

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D-1079 of 2022

M/s. Zam Zam LPG (Pvt.) Limited

Vs.

Federation of Pakistan and 03 others

Present:

Mr. Justice Irfan Saadat Khan

Justice Mrs. Rashida Asad

Date of hearing : 22.08.2022.
For the petitioner : Mr. Mushtaq Hussain Qazi Advocate
For the respondent No.1 : Pir Riaz Muhammad Shah, Deputy Attorney General for Pakistan (DAG).
For the respondents No.2 to 4 : Dr. Shah Nawaz Advocate.

JUDGMENT

IRFAN SAADAT KHAN, J. The instant petition has been filed challenging the validity of the letter bearing No.CIR/Audit-III/CTO/KHI/ST/US-25/2021/255 dated 12.11.2021 issued by the respondent No.3.

2. Briefly stated the facts of the case are that the petitioner is a regular taxpayer who received the above referred notice, which according to them is illegal and without jurisdiction and does not fulfill the parameters as enshrined under Section 25 of the Sales Tax Act, 1990 (**the Act**).

3. Mr. Mushtaq Hussain Qazi Advocate has appeared on behalf of the petitioner and, at the very outset, stated that the notice at hand is not only illegal but also uncalled for. He further stated that perusal of

the impugned notice dated 12.11.2021, followed by letter dated 17.11.2021 and notice dated 19.01.2022, would reveal that the case of the petitioner was selected for audit, without assigning cogent reasons. He stated that it is a well settled proposition of law that while selecting a case for audit, specific reasons for the same have to be given but in the instant matter, according to him, no such reasons have been given, which action is according to him clearly violative of Section 24A of the General Clauses Act 1897 also. In support of his above contention, he placed reliance on the following decisions:

- i) Muhammad Amin Muhammad Bashir Limited Vs. Government of Pakistan through Secretary Ministry of Finance, Central Secretariat, Islamabad and others (2015 SCMR 630)*
- ii) Zain Yar Khan Vs. The Chief Engineer, C.R.B.C., WAPDA. D.I. Khan and another (1998 SCMR 2419)*

4. The learned counsel further stated that through a plethora of judgments rendered by superior Courts, the procedure for selecting the case for audit have been discussed and dilated upon. Learned counsel thereafter read out the provisions of Section 25 of the Act to supplement his arguments. He relied upon the following judgments where it has been held that if the procedure prescribed under Section 25 of the Act is not followed, the action of the department would be rendered an illegality:

- i) Pakistan Telecommunication Company Ltd. Vs. Federation of Pakistan (2016 PTD 1484)*
- ii) Indus Motor Company Limited and others Vs. Pakistan and others [(2020) 121 Tax 8(H.C. Kar.)]*
- iii) Messrs Airport Support Services Vs. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others (1998 SCMR 2268)*

- iv) *Amanullah Khan and others Vs. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others (PLD 1990 SC 1092)*
- v) *Government of N.W.F.P. through Secretary and 3 others Vs. Mejee Flour and General Mills (Pvt.) Ltd., Mardan and others (1997 SCMR 1804)*
- vi) *Director Food, N.W.F.P and another Vs. Messrs Madina Flour and General Mills (Pvt.) Ltd. and 18 others (PLD 2001 Supreme Court 1)*
- vii) *Wateen Telecom Ltd. through Authorized Attorney Vs. Sindh through The Secretary of Ministry of Finance Government of Sindh, Karachi and 2 others [(2019) 120 Tax 120 Tax 244(H.C. Kar.)]*
- viii) *Hyundai Nishat Motor (Pvt.) Limited Vs. The Federal Board of Revenue through its Chairman etc. (PTCL 2022 CL. 56)*
- ix) *Dewan Sugar Mills Ltd. Vs. Federation of Pakistan and others (PTCL 2022 CL. 67)*
- x) *M/s. Pakistan Tobacco Company Limited Vs. Federation of Pakistan through the Secretary, M/o Finance, etc. (PTCL 2022 CL. 202)*
- xi) *Raza Motor Industries. Vs. The Federation of Pakistan, etc. (PTCL 2022 CL 28)*

5. The learned counsel also stated that though the petitioner was informed with regard to selection of its case for audit, but the legal requirements for giving the reasons for such a selection were missing hence, according to him, the very issuance of the notice, assumption of jurisdiction and thereafter proceeding with the matter all are illegal exercises. He further stated that it is a settled proposition of law that a thing is required to be done in the manner prescribed, or not done at all. He stated that where a superstructure is based on an illegality, the same is bound to collapse. In support of these contentions, the learned counsel has placed reliance on the following decisions:

- i) *Shahida Bibi and others Vs. Habib Bank Limited and others (PLD 2016 Supreme Court 995)*

- ii) *Zia ur Rehman Vs. Syed Ahmed Hussain and others (2014 SCMR 1015)*
- iii) *Daniyal Aziz Vs. Muhammad Tariq Anis and others (2017 CLC Note 46)*
- iv) *Muhammad Anwar and others Vs. Mst. Ilyas Begum and others (PLD 2013 Supreme Court 255)*
- v) *Arslan Poultry (Pvt.) Ltd. Vs. Officer Inland Revenue and others (2015 PTD 448)*
- vi) *Port Qasim Authority through Secretary Vs. Executive District Officer (Revenue), Karachi and others (2017 YLR Note 14) [One of us, namely Irfan Saadat Khan J. was a co-author of this decision.]*
- vii) *Shakeel Ahmed Vs. Pakistan Telecommunication Company Limited through President and others [2017 PLC (C.S.) Note 76]*
- viii) *Suo Motu Case No.18 of 2010: In the matter of (Violation of Public Procurement Rules, 2004) [PLD 2011 Supreme Court 927]*
- ix) *Haji Khan Bhatti Vs. Province of Sindh and 4 others (2017 CLC 1650)*
- x) *Shahnawaz Mallah and 2 others Vs. Raza Muhammad Brohi and 8 others (2013 CLC 792)*
- xi) *Muhammad Tariq Khan Vs. Khawaja Muhammad Jawad Asami and others (2007 SCMR 818)*
- xii) *Mst. Balqees Begum Vs. Additional District Judge and others (2020 CLC 1950)*
- xiii) *Executive District Officer (Education), Rawalpindi Vs. Muhammad Younas (2007 SCMR 1835)*
- xiv) *Moulana Atta-ur-Rehman Vs. Al-Hajj Sardar Umar Farooq and others (PLD 2008 Supreme Court 663)*
- xv) *Omer Ismail Khalid and others Vs. Pakistan Medical and Dental Council and others (PLD 2015 Islamabad 65)*
- xvi) *Asad Jamal Daudpoto Vs. Assistant Commissioner Ratodero and 4 others (2020 CLC 1945)*
- xvii) *Shafqat Ali Shah Vs. Nasreen Akhtar and 3 others (PLD 2020 Peshawar 148)*

6. The learned counsel at the end prayed that since the notice suffers with the above referred inherent legal defects, hence the same may be vacated, being illegal and without jurisdiction.

7. Dr. Shah Nawaz Advocate has appeared on behalf of the respondents No.2 to 4 and stated that the instant petition is not maintainable since audit is not an actionable injury. He stated that the respondents are fully authorized under Section 25 of the Act to select any case for audit and in the instant case due intimation was given to the petitioner with regard to selecting his case for audit. He invited our attention to Annexure "B" available at page 31 of the file with regard to the said intimation being given to the petitioner. He stated that the instant petition is premature and not maintainable as when the case of the petitioner was selected for audit, due intimation was given to the petitioner who was legally obliged, under the provisions of Section 25 of the Act, to furnish the required details/documents etc. to the department. He stated that for selecting cases for audit a procedure is provided under the law and it cannot be said that any illegality or a mala fide action with regard to selection of the case for audit has been made by the department. He stated that the instant petition is misconceived as without giving required details and documents to the department, since certain discrepancies were found with regard to payment of taxes, the instant petition has been filed which, according to him, is not maintainable. In support of his contention, the learned counsel placed reliance on the decision given in the case of *Commissioner of Inland Revenue, Sialkot and others Vs. Messrs Allah Din Steel and Rolling Mills and others (2018 SCMR 1328)*.

8. The learned counsel further submitted that the matter pertains to some factual discrepancies which are not amenable to a writ petition. According to Dr. Shah Nawaz reasons for selecting petitioner's case for audit were duly communicated to them, however, instead of responding to those queries, the petitioner has filed the instant petition prematurely. He submitted that neither there is any jurisdictional defect in the present matter nor the matter is barred by law or that of abuse of process of law, therefore, the petitioner is legally obliged to furnish the required details/documents etc.

9. The learned counsel stated that the instant petition is not maintainable on the ground that the petitioner has already submitted to the jurisdiction to the department without challenging the initial selection of the case for audit hence, according to him, if a person surrenders to the jurisdiction of an authority, he cannot challenge the same subsequently. The learned counsel next stated that under identical circumstances in a latest decision given by the Hon'ble Supreme Court of Pakistan in the case of *Commissioner Inland Revenue and others Vs. Jahangir Khan Tareen and others (2022 SCMR 92)* it has been held that even the issue of jurisdictional error is to be taken before the hierarchy provided under the statute. He finally submitted that in view of the above referred facts and the law, this petition is wholly misconceived and not maintainable as, according to him, the department has selected the case for audit under the provisions of Section 25 of the Act in accordance with law and therefore this petition merits dismissal with cost. In support of his

above contentions, the learned counsel has placed reliance on the following decisions:

- i) *Indus Motor Company Limited and others Vs. Pakistan and others [(2020) 121 Taxation 8] [also relied upon by the counsel for the petitioner].*
- ii) *Dr. Iqrar Ahmad Khan Vs. Dr. Muhammad Ashraf and others (2021 SCMR 1509)*
- iii) *Justice Khurshid Anwar Bhinder Vs. Federation of Pakistan and another (PLD 2010 SC 483)*
- iv) *Decision of this Court given in the case of Atlas Honda Limited Vs. Federation of Pakistan (C.P No.D-5107 of 2021)*

10. Pir Riaz Muhammad Shah, DAG appearing on behalf of the respondent No.1 has adopted the arguments advanced by Dr. Shah Nawaz.

11. We have heard all the learned counsel at length and have also perused the record and the decisions relied upon by them.

12. Before proceeding any further, we deem it appropriate to reproduce Section 25 of the Act hereunder, on which arguments have been put forward by both the learned counsel:

25. Access to record, documents, etc.--(1) *A person who is required to maintain any record or documents under this Act [or any other law] shall, as and when required by [Commissioner], produce record or documents which are in his possession or control or in the possession or control of his agent; and where such record or documents have been kept on electronic data, he shall allow access to [the officer of Inland Revenue authorized by the Commissioner] and use of any machine on which such data is kept.]*

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

Provided that in case the Commissioner has information or sufficient evidence showing that such registered person is involved in tax fraud or evasion of tax, he may authorize an officer of Inland Revenue, not below the rank of Assistant Commissioner, to conduct an inquiry or investigation under section 38:

Provided further that nothing in this sub-section shall bar the officer of Inland Revenue from conducting audit of the records of the registered person if the same were earlier audited by the office of the Auditor-General of Pakistan.

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

(3) After completion of the audit under this section or any other provision of this Act, the officer of Inland Revenue may, after obtaining the registered person's explanation on all the issues raised in the audit shall pass an order under section 11.

*[(4) * * *]*

*[(4A) * * *]*

(5) Notwithstanding the penalties prescribed in section 33, if a registered person wishes to deposit the amount of tax short paid or amount of tax evaded along with [default surcharge] voluntarily, whenever it comes to his notice, before receipt of notice of audit, no penalty shall be recovered from him:

Provided if a registered person wishes to deposit the amount of tax short paid or amount of tax evaded along with [default surcharge] during the audit, or at any time before issuance of show cause notice [* *], he may deposit the evaded amount of tax, [default surcharge] under section 34, and twenty-five per cent of the penalty payable under section 33:*

Provided further that if a registered person wishes to deposit the amount of tax short paid or amount of tax evaded along with [default surcharge] after issuance of show cause notice, he shall deposit the evaded amount of tax, [default surcharge] under section 34, and full amount of the penalty payable under section 33 and thereafter, the show cause notice, shall stand abated.]

[Explanation.--For the purpose of sections 25, 38, 38A, 38B and 45A and for removal of doubt, it is declared that the powers of the Board, Commissioner or officer of Inland

Revenue under these sections are independent of the powers of the Board under section 72B and nothing contained in section 72B restricts the powers of the Board, Commissioner or officer of Inland Revenue to have access to premises, stocks, accounts, records, etc. under these sections or to conduct audit under these sections.]

13. It may be noted that vide letter dated 12.11.2021 intimation was given to the petitioner with regard to selection of its case for audit under Section 25 of the Act and the reasons given for such a selection, as borrowed from the said letter, are that the petitioner had **“abnormal tax profile, dubious purchases and supplies”** and on these grounds notices for production of record dated 17.11.2021 and 19.01.2022 were issued. Perusal of the letter dated 12.11.2021 clearly reveals that the reasons given for selection of case for audit are vague, scanty, non-specific and ambiguous in nature. The law requires from the department that after selecting a case for audit, reasons have to be given for the said selection. Moreover, the reasons should be so demonstrated so as to show that those were the result of proper application of mind, meaningful in nature and should also be clear and definite. However in the instant matter the above reasons, in our view, as stated above, could neither be termed as specific nor clear but appears to be generic in nature as nothing has been spelt out in the letter that how the department has come to the conclusion with regard to abnormality in the tax profile, purchases and supplies being dubious in nature.

14. We are of the view that it cannot be said by the department that after a detailed examination and an overview of the record /documents, as furnished by the petitioner, after the selection of the

case for audit only then they would be able to justify the reasons of selection of case for audit with regard to the abnormal tax profile /dubious purchases and supplies of the petitioner as, in our view, this exercise if completed earlier, prior to the intimation given to the petitioner, then it was incumbent upon the department to have given specific reasons, cited instances and pointed out through the impugned letter as to those specific reasons for coming to the conclusion with regard to the abnormal tax profile, dubious purchases and supplies. In the decision given in the case of *Atlas Honda Ltd. Vs. Pakistan and others (C.P. No.D-5107 of 2021 along with 95 other petitions)* a Bench of this Court has observed as under:

19. The purposive interpretation of Section 177 requires the commissioner to apply his mind to each taxpayer's individual case. If he decides to select a taxpayer for audit he must give mindful, legitimate reasons that arises out from the record. If there is no independent application of mind in giving reasons to select a taxpayer for an audit under section 177 then the purpose of section 177 is not achieved and it could not be said to be an exercise undertaken by the Commissioner under section 177. Transparency must be ensured by Commissioner. The authorities were vested with the powers to exercise their discretions and it/they should act in a way that the structured discretion should be seen to have been done in a transparent and fair manner to avoid abuse of process as discussed in the case of Wateen Telecom.

20. We do not agree with the contention of Mr. Metlo, relying on Indus Sugar and PPL (Supra) cases that even irrelevant and illogical reasoning for calling record to conduct audit would serve the purpose and those illogical and irrelevant reasons would count towards the requirement of Section 177 to provide reasons. If that principle is taken to be correct then it would conclude the expression of providing reasons as utterly redundant, which is perhaps not the intent of the legislature. It would give a room to such officers to conduct roving and fishing expedition which has always been ruled out in dispensation of justice. Reasons should have arisen out of the subject however these reasons, at the same time, does not mean to be of taxpayer's liking but should make a reference to the context by logic. Section 177 empowers commissioner to call record for conducting audit and First proviso to it cuts it

in a way that reasons are inevitable to be followed by audit. Second Proviso further strengthened the stand that it must be communicated to the taxpayer. If that is the standing of reasons then its value cannot be diluted by saying that it carries no weight even if illogical and senseless reasons are provided. In the case of Celandgene Pharmaceuticals which is co-authored by the author of PPL, Bench observed that where notice under section 177 provides sufficient reasoning for selecting a case for audit, the law then does not provide for any alternate course for taxpayer. This interpretation would also supports the above understanding of reasons to be provided by Commissioner under section 177 of Ordinance 2001. Our understanding of Section 177 is also supported by Allah Din's case¹⁷ in Para 16 where emphasis on furnishing reasons was made and that it must be communicated to taxpayer.

21. Thus, under section 177 of the Ordinance 2001 the Commissioner himself must apply his mind to a specific taxpayer's return and if he decides to audit the taxpayer he must give reasons for his decision. Such reasons must be legitimate and mindful queries that must challenge the taxpayer's returns as framed and filed. A Commissioner is always expected to give mindful reason and if illogical reasons are considered as sufficient then perhaps there is no wisdom in submitting reasons at all. It could only be an eyewash and would lack transparency. By providing prior reasons before audit legislature has provided transparency in the process.

15. It may be noted that the provisions of Section 177 of the Income Tax Ordinance-2001 and Section 46 of the Federal Excise Act are parametria to the Section 25 of the Act. In the decision given in the case of *Pakistan Telecommunication Company Ltd.* (mentioned in para 4 above) a Bench of Islamabad High Court, after detailed discussion, has observed that giving reasons for selection of a case for audit are prerequisite of Section 25 of the Act and the powers enshrined in this regard upon the Commissioner have to be exercised in a rational manner as those powers are neither unguided nor unfettered nor a Commissioner can pick and choose arbitrarily and capriciously with regard to conducting audit in a matter. The learned Single Judges of this Court and that of Lahore High Court as well as

the Islamabad High Court in the cases of *Indus Motor Company Limited*, *Wateen Telecom Ltd. through Authorized Attorney*, *Dewan Sugar Mills Ltd.*, *Hyundai Nishat Motor (Pvt.) Limited*, *Raza Motor Industries and M/s. Pakistan Tobacco Company Limited* (cited above) have also highlighted this aspect that while exercising the powers under Section 25 of the Act, the department is required to give reasons and those reasons should demonstrate application of mind of the Commissioner in selecting the case for audit.

16. The word “reason” connotes an expression giving justification for an action, a ground to explain something, a consensus of informed thoughts whether factual or legal. In our view reasons should be so explicit so as to catch one’s eye at the first glimpse. It should not be a leap in a dark or a subject of fishing and roving expedition, but has to be based on sound principles of law. Before conducting audit, the department is legally obliged to muster those grounds after proper application of mind and thereafter, while confronting the taxpayer about selecting the case for audit, mindful as well as meaningful reasons have to be advanced, which have to be convincingly intimated to the taxpayer to enable the latter to furnish a suitable reply and advance objections, if any, and those reasons should be based on independent application of mind and, as explained above, not on the basis of some unfounded notions, or capricious believes. We are of the view that requirements of Section 25 would not be fulfilled until and unless proper, just and identifiable reasons are intimated to the taxpayer with regard to selection of his case for audit and only when such reasons are given and thereafter if no compelling response is

received, the case could be selected for audit and the other parameters as enshrined under Section 25 would then come into play, as this requirement of the law in our view cannot be termed to be simply procedural only.

17. The decisions relied upon by Dr. Shah Nawaz on the case of *Messrs Allah Din Steel and Rolling Mills and others* (mentioned above) is distinguishable from the facts obtaining in the instant matter as in the said judgment the Hon'ble Supreme Court of Pakistan, while dilating upon the issue of selection of case for audit, has categorically observed in paragraph 16 thereof that Section 25 provides a mechanism, which is required to be followed by the Taxation Officer /Auditor. The Apex Court has also observed that the Commissioner can call for the record and documents for conducting the audit of tax affairs of a person, provided he furnishes reasons for it. Now if the present case is examined, in the light of the dictum laid down by the Hon'ble Supreme Court, it would reveal that above decision supports the case of the petitioner rather than that of the department, as in the present case, as noted above, reasons given by the department for selecting the case for audit appear to be wholly vague, scanty and non-specific. The other decision relied upon by Dr. Shah Nawaz i.e. *Dr. Iqrar Ahmad Khan* (quoted supra) hardly has any bearing on the present case. Moreover the decision rendered in the case of *Jahangir Khan Tareen and others* (cited above) also has no bearing on the present case as the said decision discusses about legality or otherwise of a Show Cause Notice, which is not the present case, as the present case is that of selection of a case for audit.

18. We also tend to agree with the contention raised by Mr. Mushtaq Hussain Qazi that the parameters as enshrined under Section 24A of the General Clauses Act, with regard to exercise of discretion by an executive authority, for giving reasons for its decision are mandatory and any action taken by an executive authority in violation of that principle is liable to be struck down hence the decision given in the case of *Muhammad Amin Muhammad Bashir Limited, Zain Yar Khan, Messrs Airport Support Services and Amanullah Khan* (quoted above) are attracted in the present case. We also agree with Mr. Qazi that if an authority is saddled with the responsibility of exercising discretion, the said discretion has to be carried out fairly and justly. Reference in this regard may be made to the decision given in the case of *Mejee Flour and General Mills (Pvt.) Ltd.* (noted above). It is also a settled principle of law that a thing has to be done in the manner prescribed or not done at all and superstructure built on the basis of an illegality is liable to crumble to the ground. The decisions noted supra, vide paragraphs 5 of this judgment, thus are found to be relevant and applicable in the present matter.

19. As a result of what has been stated and noted above, we are of the view that the letter dated 12.11.2021 and the subsequent Notices dated 17.11.2021 and 19.01.2022 are not in accordance with law; the same therefore stand vacated. The petition, therefore, along with the listed application, stands allowed with no order as to cost.

However before parting with the order, we would like to state that the department is fully authorized under the law that if they have certain requisite material for selecting the case of the petitioner for audit, the same should be communicated to the petitioner and proceedings may be initiated afresh in accordance with law.

JUDGE

JUDGE

Karachi:

Dated: .09.2022.

Tahseen/PA