

**IN THE HIGH COURT OF SINDH AT KARACHI**

**Present:**

**Mr. Justice Muhammad Shafi Siddiqui**

**Mr. Justice Agha Faisal**

C.P. No.D-4729 of 2021

Wazir Ali Industries Ltd.

Versus

Federation of Pakistan & others

Along with 89 other petitions and  
three High Court Appeals

(As per Annexure 'A' to this judgment)

Date of Hearing: 29.09.2021, 08.11.2021, 15.11.2021,  
22.11.2021 and 29.11.2021

Petitioners: Through Mr. Mr. Hyder Ali Khan, advocate along with Mr. Sami ur Rehman, Shaheer Roshan and Hamza Waheed, advocates, Mr. Ali Almani, advocate, Mr. Arshad Hussain, advocate, Mr. Naeem Suleman Advocate, Mr. Ovais Ali Shah, Advocate along with Ms. Maryam Riaz, advocate, Mr. Abdul Rahim Lakhani, Advocate, Mr. Abdul Jabbar Mallah, Advocate, Mr. Attta Muhammad Qureshi, advocate, Mr. Ijaz Ahmed, advocate, Mr. M. Saleem Mangrio advocate along with Vivek Herani, advocate, Mr. Iqbal Salman Pasha advocate, Mr. Anwar Kashif Mumtaz advocate, Mr. Muhammad Aleem, advocate, Mr. Maqbool Hussain Shah, advocate, Ms. Lubna Pervez, advocate, Mr. Muhammad Usman Alam, advocate, Mr. Darvesh K Mandan Advocate, Mr. Imran Ali Abro advocate, Syed Mohsin Ali, advocate, Syed Muhammad Hassan Meerza, advocate and Mr. Naveed Sultan, advocate, Mr. Manzar Hussain Memon, advocate and Mr. Irfan Ali Shaikh, advocate, Mr. M. Amin Bakdukda, advocate, Mr. Inzmam Sharif holds brief for Mr. Qazi Umair Ali Advocate, Mr. Ghazanfar Ali Jatoi, advocate, Mr. Mansoor Ali Ghanghro advocate, Mr. Aamir Ali Shaikh, advocate, Mr. Rehmat Shakil advocate, Ms. Tehmina Ashraf advocate, Mr. Waseem Shaikh advocate.

Respondents: Through Mr. Mr. Ameer Bux Metlo, Advocate, Mr. Shahid Ali Qureshi, Advocate, Mr. Ayaz Sarwar Jamali Advocate alongwith Raja Love Kush, advocate, Mr. Imran Ali Metlo, Advocate, Dr. Shah Nawaz Memon, advocate alongwith Ms. Fozia M. Murad Tunio, advocate, Mr. Aqeel Ahmed Khan advocate, Mr. Qaim Ali Memon, advocate, Mr. Imran Ali Mithani, advocate, Mr. Fayaz Ali Metlo, advocate along with Barkat Ali Metlo, advocate, Rana Sakhawat Ali, advocate, Syed Shafqat Ali Shah Masoomi, advocate, Mr. Munawar Ali Memon, advocate, Barrister Ali Tahir, advocate, Mr. Haider Naqi, advocate, Chaudhry Mehmood Anwar, advocate, Mr. Touqeer Ahmed, advocate, Mr. Irfan Mir Halepota, advocate, Ms. Bushra Zia, advocate holding brief for Mr. Zubair Hashmi, advocate, Mr. Imtiaz Ali Solangi advocate, Mr. Akhtar Jabbar Shaikh advocate, Mr. Kafeel Ahmed Abbasi Deputy Attorney General, Barrister Hussain Bohra, Assistant Attorney General.

## J U D G M E N T

**Muhammad Shafi Siddiqui, J.**- This bunch of petitions and High Court Appeals involve interpretation of Section 25 of Sales Tax Act, 1990 along with correlative provisions of Federal Excise Act, 2005, such as Section 45 and 46. Petitions raises some of the fundamental questions such as:

- (i) Whether the Commissioner is required to provide reasons for selecting a person for an audit under section 25 of Sales Tax Act, 1990?
- (ii) Whether the Commissioner is required to provide reasons for calling taxpayer's record under section 25(1) of Sales Tax Act, 1990 and again when the taxpayer is being selected for audit under section 25(2) of Sales Tax Act, 1990?
- (iii) Whether Federal Board of Revenue can play an influential and decisive role over Commissioner and its jurisdiction for the selecting a taxpayer or a class/ classes of person for audit?
- (iv) What is the effect of Section 25(2) of Sales Tax Act, 1990 when it was introduced through Finance Act, 2018 and omitted through Finance Act, 2019?

- (v) Whether a taxpayer can be selected for multiple tax period in one year or only once in a year for any given tax period?

Likewise almost identical propositions were raised with reference to Federal Excise Act, 2005.

2. We have heard some of the learned counsel representing petitioners and some of the respondents' counsel. Arguments were substantially raised by Mr. Ali Almani, Mr. Ijaz Ahmed, Mr. Hyder Ali Khan and Mr. Ovais Ali Shah for petitioners, which were responded by Mr. Ameer Baksh Metlo, Mr. Shahid Ali Qureshi and Dr. Shah Nawaz Memon as well as Mr. Kafeel Ahmed Abbasi, Deputy Attorney General. Rest of the counsels adopted the arguments for their respective side counsel.

3. Petitioners' counsel contended that it is unanimous conclusion of all Courts including Islamabad High Court, Lahore High Court and of this Court that for selection of a taxpayer for audit under subsection (1) and (2) of Section 25 of Sales Tax Act, 1990, the reasons are inevitable. It is argued that discretionary powers of these authorities must be seen to have been structured which express transparency to avoid abuse of process of law, to curtail possibility of fishing and roving expedition into the affairs of taxpayer to unearth incriminating material. It is further expressed that audit is a disruptive, cumbersome and unbridled exercise of selecting a taxpayer for an audit and absence of transparency would give these officers free rule/hand to drag the taxpayer, which could be biased approach and may end up in harassment. It is argued that the phrase "as and when required" in Section 25(1) inevitably implies that reasons must be provided. It is argued that Section 25 primarily is a two-staged process however interdependent. Counsel are of the view that the aforesaid phrase would serve no purpose at all in case it is rendered meaningless and unless a reasoned order is made for calling the record, the purpose of selection in terms of subsection (2) of Section 25 would

not be matured unless an account is made that the discrepancies, as noted at the time of calling the documents, have not been reconciled.

4. Learned counsel for the petitioners argued that view of Dewan Sugar Mills<sup>1</sup> and Pakistan Tobacco<sup>2</sup> in respect of phrase “on the basis of record obtained under subsection (1)” is taken to be correct i.e. applying to the conduct of the audit by the office of Inland Revenue and not to the selection for audit by the Commissioner, it requires rewriting of subsection (2) and bringing this phrase to the beginning of the said provision. It is urged that when a provision of law is clear and unambiguous, Court should give effect to it and not to rewrite it or supply any words. Learned counsel further submitted that since these are two independent provisions, therefore, the independent reasons for both subsections are inevitable.

5. It is argued that Federal Board of Revenue on 10.03.2021 through a letter/notice directed Chief Commissioner Inland Revenue and Large Taxpayers Office (LTO) Karachi, Lahore, Islamabad, Corporate Tax Office (CTO) Islamabad, Karachi and Regional Tax Office (RTO) Sukkur for sectorial audit of Oil Marketing Companies, manufacturers of edible oil, auto industry, manufacturers of aerated water, beverages stating therein that these are sectors which needs to be audited. In consequence whereof Federal Board of Revenue was also pleased to set time line, mechanism for completion of audit under Sales Tax and Income Tax Acts in respect of such sectors as defined above. The time line for completion of audit includes selection for audit, issuance of audit report, issuance of show-cause notice, reply and rebuttal, assessment orders and final report to FBR. In consequence whereof such sectors have received respective notices under section 25 of Sales Tax Act, 1990.

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<sup>1</sup> Dewan Sugar Mills Ltd. v. Federation of Pakistan & others in Suit 850/2020 & others

<sup>2</sup> Pakistan Tobacco Co. Ltd. v. Federation of Pakistan in W.P. No.272 of 2021

6. Mr. Ameer Bakhsh Metlo, learned counsel for the respondent department has argued in the matters substantially. He submitted that the audit is the most effective tool to assess/evaluate the tax returns under the present regime of sales tax that is based on self-assessment and audit has been established to be a non-adverse action and no exception could be taken in this regard as held by Hon'ble Supreme Court in Allahdin's<sup>3</sup> case. He submitted that audit is only a mechanism on the basis of which a probe could be made, which may ultimately be routed through efficacious remedies as far as taxpayers are concerned. Mr. Metlo is of the view that Section 25 of Sales Tax Act, 1990 like sections 45/46 of Federal Excise Act, 2005 is a one-stage process and notices are issued after examination of the returns and hence process of calling record and audit could be done simultaneously as held in the case of Dewan Sugar.

7. Insofar as the conduct of audit once in a year is concerned, Mr. Metlo is of the view that petitioners were selected for audit after omission of the proviso by the Finance Act 2019 and no rights could be attributed to this procedural amendment. He further added that phrase "once in a year" does not mean that by a single notice taxpayer cannot be selected for more than one year as it would be for different tax years i.e. its limitation is for "a tax year" and only once.

8. Mr. Abbasi, learned Deputy Attorney General has substantially argued that provisions of subsection (1) of Section 25 are discretionary in nature and once discretion is exercised for calling record, no mala fide could be attributed, however, reasons could be provided while selecting taxpayer for audit which is one-stage process being cumulative effect of both.

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<sup>3</sup> 2018 SCMR 1328 (Commissioner of Inland Revenue v. Allah Din Steel and Rolling Mills)

9. We have heard the learned counsel and perused material available on record.

10. In order to understand the controversy for the sake of convenience, relevant portions of some of such notices, as received by petitioners, are reproduced hereunder to understand the points required while interpreting Section 25(1) and (2) of Sales Tax Act, 1990 and sections 45 and 46 of Federal Excise Act, 2005:-

**Petroleum companies - C.P. No.D-2234 of 2021**

**Annexure A-1**

“No.CIR/Audit-III/LTO/2021/  
Dated: 12.03.2021

The Principal Officer,  
M/s Byco Petroleum Pakistan Ltd,  
9<sup>th</sup> Floor, Block-4,  
The Harbour Front, Dolmen City,  
HC-3, Marine Drive, Clifton,  
Karachi.

**Sub: AUDIT UNDER SECTION-25 OF THE SALES TAX ACT, 1990 FOR THE PERIOD FROM 01.07.2017 TO 30.06.2018 - INTIMATION.**

*Please refer to the subject cited above.*

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

**(QAZI HIFZ UR REHMAN)**  
Commissioner Inland Revenue

**Annexure A-2**

“No.CIR/Audit-III/LTO/2021/  
Dated: 12.03.2021

To,  
Deputy Commissioner Inland Revenue,  
Unit-8 Audit-III, LTO,  
Karachi.

**Sub: AUDIT UNDER SECTION-25 OF THE SALES TAX ACT, 1990 IN THE CASE OF M/S BYCO PETROLEUM PAKISTAN LTD FOR THE PERIOD FROM 01.07.2017 TO 30.06.2018.**

In exercise of the powers conferred upon me by Section 25 of Sales Tax Act, 1990, the sales tax audit of above registered person has been proceeded for the subject period vide letter dated 12.03.2021 (copy enclosed). You are being authorized to conduct the audit. Accordingly, you are directed to proceed and finalize the same as per the provision of Sales

Tax Act, 1990 and procedures.

(QAZI HIFZ UR REHMAN)  
Commissioner Inland Revenue

Copy to:-

1. The Principal Officer, M/s BYCO PETROLEUM PAKISTAN LTD, Karachi.
2. The Additional Commissioner Inland Revenue, Range-D, Audit-III, LTO, Karachi.

(QAZI HAFIZ UR REHMAN)  
Commissioner Inland Revenue

## Edible Oil - CP No.D-4733 of 2021

### Annexure "A"

No.CIR/Audit-II/MTO-II/Khi/2020-21/38 Dated:29.06.2021

1. ...
2. ...
3. ...

*In exercise of powers conferred upon me by virtue of section 46 of Federal Excise Act, 2005, you are therefore, called upon to submit the record maintained under the Federal Excise Act, 2005, including Books of Accounts for the subject tax period, so that the audit of your FED affairs may be processed in accordance with law.*

*The concerned Deputy Commissioner-IR, holding jurisdiction of your case will communicate with you under the provisions of the Federal Excise Act, 2005, 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 FED affairs are found in order."*

### Annexure A-1

No.CIR/Audit-II/MTO-II/Khi/2020-21/37 Dated:29.06.2021

.....

Through instant correspondence ...

1. ...
2. ...
3. ...
4. ...
5. ...
6. ...

*In exercise of powers conferred upon me by virtue of section 25 of Sales Tax Act, 1990, you are therefore, called upon to submit the record maintained under Sales Tax Act, 1990, including Books of Accounts for the subject tax period, so that the audit of your sales tax affairs may be processed in accordance with law.*

*The concerned Deputy Commissioner-IR, holding jurisdiction of 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."*

**Beverage - C.P. No.D-4403 of 2021**

**Annexure 'A'**

No.AUDIT-25/TY-2020/AUDIT-II/LTO/2021

Dated:28.05.2021

....

2. On the basis of following risk areas identified during 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 Jul-2019 to Jun-2020. Accordingly, you are called upon to provide all books of account and other relevant record to the Deputy Commissioner Inland Revenue, Audit Unit-06, Audit-II, Large Taxpayer's Office, Karachi, who has been directed to conduct audit in the light of relevant provisions of the Sales Tax Act, 1990. Risk areas are given hereunder:...

....

**Automobiles - C.P. No.D-3754 of 2021**

**Annexure A-1**

C.No.Jud-I/CIR/Audit-I/MTO/2021/

Dated:04.06.2021

Subject: Selection of audit under section 25 of the Sales Tax Act, 1990 for the tax periods from July-2019 to June-2020

Thank you for filing sales tax returns for the tax period July, 2019 to June, 2020.

2. The case record has been examined and your sales tax affairs are found fit to be audited for sales tax affairs under section 25 of the Sales Tax Act, 1990. The grounds and reasons/ risk areas for audit, inter-alia are set out as under:-

(A) You have also been engaged in import of CBU units and paid value addition tax @ 3% at import stage. It is required to be checked by way of audit whether correct value addition on supply of CBU (Finished goods) is being shown by you.

(B) It is required to be checked through the audit whether or not you are paying the Federal Excise Duty as required under section 3 of Federal Excise Act 2005 read with serial 55, 55A, 55B, 55C, 55D and 56 of First Schedule Table 1 of Federal Excise Act 2005.

(C) The OEMs show vehicle ex-factory price, freight, insurance, WHT at invoice separately. It needs to be ascertained whether values of Supply for sales tax purposes is being calculated properly or not.

(D) ....

4. Therefore, in exercise of powers conferred in me under section 25 of Sales Tax Act, 1990 you are hereby called upon to produce all books of accounts and other relevant record. The concerned officer Inland Revenue shall soon be contacting you in writing in this connection. It is expected that you will cooperate with the Officer Inland Revenue during the audit proceedings."



11. The issues under consideration came up before different Benches of different High Courts. The first judgment that was delivered in the recent past is of PTCL<sup>4</sup>. It concludes that the use of phrase “as and when required” in subsection 25(1) necessarily implied that Commissioner must provide reasons for selecting a person for audit. However, the judgment did not discuss whether after providing reasons under section 25(1) the Commissioner is further required to provide reasons for selecting a taxpayer for audit under section 25(2), however in PTCL case the Bench was of the view that opportunity of hearing the taxpayer be provided and a reasoned order be passed for selecting it for an audit.

12. The second judgment that interprets provision of Section 25 is of *Indus Motors*<sup>5</sup> wherein learned Single Judge of this Court while exercising jurisdiction on the original side held that section 25 is a two-stage process. In the first step the Commissioner is required to call for taxpayer’s record within the frame of Section 25(1), though reasons are not required. In the second stage Commissioner must provide reasons for selecting the taxpayer. The conclusion that the reasons are required in the second stage while selecting a taxpayer for audit, was based on the phrase “on the basis of record” in subsection (2). Learned Judge however disagreed with the conclusion of the PTCL judgment to the extent that use of phrase “as and when required” in subsection 1 of Section 25 necessarily implies that reasons must be provided.

13. The third judgment is again of a learned Single Judge of this Court while exercising jurisdiction on the Original Side in the case of *Deewan Sugar v. Federation of Pakistan* in Suit No.850 of 2020 (unreported till date). Learned Single Judge in the case agreed with the conclusion of *Indus Motor* judgment to the extent that reasons must be provided by the Commissioner for selecting a taxpayer for an audit but disagreed

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<sup>4</sup> 2016 PTD 1484 (*Pakistan Telecommunication Company Ltd. v. Federation of Pakistan*)

<sup>5</sup> 2020 PTD 297 (*Indus Motors Co. Limited v. Federation of Pakistan*)

with the judgment to the extent that the selection for an audit under section 25 was a two-stage process in which reasons must be provided for the purpose of subsection (2) but not subsection (1). Learned Single Judge was of the view that selection for audit under section 25 is single stage process and the Commissioner can call for record under section 25(1) and select a taxpayer under section 25(2) simultaneously. Learned Single Judge however left it open as to whether reasons be provided on first notice summoning the record for audit under subsection (1) of 25 and/or the subsequent notice selecting the taxpayer for audit under subsection (2) of Section 25.

14. The fourth judgment is of Lahore High Court in the case of Hyundai Nishat Motors<sup>6</sup> (unreported) wherein learned Judge agreed with the Indus Motors judgment to the extent that Section 25 envisaged the two-stage process i.e. Commissioner in the first step may call for record under subsection (1) and only after reviewing record, the taxpayer could be selected for an audit under subsection (2). Learned Judge however disagreed with the Indus Motors judgment to the extent that Commissioner was not required to provide reasons when calling for record under subsection (1) of Section 25. In substance learned Judge held that Commissioner must provide reasons for calling for record under subsection (1) but is not required to provide reasons when selecting a person for audit under subsection (2) of Section 25.

15. The conclusion in the case of Hyundai Nishat Motors (Pvt.) Limited is that its ratio is not in agreement with Deewan Sugar judgment that the powers under subsection (1) and (2) of Section 25 could be exercised simultaneously. Since in the Hyundai judgment the impugned notices contained reasons for selecting taxpayer for audit, the Court held that the notices be treated as having been issued under subsection (1) of

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<sup>6</sup> Hyundai Nishat Motor v. The Federal Board of Revenue - W.P. No.25793 of 2021

Section 25 i.e. calling the taxpayer for the record to be submitted and not for selection for audit.

16. The last judgment on the issue is passed by learned Single Judge of Islamabad High Court in the case of Pakistan Tobacco Co. Ltd. in a writ petition bearing No.272 of 2021 (Pakistan Tobacco judgment). The learned Single Judge in this judgment agreed with Deewan Sugar judgment and held that the selection for an audit is one-stage process and the powers under subsection (1) and (2) can be exercised simultaneously. Learned Single Judge in Pakistan Tobacco judgment further held that once reasons are provided under subsection (1) at the time of calling record, no reasons have to be provided when exercising powers under subsection (2). Finally learned Single Judge held that PTCL judgment to the extent it concluded that Commissioner must provide an opportunity of hearing before selecting a taxpayer for audit, was limited to specific facts of the case.

17. Petitioners of this jurisdiction have again urged to interpret Section 25 of Sales Tax Act, 1990 along with similar provisions of Federal Excise Act, 2005, as to whether reasons are inevitable either for calling record in terms of subsection (1) of Section 25 of Sales Tax Act, 1990 or for selecting the taxpayer for audit under subsection (2) of Section 25 of the Act or both.

18. Summary of the discussion of all above five judgments is that in either form whether it be deemed to be a single stage or double stage, reasons are inevitable for audit. The discretionary authority, as settled is structured with this dispensation and it must be transparent and fair, as discussed in the case of Wateen Telecom<sup>7</sup>. It further restricts fishing and roving expedition of the officers concerned to unearth incriminating

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<sup>7</sup> 2019 PTD 1030

materials, as stated in the case of Assistant Director (I&I) v. B.R. Herman<sup>8</sup>.

19. Department's counsel Mr. Metlo made two primary submissions on these issues:

- (i) While reasons are required for selecting a taxpayer for an audit, there is no requirement under Section 25 to disclose those reasons to the taxpayer.
- (ii) An audit under Section 25 is a one stage process. Requiring the Commissioner to provide reasons for calling for the record under sub-section (1) and then for selecting a person for an audit under sub-section (2) would place too onerous a burden on the Commissioner.

20. For reaching a fair conclusion with respect to Section 25 of Sales Tax Act, 1990 and 45/46 of Federal Excise Act, 2005, we have made an attempt to minutely go through the scheme of respective laws. Let us first deal with Section 25 of Sales Tax Act, 1990 as the effect on later could be similar.

21. Originally when Section 25 was introduced in Sales Tax Act, 1990 it carried the phrase "as and when required" but it is just a solitary provision which is as under:-

*"25. Access to records, documents etc.—A registered person shall, as and when required by an officer of sales tax, produce records which are in his possession or control as may be required by such officer."*

It was amended in 1996 and acquired the following structure:-

*"25. Access to record, documents, etc.—A person who is required to maintain any record or documents under this Act shall, as and when required by an officer of sales tax, 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 of Sales Tax and use of any machine on which such data is kept."*

22. Although a minor amendment was carried out in the year 1999, a substantive change was brought in the year 2003 and then undergone

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<sup>8</sup> PLD 1992 SC 485

many consequential amendments in the year 2005, 2008, 2010, 2013, 2015, 2018, 2019 and 2020. For the purpose of present controversy, the amended provisions which came in the year 2003 is effective. It is this amendment when for the first time subsection (2) to Section 25 was introduced in terms whereof officer of the sales tax, on the basis of record obtained under subsection (1) may once in a year required to conduct audit. Section 25, as amended in 2003, is reproduced as under:-

*“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 an officer of sales tax, 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 of Sales Tax and use of any machine on which such data is kept.”*

*(2) The office of Sales Tax, on the basis of the record, obtained under subsection (1), may, once in a year conduct audit:*

*Provided that in case the Collector 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 sales tax, not below the rank of Assistant Collector, to conduct an inquiry or investigation under section 38.”*

23. In 2010 the basic structure of Section 25(1) and (2) again reframed when Commissioner was empowered to call record and an officer of Inland Revenue may then was required to be authorized for the purpose of audit. The same, as amended for 2010, is as under:-

*“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 office of Inland Revenue authorized by the Commissioner, on the basis of the record, obtained under subsection(1), may, once in a year conduct audit:*

*Provided that in case the Commissioner has information or sufficient evidence showing that such registered person is involved in tax fraud or evasion of tax,*

*he may authorize an officer of Inland Revenue, not below the rank of Assistant Commissioner, to conduct an inquiry or investigation under section 38.*

*Provided further that nothing in this subsection shall bar the sales tax officer 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.”*

24. In 2018 third proviso was added for conducting audit once in every three years, which additional proviso is reproduced as under:-

“25. ....

*Provided also that audit under this section shall be conducted only once in every three years.*

(3) ...”

The above proviso however was again deleted in 2019’s Finance Act.

25. Since 2010, Commissioner entrusted with the mandate of calling the record as and when required. Now one thing is for sure that this “as and when required” is not meaningless as being consistently followed and maintained throughout. We now need to understand what could be the event or stage when this phrase may come into play and be given some meaning. Eventually when a Commissioner examines the return of a tax payer, he may have some queries which might be tempting to call record as he may not be able to reconcile and/or resolve them through return statement. Those queries must be understood and settled to the satisfaction of the commissioner before he could make up his mind further. Now the audit is nowhere in the scheme when such questions came for consideration after going through the returns while the Commissioner acts under 25(1) of Sales Tax Act, 1990. Surely the record may satisfy the curious mind but queries must be genuine at the time of calling the record which could not have been answered without going through the record required. Therefore, record calling could not be a roving exercise and cannot be a courtesy call either. The phrase “as and when required” had remained part of Section 25 throughout ever since it was introduced. It is not “as and when desired” but “as and when

required”. Therefore, the reasons in the shape of “mindful queries” must be in existence and disclosed before calling record for the fulfillment of requirement “as and when required”. The requirements of 25(1) are neither unfettered nor are so liberal that a hunting expedition would commence. It is the periodical transfiguration of the provisions of Section 25 that led us believe that there has to be an event or occasion when the Commissioner required the record and documents maintained under this Act or any other Act. Even requiring the documents/record for satisfaction of queries must be revealed so that notice may not transform into a hunting time.

26. In the case of Gul Ahmed Textile<sup>9</sup> the Division Bench of this Court “felt the necessity” of applicability of provisions of CPC “as and when needed” under the Constitutional jurisdiction of this Court. In terms of Article 199 of the Constitution the closest phrase used by the Bench of this Court in the cited judgment is “as and when needed”, which could be in consonance with the present phrase “as and when required” i.e. only when it is applicable and not on mere desire. “As and when” is just another adaptation of “if and when”. “As and when” often used in statement of requirements, obligations, conditions and necessities. “If and when” or “as and when” are ordinary words of condition or of conditional limitations as enlisted in *Colleton v. Malmstrom*<sup>10</sup>.

27. Now we shall turn to the second limb of Section 25 which is phrased as under:-

*“(2) The officer of Sales Tax, on the basis of the record, obtained under sub-section (1), may, once in a year conduct audit:*

28. In the first step of Section 25 i.e. 25(1), it was the Commissioner who took the charge of calling the documents as required by him and after being satisfied and/or unsatisfied he may take further steps. In

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<sup>9</sup> PLD 2019 Sindh 144

<sup>10</sup> 8 N.J. Misc. 418 (1930)

case he is satisfied after going through record there will be no further exercise under section 25(2). However, if the mindful queries were not met, he may authorize an officer of the Inland Revenue, on the basis of record obtained under subsection (1) by him, to conduct audit. Now, if the officer of the Inland Revenue subordinate to the Commissioner is under the obligatory command of Commissioner to conduct audit then the Commissioner must disclose the discrepancies he found while forwarding record already obtained by him, for audit be conducted in pursuance of the queries of the Commissioner, which queries must see the daylight so that the officer of the Inland Revenue proceed accordingly. The officer of the Inland Revenue on his own without having knowledge of discrepancies, queries of the Commissioner, cannot start the proceedings of audit which has to be under the authorization. It would only be general audit but not as contemplated under section 25(1) which compelled the commissioner to call record. The authorization thus should contain the reasons and mindful queries required to be processed through the audit which he has passed on to designated officer.

29. Further, the way the Dewan Sugar and Pakistan Tobacco judgments interpret subsection (2), i.e., with the phrase “on the basis of the record, obtained under sub-section (1)” applying to the conduct of the audit by the officer of Inland Revenue and not the selection for audit by the Commissioner, in our view it requires re-writing sub-section (2) and moving this phrase to the beginning of the said subsection to give achieved meaning as interpreted in these referred judgments of Dewan Sugar and Pakistan Tobacco.

30. The plain reading of this phrase is that it applies to the Commissioner’s act of authorizing the officer to conduct the audit, i.e., selecting the taxpayer for an audit, and not the officer’s act of conducting the audit itself.



31. Some arguments have also been raised by respondents' counsel with regard to proviso to Section 25 of *ibid* Act. The first proviso to Section 25(2) provides that where the Commissioner has sufficient information that the taxpayer is involved in tax fraud or evasion, he may authorize an officer to conduct an inquiry or investigation under Section 38. This clearly implies that sub-section (2) does not concern the manner in which an audit is to be conducted, but specifically concerns selection of a person for an audit, inquiry or investigation. If the selection for audit had to be made under sub-section (1), as the *Dewan Sugar and Pakistan Tobacco* judgments suggest, then this proviso should have been inserted in sub-section (1) and not sub-section (2).

32. No doubt these two provisions of Section 25 are distinct and different but inseparable as well. Reason being that the Commissioner who called the documents and/or record of the taxpayer for the satisfaction of the queries and objections in context of the returns, he must have formed a view for the officer of Inland Revenue to be communicated for conducting an audit. Subsection (2) of Section 25 cannot work independently unless the Commissioner has framed such obligations on the basis of record that "HE" obtained.

33. The example set out by this Court in the *Pfizer*<sup>11</sup> judgment establishes that the purpose of Section 25 is something more than simply ensuring general compliance of the law by taxpayers or checking the veracity of random returns. It is to check the veracity of returns where the Commissioner has reasons to believe that return has not been properly filed or to check instances of tax evasions and tax fraud.

34. In interpreting Section 25 of the 1990 this Court should adopt a purposive approach to express the legislative intent. The superior courts have consistently affirmed this approach in interpreting provisions of

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<sup>11</sup> 2016 PTD 1429

statutes in the cases of Saif-ur-Rehman<sup>12</sup>, Muhammad Nawaz Chandio<sup>13</sup>, Dilawar Hussain<sup>14</sup> and Director General FIA<sup>15</sup>.

35. The arguments of Mr. Metlo that the Commissioner may have reasons to call documents/record but is not under obligation to disclose is novel. It strikes at the root of the concept of judicial review. All administrative actions are subject to judicial review. To judicially review such actions, courts must be able to see its legitimacy, based on which the authority has acted. If no legitimate occasions are disclosed, there is no basis on which an action can be judicially reviewed. This is precisely why the courts have consistently “read in” the requirement to provide reasons in all statutes, even where such requirement is not explicitly mentioned in a statute<sup>16</sup>.

36. Thus, insofar as Section 25 is concerned, we would conclude that for purposes of Section 25(1) Commissioner must frame legitimate mindful queries to the knowledge of a taxpayer after going through the returns which must be either be satisfied after calling the record or otherwise. In case such mindful queries remained unsatisfied, he then was obliged to give reasons under subsection (2) of Section 25 for conducting audit.

#### **Commissioner’s Independence under section 25:**

37. Under the scheme of 1990 Act FBR, has power to select a taxpayer for audit under section 72B of the Act, which is random and/or parametric balloting basis while the Commissioner has power to select a person for an audit under section 25 after applying his mind and

<sup>12</sup> 2018 SCMR 1885 (Saif-ur-Rehman v. Additional District Judge & others)

<sup>13</sup> 2016 SCMR 875 (Muhammad Nawaz Chandio v. Muhammad Ismail Rahu and others)

<sup>14</sup> PLD 2016 SC 514 (Dilawar Hussain and others v. Province of Sindh and others)

<sup>15</sup> 2016 SCMR 447 (Director General, FIA and others v. Kamran Iqbal and others)

<sup>16</sup> (i) Muhammad Amin Muhammad Bashir v. Government of Pakistan - 2015 SCMR 630 at 637 D to 638 F (SCP), (ii) Zahir Shah v. Muhammad Usman Ghani - 2005 YLR 1394 at 1399 E to F, 1401 I (LHC/SB), (iii) Chaudhry Muhammad Hussain v. Commissioner of Income Tax, 2005 PTD 152 at 159 A, 162 F to 163 G (LHC/SB), (iv) Airport Support Services v. Airport Manager, Quid-e-Azam International Airport, Karachi - 1998 SCMR 2268 at 2277 D (SCP)

providing reasons. The provisions of Section 72B is to ensure general compliance with the law by all taxpayers whereas Section 25 is to examine the veracity of specific taxpayer's returns based on commissioner's queries and reasons arising out of independent returns and record. The act of examining the record and selection is a process of application of mind and therefore reasoning would become an essential ingredient for an exercise to be undertaken under Section 25.

38. The powers of the Commissioner under section 25 and the powers of FBR under section 72B, as stated above, are independent. The former is based on subjective criteria and the Commissioner is empowered to critically analyse the returns of taxpayer whereas the Commissioner is required to apply his mind to the case of individual taxpayer and decide if there are reasons to select a taxpayer for audit. The FBR's powers under section 72B are objective in substance; it is being done under an objective policy for that year and then the taxpayer are selected and/or a sector or sectors of taxpayers are selected through computer balloting on the basis of criterion. This separation of powers is further clarified through explanation added to Section 25 which is as under:-

*“Explanation:- For the purpose of section 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.”*

39. Although it extends powers of board to have access to premises, stock, accounts, record etc. but impliedly it also separates the powers of Board and Commissioner/Officer Inland Revenue. If such directions are given by the FBR to the Commissioner to select a taxpayer or a sector for

an audit under section 25 then the two provisions would collapse and would render either of them redundant and inefficacious.

40. Thus, while the Commissioner applied mind and provide reasons for selection, the later scheme of FBR under section 72B enables it to select a taxpayer through random and parametric balloting based on the development of a software which takes over the task of a commissioner.

41. Under the scheme of Sales Tax Act, 1990 a simple letter alone by the Board cannot form a yardstick to purposely trespass the independent jurisdiction of the Commissioner which may be a debatable issue in the case of Income Tax Ordinance, 2001. For the purposes of present issues originating from Sales Tax Act, 1990 and Federal Excise Act, 2005, it is usurpation of independence of Commissioner. Proceedings under section 25 depend on the discretion regulated under the law, which is directed to be exercised by the Board and the manner in which it is to be accomplished. If it trespasses the independence and discretionary rights of the Commissioner based on an independent scheme such as Section 25 then it amounts to invading the independent powers.

42. In the present case FBR has issued circulars containing detailed directions to its officers with strict timeline for selection and completion of audit of all sectors mentioned therein which includes oil refineries, oil marketing companies, traders of electronics, automobiles, manufacturers of beverages etc. The timeline provided by the FBR was specified in the sense that:

- i) Taxpayer must be selected for audit;
- ii) Audit report must be issued;
- iii) Show-cause notice must be issued;
- iv) Assessment order must be passed; and
- v) Final report be provided to the FBR

Consequently in pursuance of above directions audit notices were issued to the petitioners for multiple tax years in accordance with these timelines.

43. This is the reason that sample notices for all the sectors have been reproduced above in order to demonstrate that it is an automatic selection and in some cases even notices calling for documents/record under subsection (1) of Section 25 under automatic audit selection. The pending petitions could be concluded/ decided on this count alone. Perusal of these circulars and timing of the audit selection leave no doubt that entire exercise by the Commissioner is being carried out at the behest and on directions of the FBR and will eventually (as could be seen) result in demand being created against the petitioners and we feel FBR itself is responsible for this foul play.

44. Cumulative effect of the above discussion will lead us to conclude that the impugned notices must fail and hence the additional consideration raised by the counsels regarding third proviso i.e. “once in three years” and later “once in a year” become irrelevant and left with academic bearing only, hence we conclude to decide these petitions and High Court Appeals on the basis of above reasoning and leave above additional grounds for some other appropriate cases where it would be more effective, relying on Tiwana<sup>17</sup>.

45. Thus, on the basis of above discussion petitions are allowed, impugned notices are quashed and High Court Appeals filed by the department merits no consideration and are accordingly dismissed.

Dated: 20.12.2021

**Judge**

**Judge**

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<sup>17</sup> 2015 SCMR 1739 (Lahore Development Authority v. Ms. Imrana Tiwana)

LIST OF CASES CONNECTED ALONGWITH  
Const. P. 4729/2021 Karachi

**Wazir Ali Ind Ltd VS Fed. of Pakistan and others**

S. No	Case No	Case Title
1	<a href="#">Const. P. 2234/2021</a>	Byco Petroleum Ltd VS Pakistan and Others
2	<a href="#">Const. P. 2235/2021</a>	Byco Petroleum Ltd VS Pakistan and Others
3	<a href="#">Const. P. 2236/2021</a>	Byco Petroleum Pakistan Ltd VS Pakistan and Others
4	<a href="#">Const. P. 2308/2021</a>	National Refinery Ltd VS Pakistan and Others
5	<a href="#">Const. P. 2309/2021</a>	National Refinery Ltd VS Pakistan and Others
6	<a href="#">Const. P. 2310/2021</a>	National Refinery Ltd VS Pakistan and Others
7	<a href="#">Const. P. 2406/2021</a>	Shell Pakistan Ltd VS Pakistan and Others
8	<a href="#">Const. P. 2407/2021</a>	Shell Pakistaqn Ltd VS Pakistan and Others
9	<a href="#">Const. P. 2408/2021</a>	Shell Pakistan Ltd VS Pakistan and Others
10	<a href="#">Const. P. 2411/2021</a>	Puma Energy Pakistan Pvt Ltd VS Pakistan and Others
11	<a href="#">Const. P. 2412/2021</a>	Puma Energy Pakistan Pvt Ltd VS Pakistan and Others
12	<a href="#">Const. P. 2413/2021</a>	Puma Energy Pakistan Pvt Ltd VS Pakistan and Other
13	<a href="#">Const. P. 2414/2021</a>	Puma Energy Pakistan Pvt Ltd VS Pakistan and Others
14	<a href="#">Const. P. 2415/2021</a>	Puma Energy Pakistan Pvt Ltd VS Pakistan and Others
15	<a href="#">Const. P. 2468/2021</a>	M/s PSO Co. Ltd VS Fed. of Pakistan and Others
16	<a href="#">Const. P. 2469/2021</a>	M/s PSO Co. Ltd VS Fed. of Pakistan and Others
17	<a href="#">Const. P. 2470/2021</a>	M/s PSO Co. Ltd VS Fed. of Pakistan and Others
18	<a href="#">Const. P. 2471/2021</a>	M/s PSO Co. Ltd VS Fed. of Pakistan and Others
19	<a href="#">Const. P. 2492/2021</a>	Be Energy Ltd VS Pakistan and Others
20	<a href="#">Const. P. 2493/2021</a>	Be Energy Ltd VS Pakistan and Others
21	<a href="#">Const. P. 2494/2021</a>	Be Energy Ltd VS Pakistan and Others
22	<a href="#">Const. P. 2613/2021</a>	M/s Pakistan Refinery Ltd VS Fed. of Pakistan & Ors
23	<a href="#">Const. P. 2780/2021</a>	Hascol Petroelum Ltd VS Fed. of Pakistan and Others
24	<a href="#">Const. P. 3034/2021</a>	Dawlance (Pvt) Ltd VS Pakistan and Others
25	<a href="#">Const. P. 3035/2021</a>	Del Electronics Pvt Ltd VS Pakistan and Others
26	<a href="#">Const. P. 3036/2021</a>	United Refrigeration Ind Ltd VS Pakistan and Others
27	<a href="#">Const. P. 3094/2021</a>	M/s Shabbir Tiles & Ceramics VS FBR and Others
28	<a href="#">Const. P. 3377/2021</a>	Lucky Motor Corp Ltd VS Fed. of Pakistan and Others
29	<a href="#">Const. P. 3508/2021</a>	Afzal Motor (Pvt) Ltd VS Fed. of Pakistan and Others
30	<a href="#">Const. P. 3509/2021</a>	Deawoo Pak Motors Pvt Ltd VS Fed. of Pakistan and Others
31	<a href="#">Const. P. 3510/2021</a>	Ghandhara Ind Ltd VS Fed. of Pakistan and Others
32	<a href="#">Const. P. 3511/2021</a>	Ghandhara Nissan Ltd VS Fed. of Pakistan and Others
33	<a href="#">Const. P. 3526/2021</a>	M/s Ghandhara DF (Pvt) Ltd VS Fed. of Pakistan and Others
34	<a href="#">Const. P. 3544/2021</a>	Master Changan Motors Ltd VS Fed. of Pakistan and Others
35	<a href="#">Const. P. 3545/2021</a>	M/s Fuso Master Motors Pvt Ltd VS Fed. of Pakistan and Others
36	<a href="#">Const. P. 3546/2021</a>	Master Motors Corp Pvt Ltd VS Fed. of Pakistan and Others
37	<a href="#">Const. P. 3570/2021</a>	M/s Hinopak Motors VS Fed. of Pakistan and Others

38	<a href="#">Const. P. 3704/2021</a>	Master Changann Motors Ltd VS Fed. of Pakistan and Others
39	<a href="#">Const. P. 3754/2021</a>	Lucky Motor Corp VS Pakistan and Others
40	<a href="#">Const. P. 3790/2021</a>	Automobiles Corp of Pakistan VS Fed. of Pakistan and Others
41	<a href="#">Const. P. 4090/2021</a>	M/s Sara Automobiles Ind VS Fed. of Pakistan and Others
42	<a href="#">Const. P. 4170/2021</a>	M/s Teeno Pack Telecom Pvt Ltd VS Fed. of Pakistan and Others
43	<a href="#">Const. P. 4202/2021</a>	Philip Morris Pakistan Ltd VS Fed. of Pakistan and Others
44	<a href="#">Const. P. 4403/2021</a>	Pakistan Beverages Ltd VS Fed. of Pakistan and Others
45	<a href="#">Const. P. 4405/2021</a>	Pakola Products Ltd VS Fed. of Pakistan and Others
46	<a href="#">Const. P. 4677/2021</a>	Seasons Edible Oil VS Fed. of Pakistan and Others
47	<a href="#">Const. P. 4722/2021</a>	Atlas Honda Ltd VS Pakistan and Others
48	<a href="#">Const. P. 4723/2021</a>	Atlas Honda Ltd VS Pakistan and Others
49	<a href="#">Const. P. 4730/2021</a>	Ahmed Vegetable Oil & Ghee Mills VS Fed. of Pakistan and Others
50	<a href="#">Const. P. 4731/2021</a>	Ahmed Oil & Ghee Ind Ltd VS Fed. of Pakistan and Others
51	<a href="#">Const. P. 4732/2021</a>	Mapak Edible Oil (Pvt) Ltd VS Fed. of Pakistan and Others
52	<a href="#">Const. P. 4733/2021</a>	Dalda Foods Ltd VS Fed. of Pakistan and Others
53	<a href="#">Const. P. 4734/2021</a>	Pakagro Oil Mills (Pvt) Ltd VS Fed. of Pakistan and Others
54	<a href="#">Const. P. 4759/2021</a>	Hitech Oil & Mills Pvt Ltd VS Fed. of Pakistan and Others
55	<a href="#">Const. P. 4760/2021</a>	Shujabad Agro Industries Pvt Ltd VS Fed. of Pakistan & Ors
56	<a href="#">Const. P. 4761/2021</a>	Abdullah Oil Industries VS Fed. of Pakistan & Ors
57	<a href="#">Const. P. 4762/2021</a>	Taqwa Oil Industries (Pvt) Ltd VS Fed. of Pakistan & Ors
58	<a href="#">Const. P. 4763/2021</a>	M/s M.M Ghee Mills VS Fed. of Pakistan and Others
59	<a href="#">Const. P. 4764/2021</a>	M/s Ahmed Oil Ind (Pvt) Ltd VS Fed. of Pakistan and Others
60	<a href="#">Const. P. 4765/2021</a>	A&Z Agro Industries (Pvt) Ltd VS Fed. of Pakistan & Ors
61	<a href="#">Const. P. 4766/2021</a>	Palm Zone (Pvt) Ltd VS Fed. of Pakistan & Ors
62	<a href="#">Const. P. 4767/2021</a>	M.H Qasim Industries (Pvt) Ltd VS Fed. of Pakistan & Ors
63	<a href="#">Const. P. 4828/2021</a>	M/s Ghandhara Nissan Ltd VS Fed. of Pakistan and Others
64	<a href="#">Const. P. 4857/2021</a>	Indus Motor Co. Ltd VS Pakistan and Others
65	<a href="#">Const. P. 4858/2021</a>	Indus Motor Co. Ltd VS Pakistan and Others
66	<a href="#">Const. P. 4863/2021</a>	Mehran Bottlers (Pvt) Ltd VS Fed. of Pakistan and Others
67	<a href="#">Const. P. 4864/2021</a>	Taqwa Oil Ind (Pvt) Ltd VS Fed. of Pakistan and Others
68	<a href="#">Const. P. 4895/2021</a>	Sukkur Beverages Ltd VS Fed. of Pakistan and Others
69	<a href="#">Const. P. 5039/2021</a>	Popular Juice Ind (Pvt) Ltd VS Fed. of Pakistan and Others
70	<a href="#">Const. P. 5040/2021</a>	Popular Food Ind (Pvtt) Ltd VS Fed. of Pakistan and Others
71	<a href="#">Const. P. 5051/2021</a>	M/S Raazy Motor Industries (Pvt) Ltd V Federation of Pakistan & Ors
72	<a href="#">Const. P. 5087/2020</a>	Mst. Seema Akber Lalani VS Fed. of Pakistan and Others
73	<a href="#">Const. P. 5087/2021</a>	Habib Oil Mills (Pvt) Ltd VS Fed. of Pakistan and Others
74	<a href="#">Const. P. 5191/2021</a>	M/s R & I Electrical Appliances (Pvt) Ltd VS Fed. of Pakistan & ors.
75	<a href="#">Const. P. 5224/2021</a>	M/s Paracha Textile Mills VS Fed. of Pakistan and Others
76	<a href="#">Const. P. 5338/2020</a>	Al-Sabahat Enterprises VS Fed. of Pakistan and Others
77	<a href="#">Const. P. 5339/2020</a>	M/s Global Textile VS Fed. of Pakistan and Others
78	<a href="#">Const. P. 5518/2021</a>	Master Motor Corp VS Fed. of Pakistan and Others
79	<a href="#">Const. P. 5737/2021</a>	M/s W.R Eidle Oil Refinery VS Fed. of Pakistan and Others
80	<a href="#">Const. P. 6318/2021</a>	M/s Hantax VS Fed. of Pakistan and Others
81	<a href="#">Const. P. 6332/2021</a>	M/s Pacific Oil Mills Pvt Ltd VS Fed. of Pakistan and Others
82	<a href="#">Const. P. 6433/2021</a>	M/s Pakistan Oil Mills Pvt Ltd VS Fed. of Pakistan and Others

83	<a href="#">Const. P. 6636/2021</a>	Razzaque Basit Oil Ind Pvt Ltd VS Fed. of Pakistan and Others
84	<a href="#">Const. P. 6647/2021</a>	Afzal Motos Pvt Ltd VS Fed. of Pakistan and Others
85	<a href="#">Const. P. 6724/2021</a>	M/s Zainab Cooking Oil Mills Pvt Ltd VS Fed. of Pakistan and Others
86	<a href="#">Const. P. 6725/2021</a>	M/S Al Noor Oil Extraaction Plant (Pvt) Ltd VS Federation of Pakistan & Others
87	<a href="#">Const. P. 6801/2021</a>	Chase Departmental Store VS Fed. of Pakistan and Others
88	<a href="#">Const. P. 6802/2021</a>	Chase Retail Store VS Fed. of Pakistan and Others
89	<a href="#">Const. P. 6822/2021</a>	M/s N.K Equipment Corp VS Fed. of Pakistan and Others
90	<a href="#">H.C.A 62/2020</a>	Commissioner I-R Zone-I & another VS M/s. Indus Motor Company Ltd. & others
91	<a href="#">H.C.A 63/2020</a>	Commissioner I-R Zone-IV & another VS M/s. Byco Oil Pakistan Ltd. another
92	<a href="#">H.C.A 83/2020</a>	Commissioner I-R Zone-V VS M/s. National Foods Limited & others