTN: 4012118-6, and other business concerns, located at D-67/1, BLOCK-4, CLIFTON, KARACHI, maintained by it and / or by any other persons in his behalf.

S.No	Name of Officer	Designation
..
..

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

(- sd -)
DIRECTOR"

3. The Plaintiffs allege that their premises were in fact 'raided' by tax officers who came there in a hostile manner, in some cases with armed police personnel, and resorted to harassment and intimidation to gain access to the files, books, record and computers of the

Plaintiffs, and proceeded to seize the same. Except Suit No. 2180/2015, all Plaintiffs have filed a copy of the resumption memo or receipt issued for the record seized during the search, *albeit* some of the Plaintiffs allege that the resumption memo/receipt does not list the entire record seized.

4. In their pleadings, the Plaintiffs have averred that the search of their premises was *malafide*, arbitrary and a fishing inquiry; that it was without assigning any reasons, without attributing any illegality to the Plaintiffs and without having any definite information against the Plaintiffs; that the search under section 38 STA was unlawful also for want of a warrant mandated by section 40 STA; that the Director DG I&I had no authority to authorize a search, which power vested in the FBR or the Commissioner under section 30A STA, and in the Commissioner under section 175 ITO; and therefore, the SROs issued by the FBR to confer powers of search on the DG I&I were *ultra vires* the provisions of the STA and ITO respectively. The prayers common to all these suits are: for a declaration that the Authorization Letter issued for the search, and the record taken into custody during such search, are unlawful; for an injunction directing the Defendant tax authorities to return the record; and for restraining the Defendant tax authorities from taking any action against the Plaintiffs on the basis of the record so seized. In addition, some of the Plaintiffs have also prayed that SRO 116(I)/2015 and/or SRO 115(I)/2015 issued by the FBR to confer powers of search on the DG I&I, be declared *ultra vires* the provisions of the STA and ITO; and for damages.

5. The written statements of the tax department plead that the jurisdiction of this Court to decide these suits is ousted by the provisions of section 51 STA, section 227 ITO and section 9 CPC; that by virtue of section 30A STA and section 230 ITO, the FBR was empowered to confer upon the DG I&I the power of search under section 38 STA and section 175 ITO, and hence SROs for the same were issued with lawful authority; that the search of the Plaintiffs' premises was not arbitrary, rather the Plaintiffs were selected for

search on a scrutiny of their tax returns or on the basis of intelligence gathered and/or received which showed that the Plaintiffs were involved in tax evasion by suppressing receipts/sales, taxable activities and taxable income. In some of the suits the tax department has also pleaded that the scrutiny of the record taken into custody during the search has revealed that the Plaintiffs have been concealing taxable activity, taxable income and are involved in tax evasion and tax fraud.

6. At the hearing for settlement of issues on 16-02-2021, all learned counsel representing the Plaintiffs gave up any issue of fact and requested that the suits may be finally determined on issues of law only which do not require evidence. Therefore, with the consent of learned counsel on both sides, and in view of Order XV Rule 3 CPC, these suits were heard for final judgment.

7. The issues of law on which learned counsel were heard are recorded in the order dated 01-03-2021. However, while examining these suits in Chambers, it transpired that in Suit No. 2031/2016 and Suit No. 213/2019, the impugned search had been authorized not by the Director DG I&I but by the Commissioner. Further, in Suit No. 1229/2016 and Suit No. 1741/2016, the impugned Authorization Letters had also cited Rule 62 of the Federal Excise Rules, 2005 and section 45 of the Federal Excise Act, 2005 for authorizing the search. These variations in said suits had not been highlighted by learned counsel during arguments. To cater to said variations, the issues require an amendment and an addition. It will emerge *infra* that the answer to the issues originally settled applies equally to the issues as amended and added to, and no prejudice is caused to either side by the amendment and addition. Therefore, in exercise of powers under Order XIV Rule 5 CPC, Issue No.(ii) is amended to include 'the Commissioner', and an issue is added to address the common search under the Federal Excise Act, 2005. The issues now read as follows, the amendment/addition being highlighted in italics:

- (i) Whether the suits are barred by reason of the special provisions of the Sales Tax Act, 1990 and/or the Income Tax Ordinance, 2001 ?
- (ii) Whether the raid and/or search and seizure by the Directorate General (Intelligence & Investigation) Inland Revenue *or by the Commissioner* at the premises of the Plaintiffs under section 38 of the Sales Tax Act, 1990 was unlawful ? If so, to what effect ?
- (iii) Whether the entry, search and seizure of record by the Directorate General (Intelligence & Investigation) Inland Revenue under section 175 of the Income Tax Ordinance, 2001 at the offices of the Plaintiffs was unlawful ? If so, to what effect ?
- (iv) *Whether the search of the Plaintiffs' premises and seizure of their record under the Federal Excise Act, 2005 or the Federal Excise Rules, 2005 was unlawful ? If so, to what effect ?*
- (v) What should the decree be ?

The second part of Issues (ii) and (iii), i.e. "If so, to what effect ?", was settled to cater to the prayer of the Plaintiffs that in the event this Court comes to the conclusion that the impugned searches were unlawful, then the Defendants should be directed to return the record seized and restrained from taking any action against the Plaintiffs on the basis of such record.

8. Mr. Owais Ali Shah, learned counsel for the Plaintiffs in Suit No. 2297/2018, Suit No. 2298/2018 and Suit No. 625/2016, submitted that since the conditions to a search under section 38 STA and section 175 ITO, and the consequence of not fulfilling those conditions were matters already decided by case-law, he will confine himself to that and to the relief sought to that end, and therefore he did not press the other prayers of his suits, including the prayers against SRO 116(I)/2015 and SRO 115(I)/2015 whereby the power of search was conferred on the DG I&I. Learned counsel submitted that even assuming that the Director DG I&I was competent to authorize the search, the search conducted under section 38 STA without the warrant mandated by section 40 STA was completely unlawful; that

sections 38 and 40 STA have to be read together and the requirement of obtaining a search warrant could not be by-passed; that as per section 40 STA, the search is in relation to “proceedings under this Act”, and therefore until the Commissioner requires the assistance of the DG I&I in relation to a pending proceeding, the Director DG I&I had basis to authorize a search on his own. Learned counsel submitted that the “inquiry or investigation in any tax fraud” contemplated in section 38 STA can only be authorized by the Commissioner acting under the proviso to section 25(2) STA; that the impugned Authorization Letters issued under section 38 STA do not allege any tax fraud by the Plaintiffs, nor could the Director DG I&I undertake any inquiry on his own. Learned counsel submitted that the consequence of such unlawful search was that the record taken into custody during such search had to be returned, and no action could be taken by tax authorities against the Plaintiffs on the basis of such record. To support of his submissions, learned counsel cited the cases of *Collector of Sales Tax and Central Excise (Enforcement) v. Mega Tech (Pvt.) Ltd.* (2005 SCMR 1166); *Collector of Sales Tax v. Food Consults (Pvt.) Ltd.* (2007 PTD 2356); *Federation of Pakistan v. Master Enterprises (Pvt.) Ltd.* (2003 PTD 1034); *Agha Steel Industries Ltd. v. Directorate of Intelligence and Investigation* (2019 PTD 2119); and *N.P. Water Proof Textile Mills (Pvt.) Ltd. v. Federation of Pakistan* (PTCL 2005 CL. 32).

9. As regards the impugned search under section 175 ITO, Mr. Owais Ali Shah Advocate submitted that the provision itself stipulates that the search thereunder is “in order to enforce a provision of this Ordinance”; therefore section 175 ITO can only be invoked where the taxpayer is not in compliance of some other provision of the ITO; and again, until the Commissioner requires the enforcement of that other provision, the Director DG I&I had no basis to authorize a search on his own; and that the impugned Authorization Letters do not give any reasons for authorizing the search. To support his submissions, learned counsel cited the cases of

Agha Steel Industries Ltd. v. Directorate of Intelligence and Investigation (2019 PTD 2119); *K.K. Oil and Ghee Mills (Pvt.) v. Federal Board of Revenue* (2016 PTD 2601); *Khurram Shahzad v. Federation of Pakistan* (2019 PTD 1124); and *Tri-Star Industries (Pvt.) Ltd. v. C.I.T.* (1998 PTD 3923).

10. Mr. Hyder Ali Khan, learned counsel for the Plaintiff in Suit No. 2121/2018 also confined himself and the suit to the points raised by Mr. Owais Ali Shah. To bolster those points he cited the case of *Ihsan Yousuf Textile Mills (Pvt.) Ltd. v. Federation of Pakistan* (2003 PTD 2037) to add that section 38 STA was not an independent provision for search but only an enabling provision, whereas the search itself had to be carried out in accordance with section 40 STA. To further the submission that the record taken into custody during the unlawful search has to be returned and no action can be taken thereon, learned counsel relied on the cases of *S.M. Yousuf v. Collector of Customs* (PLD 1968 Kar 599) and *Muhammad Yousuf v. The Collector of Sea Customs, Karachi* (PLD 1969 SC 153). As to the question to the maintainability of the suits, learned counsel relied on the case of *K.G. Traders v. Deputy Collector of Customs* (PLD 1997 Kar 541) to submit that when the impugned searches were not in accordance with the law that conferred such power, the suits were very much maintainable.

Learned counsel for the other Plaintiffs took the same course as Mr. Owais Ali Shah and Mr. Hyder Ali Khan to confine their suits as aforesaid and adopted the same arguments.

11. In Suit No. 1176/2018, the impugned search under section 38 STA was authorized by the Commissioner Zone-V, RTO-III, not the DG I&I, during which certain record was also taken into custody. Subsequently, the said Commissioner proceeded to suspend the sales tax registration of the Plaintiff under Rule 12(a)(i)(B) of the Sales Tax Rules, 2006 for failing to give access to the entire record during the search. However, that order was suspended by this Court by an interim order that continues. Apart from impugning the search, the

Plaintiff has also challenged the order of suspension of his sales tax registration. Ms. Fauzia Rasheed, learned counsel for the Plaintiff submitted that while the allegation of not providing the entire record was false, nonetheless under section 21(2) STA, sales tax registration can only be suspended for issuing fakes invoices or committing tax fraud, and after giving a prior show-cause notice as held by a learned Division Bench of this Court in the cases of *Saleem Ahmed v. Federation of Pakistan* (C.P. No. D-8101/2017) & others. Learned counsel further submitted that the Commissioner Zone-V had no territorial jurisdiction in the matter, as the same was with the Commissioner Zone-IV pursuant to FBR's jurisdiction notification dated 18-09-2017.

12. Mr. Aqeel Qureshi, learned counsel for the tax department submitted that the impugned search was made to check the veracity of the tax returns filed by the Plaintiffs, and the record taken into custody by the DG I&I during the search was passed on to the Commissioner for appropriate action. He submitted that the Director DG I&I can authorize a search not only on a request for assistance received from the Commissioner, but he can also act on his own on the basis of intelligence gathered by the officers of the DG I&I.

Mr. Ameer Bakhsh Metlo, learned counsel for the tax department relied on the case of *Vincraft (Pvt.) Ltd. v. Federal Board of Revenue* (2017 PTD 2114) to submit that no exception can be taken to the power to search a premises under section 175 ITO; that section 38 STA is not dependent on section 40 STA; that in *Iqbal and Sons v. Federation of Pakistan* (2017 PTD 590), the Lahore High Court had rejected the argument that section 38 STA exists only to cater to an audit under section 25 STA.

Mr. Mohsin Imam, learned counsel for the tax department submitted that these suits in tax matters could not proceed further until the Plaintiffs deposit 50% of the tax calculated by the department as so required by the case of *Searle IV Solution v. Federation of Pakistan* (2018 SCMR 1444). However, that argument did not notice that after that condition was imposed by the Honourable

Supreme Court, these suits were examined for said purpose, and the Court came to the conclusion that since these suits did not impugn any demand of tax, the said condition of deposit was not attracted. None of those orders were ever assailed by the tax department.

Issue (i): Whether the suits are barred by reason of the special provisions of the Sales Tax Act, 1990 and/or Income Tax Ordinance, 2001 ?

13. Though written statements of the tax department had pleaded that the jurisdiction of this Court was ousted respectively by the provisions of section 51 STA and section 227 ITO, however, those grounds were not urged at the time of arguments, presumably because it has since been held by the Supreme Court in *Searle IV Solution v. Federation of Pakistan* (2018 SCMR 1444) that the words 'civil court' in such ouster clauses does not include the High Court of Sindh at Karachi exercising jurisdiction in civil suits. Nonetheless, there is the question of an 'implied bar' to the jurisdiction of this Court within the meaning of section 9 CPC, arising as a consequence of special law which provides for a special mechanism to address matters arising thereunder. Thus, the objection urged against the maintainability of these suits was essentially that the suits are impliedly barred by reason of the special mechanism of the STA and the ITO and the Plaintiffs should resort to remedies provided thereunder as and when an appealable order is passed against them on the basis of the record seized during the search.

14. 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*. Having said that, all of these suits have been pitched on the recognized exception that the impugned action, i.e. the search of the Plaintiffs' premises, was initiated in violation of the provisions which authorized such search. 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 ITO. 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 No.(i) is answered accordingly.

Issue (ii): Whether the raid and/or search and seizure by the Directorate General (Intelligence & Investigation) Inland Revenue or by the Commissioner at the premises of the Plaintiffs under section 38 of the Sales Tax Act, 1990 was unlawful? If so, to what effect?

15. Though section 38 STA does not use the word 'search', the words "shall have free access" with the power to "take into his

custody such records” manifest that it is a provision for search. While section 38 STA empowers the FBR or the Commissioner to authorize a search, the search in most of these suits was authorized by the Director DG (I&I) in exercise of powers under SRO 116(I)/2015 (or the superseding SRO 1301(I)/2018), issued under sections 30A and 30E STA which empowered the FBR to specify the functions, jurisdiction and powers of the DG I&I.¹ Since the *vires* of sections 30A and 30E STA were not called in question in these suits, and the prayer for declaring SRO 116(I)/2015 as *ultra vires* the STA was not pressed during arguments, the authority of the Director DG I&I to authorize the impugned searches need not be discussed herein. To answer Issue No.(ii) it is to be examined foremost whether a search under section 38 STA is independent of the provisions of section 40 STA which requires not only the obtaining of a warrant from the Magistrate before making a search, but also circumscribes the search to circumstances “where any officer of Inland Revenue has reason to believe that any documents or things which in his opinion, may be useful for, or relevant to, any proceedings under this Act are kept in any place”.

16. At the time relevant to these suits, sections 38 and 40 STA read as under:

“38. Authorised officers to have access to premises, stocks, accounts and records - (1) Any officer authorised in this behalf by the Board or the Commissioner shall have free access to business or

¹ In *Wasim Ahmad v. Federation of Pakistan* (2014 PTD 1733) a Division Bench of this Court held that on a combined reading of sections 30, 30A and 30E STA, the FBR was empowered to confer jurisdiction on the officers of the DG I&I to perform functions of officer of Inland Revenue, but only after having declared the officer of DG I&I “to be” an officer of Inland Revenue, both of which could be done by the FBR by a common notification. To comply with that judgment, the FBR issued SRO 116(I)/2015 appointing officers of the DG I&I ‘to be’ officers of Inland Revenue, and conferring upon them powers and jurisdiction to act as such in respect of certain sections of the STA including section 38. Subsequently, section 30A STA was amended by Finance Act, 2018 to expressly empower the FBR to confer upon the DG I&I and its officers the powers of authorities specified in section 30 i.e. the powers of officer of Inland Revenue. The validation clause of section 74A STA was also amended to validate all actions taken pursuant to section 30A prior to the Finance Act, 2018, i.e. SRO 116(I)/2015 and actions taken by the DG I&I thereunder.

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

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

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

“40. Searches under warrant.- (1) Where any officer of Inland Revenue has reason to believe that any documents or things which in his opinion, may be useful for, or relevant to, any proceedings under this Act are kept in any place, he may after obtaining a warrant from the magistrate, enter that place and cause a search to be made at any time.

(2) The search made in his presence under sub-section (1) shall be carried out in accordance with the relevant provisions of the Code of Criminal Procedure, 1898 (V of 1898).”

17. Prior to the Finance Act, 2004, section 40 STA read only as follows:

“40. Searches how to be made.- (1) All searches made under this Act or the rules made thereunder shall be carried out in accordance with the relevant provisions of the Code of Criminal Procedure, 1898 (V of 1898).”

The ‘relevant provisions of the Code of Criminal Procedure’ in turn envisaged the obtaining of a search warrant from the Magistrate.

Thus, in section 40 STA, as it stood prior to the Finance Act, 2004, the requirement of a search warrant was by way of a reference to the CrPC. At that time, section 40 STA was also followed by section 40A to override section 40 and hence to override the requirement of a search warrant in certain circumstances. The erstwhile section 40A STA, which was ultimately omitted by Finance Act, 2006, was as follows:

“40A. Search without warrant.-- (1) Notwithstanding the provisions of section 40, where any Officer of Sales Tax not below the rank of an Assistant Collector of Sales Tax has reasons to believe that any documents or things which, in his opinion, may be useful for, or relevant to, any proceedings under this Act are concealed or kept in any place and that there is a danger that they may be removed before a search can be effected under section 40, he may, after preparing a statement in writing of the grounds of his belief for which search is to be made, search or cause search to be made in his presence, for such documents or things in that place.

(2) Any officer or person who makes a search or causes a search to be made under sub-section (1) shall leave a signed copy of the statement referred to in that section in or about the place searched and shall, at the time search is made or as soon as is practicable thereafter, deliver a signed copy of such statement to the occupier of the place at his last known address.

(3)

18. The frequent arbitrary use of section 40A STA by tax authorities to search premises i.e. without resorting to the procedure of the CrPC for obtaining a search warrant, came up before the superior Courts time and again. The leading case is of *Federation of Pakistan v. Master Enterprises (Pvt.) Ltd.* (2003 PTD 1034) where the Supreme Court held :

“6. We are in full agreement with the contentions raised at the bar by the learned counsel for the respondent. Admittedly, the provisions of sections 40 and 40-A of the Act have not been complied with by the petitioners while conducting raid and seizing the documents. It is expressly stipulated in the above provisions that all searches made under Act or the Rules shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898) (hereinafter referred to as the Code). Procedure regarding search has been laid down in sections 96, 98, 99-A and 100 of the Code whereby, firstly, a search warrant is to be obtained from the Illaqa Magistrate when search of the premises is to be made. In

view of section 103 of the Code, it is mandatory to join two or more respectable inhabitants of the locality in which the place to be searched is situated to attend and witness the search and a list of all articles taken into possession shall be prepared and a copy thereof shall be delivered there and then. Though repeatedly called upon learned counsel for the petitioners failed to show from record that the above provisions of law were strictly followed while seizing the record and sealing the premises of the respondent-company. As such, we do not find any cogent reason to interfere with the impugned judgment which is unexceptionable.”

In *Ihsan Yousuf Textile Mills (Pvt.) Ltd. v. Federation of Pakistan* (2003 PTD 2037), the Lahore High Court held that section 38 STA was a general provision for search, and rejected the argument that section 38 STA provided for a search independent of sections 40 and 40A STA. It was observed that :

“13. If the stand point of the department vis-a-vis section 38 is accepted then no one can give the picture of a situation in which section 40 or 40-A would be invocable. In other words if the interpretation of the provision as being made by the Revenue is accepted correct then either section 38 is superfluous or, vice versa, both sections 40 and 40-A are reduced to be a mere duplication. The correct approach therefore, would be to make a accumulative reading of all the three provisions. When it is so done, one reaches the only possible and practical conclusion that the provisions of section 38 are not by itself search and seizure provisions and these, therefore, must give way to the two specific provisions of sections 40 and 40-A.”

The case of *Ihsan Yousuf Textile* went on to hold that evidence collected through illegal means was not admissible, and therefore the record seized during the unlawful search was ordered to be returned to the petitioners, with the further direction that: “Also none of these materials, records, books of accounts and articles etc. shall directly or indirectly be used in adjudication proceedings against the respondents or to create demand based thereupon in any other manner.”

In *Food Consults (Pvt.) Ltd. v. Collector* (Central Excise & Sales Tax) Lahore (2004 PTD 1731), the Lahore High Court observed that to prevent the ‘free access’ envisaged under section 38 STA from being

misused, the legislature had made a safeguard in section 40 STA; that had the legislature intended for sections 38, 40 and 40A STA to be independent of each other and to confer separate powers upon taxation officers, then there was no need for sections 40 and 40A STA. The impugned search and seizure of record was held to be unlawful; the tax authorities were directed to return the record to the petitioners, and were also restrained from taking any proceedings against the petitioners on the basis of such record. Such writs issued by the Lahore High Court were maintained by the Supreme Court in *Collector of Sales Tax v. Food Consults (Pvt.) Ltd.* (2007 PTD 2356).

In *N.P. Water Proof Textile Mills (Pvt.) Ltd. v. Federation of Pakistan* (PTCL 2005 CL. 32), again a case involving the use of section 40A STA to conduct a search without a warrant, a learned Division Bench of this Court relied also on the case of *Ihsan Yousuf Textile* to hold such search to be unlawful when reasons required to be given for dispensing with a warrant were not adequately transcribed by the authorizing officer. While discussing the provisions of sections 38, 40 and 40A STA, it was observed:

“19. A bare perusal of the provisions contained in sections 38 and 40A of the Sale Tax Act, 1990 shows that on one hand, the Legislature has empowered the tax officials to detect the instances of tax evasion and protect the State revenue and on other hand the citizens have not been left totally at the mercy of tax officials. In order to avoid arbitrariness and misuse of power on the part of tax officials, citizens have been provided the necessary protection, and thereby a balance has been struck by Legislature.”

As regards the consequence of the unlawful search, the case of *N.P. Water Proof Textile Mills* went on to hold:

“21. It is further held that all subsequent proceedings held in pursuance of such illegal search are also void *ab initio* and all the proceedings/actions taken are hereby quashed. The Respondent No.2 is directed to return all the documents to the petitioner still lying which the respondents, as the documents illegally procured cannot be used for any action against the petitioner, as they are inadmissible-in-evidence.”

19. By the Finance Act, 2004, section 40 STA was substituted to read as reproduced in para 16 above. Resultantly, not only was the obtaining of a search warrant made part of section 40 STA, but the search was also qualified by the words: 'Where any officer of Inland Revenue has reason to believe that any documents or things which in his opinion, may be useful for, or relevant to, any proceedings under this Act are kept in any place'. The case of *Collector of Sales Tax and Central Excise (Enforcement) v. Mega Tech (Pot.) Ltd.* (2005 SCMR 1166) dealt with a search made after section 40 STA had been amended as aforesaid. There, the facts were that the officer of sales tax alleged that the taxpayer had refused to provide him record and to give access when he visited the taxpayer's premises pursuant to section 38 STA, and therefore he resorted to section 40A STA to conduct the search without obtaining a warrant under section 40 STA. The Supreme Court held :

"8. Learned High Court appears to be justified in doubting the bona fides of the petitioners in bypassing the statutory provisions contained in section 40 of the Act and straightaway assuming extraordinary powers under section 40-A. There may be no cavil with the submission that the authorized officer had full powers and authority to inspect the premises of the respondent-Company under section 38 of the Act with a view to satisfy himself that proper records under the provisions of the Act, rules and regulations were maintained, nevertheless, in law, he is expected to act fairly, justly and reasonably. At any rate, it is not apparent from the statement prepared by the authorized officer that it was his genuine belief that there was reasonable danger of removal of records, which may be relevant to any proceedings under the Act. In the absence of any strong belief to such effect, we are not inclined to agree with the submission that section 40-A confers unlimited and unbridled powers on the authorized officer to conduct search or to impound any kind of documents without any reasonable cause and without obtaining any search warrant from the Magistrate.

9. Reasonable belief of an officer must have direct nexus and material bearing on the strong circumstances for formation of such opinion. Indeed the legislature has used the expression 'reasonable belief and not a mere suspicion in the mind of an authority with a view to authorise the search of premises without obtaining a search warrant from a Magistrate. Sections 40 & 40-A of the Act in our opinion appear to be neither overlapping nor in conflict with each other. While section 40

caters for search where a sales tax officer has reason to believe that any documents or things, which may be useful or relevant to any proceedings, he may enter the place and cause a search after obtaining search warrant from the Magistrate, section 40-A was enacted to meet an emergent situation where a sales tax officer has reason to believe that documents or things useful for or relevant to any proceedings under the Act, kept at any place are apprehended to be removed, he may proceed to make a search without obtaining any warrant. It would, however, appear that every word used by the Legislature must be given its true meaning and the provisions construed together in a harmonious manner. To our mind, it would not be legal and proper to apply one provision of law in isolation from the other provision as no surplusages or redundancy can be attributed to the legislative organ of the State.

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

The cases of *Ihsan Yousuf Textile* and *N.P. Water Proof Textile* were noticed by the Supreme Court in *Mega Tech*. The cases of *Chairman, Central Board of Revenue v. Haq Cotton Mills (Pvt.) Ltd.* (2007 PTD 1351) and *Collector of Sales Tax v. Food Consults (Pvt.) Ltd.* (2007 PTD 2356) also rely on *Mega Tech*.

20. After a study of the case-law above, the principles that are settled after the case of *Mega Tech* can be stated as follows:

- (i) Section 38 STA is not an independent power to search and has to be read with section 40 STA, otherwise section 40 becomes surplus if not redundant, which cannot be the intent of the legislature;
- (ii) The power to search a premises under section 38 STA is conditioned by section 40 STA, (a) by requiring a search warrant from the Magistrate, and (b) by a reason to believe that the search would

yield a document or thing, which in the opinion of the tax authority would be useful for, or relevant to, any proceedings under the STA;

(iii) Section 40 STA exists as a procedural counter-balance and safeguard provided to citizens against the misuse of free access and drastic powers granted to tax authorities under section 38 STA;

(iv) A search conducted without fulfilling the above mentioned requirements of section 40 STA is unlawful, and as a consequence, the record obtained unlawfully has to be returned and cannot be used in evidence against the person in determining his tax liability.

The finding that evidence collected during an unlawful search of a person's premises cannot be used against him, is of course based on the doctrine of 'fruit of the poisonous tree', a rule of exclusion of evidence. The doctrine came to be established by decisions of the Supreme Court of the United States in *Silverthorne Lumbar Co. v. United States*, 251 US 385 (1920); *Nardone v. United States*, 302 US 379 (1937); and *Nardone v. United States*, 308 US 338 (1939). There are however certain exceptions to that doctrine, the relevant one being, as observed in *Silverthorne Lumbar* that: "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others". Where that exception is invoked, it was held in *Nardone* (308 US 338) that the independent source alleged is open to question before the relevant forum and has then to be proved.

21. Given the settled interpretation of sections 38 and 40 STA discussed above, the argument of the tax department that section 38 STA is a power of search independent of section 40 STA, has no force. Rule 92 of the Sales Tax Rules, 2006 also stipulates that: "All searches shall be carried out in accordance with the relevant provisions of the Code of Criminal Procedure, 1898". After the omission of section 40A STA by the Finance Act, 2006, tax authorities under the STA do not have any power to search a premises without obtaining a warrant under section 40 STA. Even before that, section 40 STA can only be

invoked where the relevant officer “has reason to believe that any documents or things which in his opinion, may be useful for, or relevant to, any proceedings under this Act are kept in any place”. While that ‘reason to believe’ is to be demonstrated by the authorized officer before the Magistrate from whom the warrant is sought, the *sine qua non* for the search is “proceedings under this Act”. In my view, the ‘proceedings’ referred to in section 40A STA are those which are already initiated under the STA prior to the search. A provision for search cannot be used by tax authorities to collect evidence to see if proceedings can then be initiated against a person, for such an act would amount to a fishing inquiry, 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).

22. Excepting the suits that are discussed *infra*, it is not the case of the tax department that the search was in relation to proceedings pending against the Plaintiffs or another other person under the STA. In none of the suits that impugn a search under section 38 STA, including the suits discussed separately *infra*, did the tax authorities obtain a search warrant as required by section 40 STA. Therefore, if not for want of a pending proceeding, the impugned searches under section 38 STA were unlawful for want of a warrant. The written statements of the tax department where they attempt to justify the search by submitting that the same was carried out after monitoring the business activities of the Plaintiffs and after gathering intelligence against them, are firstly reasons that are assigned *ex-post facto*, and secondly, do not answer section 40 STA. In some of the suits, the written statements plead that the record taken into custody during the search has revealed tax evasion. Again, the answer to that is in the principles laid down in para 20 above, viz., that the record seized unlawfully from the Plaintiffs cannot be used against them in determining their tax liability.

23. In Suit No. 2218/2015, it appears that the Plaintiff was being investigated for adjustment of input tax on the basis of fake and

flying invoices issued by another registered person, and prior to the impugned search the Plaintiff had been summoned in that regard by a notice under section 37 STA. It is the Plaintiff's case that it had complied with that summons, which averment is not denied by the tax department in its counter-affidavit.

In Suit No. 925/2016, it appears that prior to the impugned search under section 38 STA and section 175 ITO, a notice was issued to the Plaintiffs under section 37 STA in connection with an inquiry into purchases that did not reflect in the Plaintiffs' bank account.

In Suit No. 2031/2016, the impugned notice under section 38 STA alleged that an inquiry had been initiated against the Plaintiff to discover whether the Plaintiff also manufactures the goods it sells, and whether it makes purchases from unregistered persons.

In Suit No. 450/2017, show-cause proceedings under section 11 STA were pending against the Plaintiff at the time of the search under section 38 STA. (Though the Plaintiff had also impugned said show-cause notice, it had dropped such prayer as recorded in the order dated 20-08-2018.)

In Suit No. 213/2019, the tax department alleges that the Plaintiff has suppressed the fact of show-cause notices dated 28-01-2019 issued under section 11(2) STA and for revoking the Plaintiff's exemption certificate obtained under section 148 ITO. However, the record shows that the impugned search under section 38 STA was carried out on 25-01-2019, prior to said show-cause notices.

Be that as it may, even if the Plaintiffs of the above mentioned suits were under any inquiry, investigation or proceeding, the mandatory requirement of obtaining a warrant under section 40 STA was never met before embarking on the search and seizing record, and that is ground sufficient to declare the search unlawful.

24. In view of the foregoing, the Plaintiffs succeed in demonstrating that the impugned search of their respective premises under section 38 STA was unlawful. The first part of Issue No.(ii) is

answered accordingly. Having concluded so, I need not discuss the inter-play between section 38 STA and the inquiry or investigation authorized under the proviso to section 25(2) STA.

Coming to the second part of Issue No.(ii), the consequence of the unlawful search is also settled legal position as discussed in para 20 above, viz. that the record taken into custody unlawfully is to be returned to the Plaintiffs, and save the exception discussed in para 20 above, such record cannot be used as evidence in determining the tax liability of the Plaintiffs.

In Suit No. 1176/2018, the additional consequence is that the order suspending the Plaintiff's sales tax registration for not providing the complete record during a search that was unlawful, is void and of no legal effect. Having held so, I do not examine the other grounds urged in Suit No. 1176/2018 to challenge the impugned search and the suspension of sales tax registration.

Issue (iii): Whether the entry, search and seizure of record by the Directorate General (Intelligence and Investigation) Inland Revenue under section 175 of the Income Tax Ordinance, 2001, at the offices of the Plaintiffs was unlawful? If so, to what effect?

25. At the time relevant to these suits, section 175 ITO read as under:

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

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

retain the computer for as long as is necessary to copy the information required; and

- (e) may make an inventory of any articles found in any premises or place to which access is obtained under clause (a).
- (2) The Commissioner may authorize any valuer or expert to enter any premises and perform any task assigned to him by the Commissioner.
- (3) The occupier of any premises or place to which access is sought under sub-section (1) shall provide all reasonable facilities and assistance for the effective exercise of the right of access.
- (4) Any accounts, documents or computer impounded and retained under sub-section (1) shall be signed for by the Commissioner or an authorised officer.
- (5) A person whose accounts, documents or computer have been impounded and retained under sub-section (1) may examine them and make extracts or copies from them during regular office hours under such supervision as the Commissioner may determine.
- (6) Where any accounts, documents or computer impounded and retained under sub-section (1) are lost or destroyed while in the possession of the Commissioner, the Commissioner shall make reasonable compensation to the owner of the accounts, documents or computer for the loss or destruction.
- (7) This section shall have effect notwithstanding any rule of law relating to privilege or the public interest in relation to access to premises or places, or the production of accounts, documents or computer-stored information.
- (8) In this section, "occupier" in relation to any premises or place, means the owner, manager or any other responsible person on the premises or place."

26. That section 175 ITO bestows a power of search with the power to impound record during the search, that much is not in issue. Though section 175 ITO empowers the Commissioner to authorize such search, the search in most of these suits was authorized by the Director DG (I&I) in exercise of powers under SRO 115(I)/2015, issued under section 230 ITO, which empowers the FBR to confer upon the DG I&I and its officers the power of income tax authorities specified in section 207 ITO, including that of the Commissioner. Since the *vires* of section 230 ITO and/or SRO 115(I)/2015 were either not called in question in these suits, or prayers made to that end were not pressed during arguments by learned counsel for the Plaintiffs, the competence of the Director DG I&I to authorize the impugned searches under section 175 ITO need not be discussed herein.

27. The power to search a premises under section 175 ITO is not uninhibited. The purpose of the search, and consequently the circumstances in which the provision can be invoked, is restricted by the opening words of section 175 ITO itself, viz., “In order to enforce any provision of this Ordinance.....”.

In *K.K. Oil and Ghee Mills (Pvt.) Ltd. v. Federal Board of Revenue* (2016 PTD 2601), a learned single Judge of the Islamabad High Court took the view that the opening words of section 175 ITO connote that it could only be invoked where the taxpayer resists or refuses to comply with a lawful order or direction passed by the tax authority under some provision of the ITO, and the tax authority has no other means to enforce that provision. It was further held that the exercise of the power had to be justified by reasons. In *Khurram Shahzad v. Federation of Pakistan* (2019 PTD 1124) a learned single Judge of the Lahore High Court held that section 175 ITO can only be invoked if there is some default by the taxpayer under the ITO, and therefore there must be a clear statement by the tax authority as to which provision of the ITO is required to be enforced along with reasons. In *Agha Steel Industries Ltd. v. Directorate of Intelligence and Investigation* (2019 PTD 2119), a learned single Judge of this Court observed that the power of section 175 ITO can only be exercised as a matter of last resort when there are some pending proceedings against the taxpayer which are being obstructed. The case of *Vincraft (Pvt.) Ltd. v. Federal Board of Revenue* (2017 PTD 2114) relied upon by learned counsel for the tax department is distinguishable, as in that case the learned Bench of the Peshawar High Court was dealing with the question whether the procedure of section 40 STA has to be followed while conducting search under section 175 ITO, and it was held that section 175 ITO was a code in itself with no room to import the provisions of section 40 STA.

28. Given the opening words of section 175 ITO, viz. “In order to enforce any provision of this Ordinance”, there can be no doubt that it can only be invoked to enforce some specific provision of the ITO by

way of a search, and not, as the tax department would like to believe, generally as a tool to test the veracity of tax returns. Therefore, to start with, section 175 ITO contemplates that the provision of the ITO sought to be enforced through section 175 ITO has to be specified by the tax authority so that the scope of the search is restricted to that provision, and the record impounded during the search is examined and used only to that end, failing which the search would amount to a fishing inquiry, 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). Secondly, the manner prescribed in sub-section (1)(a) to (e) of section 175 ITO for enforcing a provision of the ITO, viz. by the obtaining of information or record, implies, rather presupposes that some legal action such as an inquiry, investigation, audit or other legal proceeding has already been initiated by the tax authority against the taxpayer under the ITO for which information/record is necessitated by way of a search, for if there is no action pending against the taxpayer, the search would again be an unlawful fishing inquiry. Where the search is so necessitated, then the requirement of giving reasons for the same in the Authorization Letter has to be read into section 175 ITO by virtue of section 24A of the General Clauses Act, 1897 so as to demonstrate that the tax authority is acting reasonably, fairly, justly and for the advancement of the purposes of the statute. The proposition that the search under section 175 ITO is in furtherance of some legal action pending against the taxpayer, also seems to be accepted in the Form prescribed under Rule 72 read with Part-XIII of the First Schedule to the Income Tax Rules, 2002 for authorizing the search. That authorization Form stipulates that while conducting the search, "*The officer of Inland Revenue may keep in mind the enquiry/investigation, audit relating to tax issues only.*"

29. Learned counsel for the Plaintiffs had relied on the case of *K.K. Oil and Ghee Mills* to submit that the word 'enforce' in section 175 ITO implies that it can only be invoked after the taxpayer has been called

upon to produce record under some provision of the ITO, such as section 176, and the taxpayer resists or refuses to do so. With that view I am unable to agree, for that would rule out a search where the tax authority has evidence that the true record is suppressed from it, or that it would escape on a notice to produce. In my view, the conditions of a search under section 175 ITO discussed above, viz. (i) specifying the provision sought to be enforced, (ii) some legal action under the ITO pending against the taxpayer, and (iii) the giving of reasons for the search in the Authorization Letter, are adequate safeguards against the misuse of said provision.

30. Excepting the suits that are discussed *infra*, it is not the case of the tax department that the search was in relation to any inquiry, investigation, audit or other action pending against the Plaintiffs under the ITO. In none of the suits that impugn a search under section 175 ITO, including the suits discussed separately *infra*, did the Authorization Letter of the search specify the provision sought to be enforced or give reasons for the search. Therefore, if not for want of a pending action against the Plaintiffs under the ITO that could have justified a search, the impugned searches under section 175 ITO were unlawful for failing to specify the provision sought to be enforced and for failing to give reasons. The written statements of the tax department where they attempt to justify the search by submitting that the same was carried out after monitoring the business activities of the Plaintiffs and after gathering intelligence against them, are firstly reasons that are assigned *ex-post facto*, and secondly, do not meet the conditions of section 175 ITO discussed above. In some of the suits, the written statements plead that the record taken into custody during the search has revealed tax evasion. However, as discussed under Issue No. (ii) above, the record impounded/seized from the Plaintiffs during an unlawful search, cannot be used against them as evidence in determining their tax liability.

31. In Suit No. 508/2017, it is pleaded by the tax department that the search under section 175 ITO was authorized after the Plaintiff

failed to comply with a notice to produce record under section 176 ITO; however, a copy of that notice is not annexed with the written statement. In Suit No. 2482/2016, it appears that the search under section 175 ITO was taken pending show-cause proceedings against the Plaintiff for amendment of assessment under section 122 ITO. But even if some action or proceeding was pending against the Plaintiffs of these two suits, the Authorization Letters of the search do not state that the search is in furtherance of that very action/proceeding, nor do the Authorization Letters specify the provision of the ITO sought to be enforced by way of the search or give reasons therefor. In fact, in Suit No. 508/2017, the Authorization Letter states otherwise and describes the proposed search as a 'field audit'. Therefore, even in these two suits, the impugned search was an unlawful fishing inquiry as it did not satisfy the conditions of section 175 ITO.

32. In view of the foregoing, the Plaintiffs succeed in demonstrating that the impugned search of their respective premises under section 175 ITO was unlawful. The first part of Issue No. (iii) is answered accordingly. The answer to the second part of the Issue, i.e. 'to what effect?', would be the same as under Issue No. (ii) above, viz. that the record taken into custody/impounded unlawfully is to be returned to the Plaintiffs, and save the exception discussed in para 20 above, such record cannot be used as evidence in determining the tax liability of the Plaintiffs.

Issue (iv): Whether the search of the Plaintiffs' premises and seizure of their record under the Federal Excise Act, 2005 or the Federal Excise Rules, 2005 was unlawful? If so, to what effect?

33. As noted above, this additional issue arises only in two suits. In Suit No. 1229/2016, the Authorization Letter for the impugned search was issued simultaneously under section 175 ITO and Rule 62 of the Federal Excise Rules, 2006. In Suit No. 1741/2016, the Authorization Letter for the impugned search was issued simultaneously under sections 38 STA, section 175 ITO and section 45 of the Federal Excise

Act, 2005. However, the search that was conducted under all said provisions was a common search.

34. The answer to the issue above is relatively simple. All searches under the Federal Excise Act, 2005 and the Rules thereunder, are regulated by section 25 of said Act which reads as follows:

“25. Searches and arrests how to be made.--All searches or arrests made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the relevant provisions of the Code of Criminal Procedure, 1898 (V of 1898).”

Section 25 of the Federal Excise Act, 2005 is identical to section 40 STA as it stood prior to the Finance Act, 2004, which was interpreted by the Supreme Court in the case of *Master Enterprises* (2003 PTD 1034) to hold that the obtaining of a warrant prior to the search was mandated by way of reference to the CrPC, and a search without such warrant was unlawful (see para 18 above). Admittedly, no search warrant was obtained by the tax authority under section 25 of the Federal Excise Act. Therefore, for reasons discussed under Issue No.(ii), the impugned search in Suit No. 1229/2016 and Suit No. 1741/2016 under the Federal Excise Act, 2005 or the Federal Excise Rules, 2005 was also unlawful, and the consequences thereof would be the same as discussed under Issue No.(ii). Issue No. (iv) is answered accordingly.

Issue (v): What should the decree be ?

35. The office objection in Suit No. Nil/2016, *Dr. Zulfiqar H. Tunio v. Federation of Pakistan & another*, which was with regards to certified copies, does not serve any purpose at this stage. The office objection in Suit No. Nil/2016, *Muhammad Ashraf v. Federation of Pakistan & another*, was with regards to court-fee which was subsequently affixed. Therefore, the office shall register said suits.

36. Having concluded that the search and seizure impugned in all these suits were unlawful, the suits are decreed to the extent and in terms that follow.

- (a) In the suits listed as Set-I, it is declared that the impugned search of the Plaintiffs' premises under section 38 of the Sales Tax Act, 1990 was in violation of the provisions of section 40 of said Act, hence unlawful;
- (b) In Suit No. 1176/2018, in addition to clause (a) above, it is also declared that the order dated 21-05-2018 passed by the Commissioner to suspend the sales tax registration of the Plaintiff, is void, of no legal effect and is set-aside;
- (c) In the suits listed as Set-II, it is declared that the impugned search of the Plaintiffs' premises under section 175 of the Income Tax Ordinance, 2001 was without fulfilling the conditions of section 175, hence unlawful;
- (d) In Suit No. 1229/2016, in addition to clause (c) above, it is also declared that the impugned search of the Plaintiffs' premises under the Federal Excise Rules, 2005 was in violation of section 25 of the Federal Excise Act, 2005, hence unlawful;
- (e) The suits listed as Set-III are decreed as per clauses (a) and (c) above;
- (f) In Suit No. 1741/2016, in addition to a decree as per clause (e) above, it is also declared that the impugned search of the Plaintiffs' premises under the Federal Excise Act, 2005 was in violation of section 25 of said Act, hence unlawful;
- (g) In all suits listed as Set-I, Set-II and Set-III, the Defendant tax authorities are directed to return to the Plaintiff(s) all record, documents, computer hardware etc. taken into custody or impounded during the impugned search; and save the exception discussed in para 20 of the judgment, said Defendants are restrained from using said material as evidence in determining the tax liability of the Plaintiff(s).

The office shall draw up a decree in each suit accordingly. The CMAs have become infructuous and are disposed of accordingly.

JUDGE

Karachi
Dated: 13-09-2021