

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Mahmood A. Khan

C.P. No.D-5107 of 2021

Atlas Honda Ltd.

Versus

Pakistan & others

Along with 95 other petitions
(As per Annexure 'A' to this judgment)

Date of Hearing: 08.12.2021, 17.12.2021 and 20.12.2021

Petitioners:

Through Mr. Hyder Ali Khan, advocate along with Mr. Shaheer Roshan Shaikh, advocate, Mr. Sami-ur-Rehman Khan, advocate, Mr. Furqan Mushtaq, advocate and Mr. Hamza Waheed, advocate, Mr. Ovais Ali Shah, advocate along with Ms. Mariam Riaz, advocate, Ms. Fizzah Bucha, advocate and Mr. Umer Ilyas, advocate, Mr. Ijaz Ahmed, advocate, Qazi Umair Ali, advocate, Mr. Anwar Kashif Mumtaz, advocate along with Mr. Usman Alam, advocate and Mr. Ammar Athar Saeed, advocate, Mr. Inziam Sharif, advocate, Mr. Jawaid Farooqi, advocate, Mr. Hussain Ali Almani, advocate, Syed Mohsin Ali, advocate, Mr. Amin Bandukda, advocate, Mr. Naeem Suleman, advocate along with Mr. Arshad Hussain, advocate, Mr. Muhammad Salim Mangrio, advocate, Ms. Lubna Pervez, advocate, Mr. Abdul Rahim Lakhani, advocate, Mr. Abdul Jabbar Mallah, advocate, Mr. Atta Muhammad Qureshi, advocate, Mr. Naveed Sultan, advocate, Syed Muhammad Hassan Meerza, advocate, Mr. Saleem Altaf, advocate, Ms. Syeda Abida Bukhari, advocate, Mr. Darvesh K. Mandhan, advocate, Mr. Manzar Bashir, advocate, Mr. Waqas Asad Shaikh, advocate, Mr. Muhammad Faheem, advocate, Mr. Muhammad Aleem, advocate, Mr. Taimur Ahmed, advocate, Mr. Jehangir K. Agha, advocate, Mr. Muhammad Faheem Bhayo, advocate along with Mr. Muhammad Din Qazi, Mr. Saleem Altaf, advocate, Mr. Waseem Shaikh, advocate, Mr. Muhammad Khalid,

advocate, Mr. Muhammad Adeel Awan, advocate, Mr. Manzar Hussain Memon, advocate along with M/s Aamir Ali Shaikh and Irfan Ali Shaikh, advocates, Mr. Hashmatullah Aleem, advocate along with Mr. Aijaz Ahmed, advocate, Mr. Kamran Arshad, advocate.

Respondents:

Through Mr. Kafeel Ahmed Abbasi, DAG along with Mr. Hussain Bohra, Assistant Attorney General, Mr. Mr. Ameer Buksh Metlo, advocate, along with Mr. Fayaz Ali Metlo, advocate, Mr. Imran Ahmed Metlo, advocate and Mr. Barkat Ali, advocate, Mr. Irfan Mir Halepoto, advocate, Mr. Shahid Ali Qureshi, advocate, Mr. Munawwar Ali Memon, advocate, Mr. Ghulam Murtaza Korai, advocate, Mr. Qaim Ali Memon, advocate, Mr. Aatif Awan, advocate, Mr. Ali Tahir, advocate, Syed Shafqat Ali Shah Masoomi, advocate for FBR, Mr. Tauqir Ahmed, advocate for FBR, Rana Sakhawat Ali, advocate for FBR, Mr. Ayaz Sarwar Jamali, advocate for FBR along with Raja Love Kush, advocate, Mr. Akhtar Hussain Jabbar, advocate, Mr. Iqbal Hussain, advocate, Mr. Muhammad Zubair Hashmi, advocate, Mr. Taseer Ahmed, advocate, Mr. Imran Ali Mithani, advocate, Mr. Shahnawaz Memon, advocate, Mr. Muhammad Faisal Qureshi, advocate, Muhammad Bilal Bhatti, advocate, Mr. Ch. Mehmood Anwar, advocate, Mr. Imtiaz Ali Solangi, advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Root cause of this bunch of petitions is sectoral audit notices of FBR which triggered proceedings under section 177 of Income Tax Ordinance, 2001 (hereinafter referred to as "Ordinance 2001") on issuance of notices by Commissioner, violating rights of petitioners, as claimed.

2. For the sake of brevity, arguments raised by petitioners' counsel have been summarized collectively without any disrespect to any of them.

3. With their grievance of sectoral audit, counsels for petitioners argued that under the scheme of Ordinance 2001, FBR has the power to

select a taxpayer for an audit under section 214C based on a random or parametric ballot, whereas Commissioner has the power to select a person for an audit under section 177 after applying mind and providing reasons for such selection. The counsel emphasized that powers under the two provisions are independent. They argued that on numerous occasions Courts undisputedly held that powers of the Commissioner to select a person for audit under section 177 are independent of the powers of the FBR to select a person for an audit under section 214C of the Ordinance 2001. The distinction is also apparent that in the later, the FBR may select a taxpayer through a random or parametric ballot whereas in the former the Commissioner examines the contents of return and form independent legitimate reasons for scrutiny through audit.

4. Mr. Metlo, learned counsel appearing for respondents/ department, on the other hand, submitted that writ against such cause i.e. audit would not lie¹, Article 199 could only be enforced against specific right², which is being violated and since "audit denial" is not a right of taxpayer, neither it (audit) takes away any of the taxpayer's right, therefore no writ is maintainable³. The audit is just procedural scrutiny and the remedies under statute could be exhausted at the relevant time. He added that proceedings under section 177 are not amenable to writ jurisdiction⁴. He further argued that reasons provided by the Commissioner not necessarily found justiciable for taxpayer as such discretion rests upon Commissioner and taxpayer's intervention for justiciable reason is uncalled at this stage of calling documents to conduct audit⁵.

¹ PLD 1991 SC 691 (Mohammad Baran v. Board of Revenue)

² 2021 SCMR 1376 (Government of Khyber Pakhtunkhah v. Saeed-ul-Hasan)

³ 2015 PTD 2572 (Mujahid Oil Refinery (Pvt.) Ltd. v. Director I&I Inland Revenue)

⁴ 2009 PTD 20 (Honda Fort (Pvt.) Ltd. v. Commissioner of Income Tax)

⁵ 2016 PTD 2664 (Pakistan Petroleum Ltd. v. Pakistan)

5. Learned Deputy Attorney General Mr. Kafeel Ahmed Abbasi has relied upon Section 213 and 214 of Ordinance 2001 and section 4 of FBR Act 2007. He submitted that it is the Federal Board which may give guidelines and policies which are binding on the subordinate officials of the Board and the impugned directions of sectoral audit cannot be read as usurping the independent rights and independence of the Commissioner as available to him under section 177 of Ordinance 2001. He relied upon the case of Elahi Cotton⁶.

6. The effective question arising out of these petitions is whether the Commissioner can select taxpayer for an audit under section 177 of Ordinance 2001 on the directions of Federal Board of Revenue based on sectoral audit?

7. We have heard the learned counsel and perused material available on record and after thoughtful consideration formed a view about independence and independent provisions i.e. 177 and 214C of the Ordinance 2001 and our analysis are discussed as under:

8. The question of independent powers of Board and Chairman under sections 214C and 177 of Ordinance 2001 came before different benches and the most recent, which also embarked upon sectoral audit is of Islamabad High Court in the case of Pakistan Tobacco⁷.

9. Audit has always remained a matter of concern for taxpayers and at times genuinely and at times just to prolong, drag and gain time, proceedings were initiated by taxpayer challenging their selection for audit on different counts.

10. The audit is a highly time consuming and cumbersome exercise and the legislature in its conscious approach has carved out different mechanisms for achieving the end results. Section 214C of the Ordinance

⁶ 1997 PTD 1555 relevant pages 1652 & 1654

⁷ Judgment in Writ Petition 272 of 2021 in the case of Pakistan Tobacco

2001 is now made to stand against section 177 in the current dispute.

For the purposes of understanding true spirits, Sections 177 and 214C of ibid Ordinance 2001 are reproduced as under:-

177. Audit.— (1) The Commissioner may call for any record or documents including books of accounts maintained under this Ordinance or any other law for the time being in force for conducting audit of the income tax affairs of the person and where such record or documents have been kept on electronic data, the person shall allow access to the Commissioner or the officer authorized by the Commissioner for use of machine and software on which such data is kept and the Commissioner or the officer may have access to the required information and data and duly attested hard copies of such information or data for the purpose of investigation and proceedings under this Ordinance in respect of such person or any other person:

Provided that—

(a) the Commissioner may, after recording reasons in writing call for record or documents including books of accounts of the taxpayer; and

(b) the reasons shall be communicated to the taxpayer while calling record or documents including books of accounts of the taxpayer:

Provided further that the Commissioner shall not call for record or documents of the taxpayer after expiry of six years from the end of the tax year to which they relate.

(2) After obtaining the record of a person under sub-section (1) or where necessary record is not maintained, the Commissioner shall conduct an audit of the income tax affairs (including examination of accounts and records, enquiry into expenditure, assets and liabilities) of that person or any other person and may call for such other information and documents as he may deem appropriate.

....

Section 214C

214C. Selection for audit by the Board.— (1) The Board may select persons or classes of persons for audit of Income Tax affairs through computer ballot which may be random or parametric as the Board may deem fit.

(1A) Notwithstanding anything contained in this Ordinance or any other law, for the time being in force, the Board shall keep the parameters confidential.

(2) Audit of Income Tax affairs of persons selected under sub-section (1) shall be conducted as per procedure given in section 177 and all the provisions of the Ordinance,

except the first proviso to sub-section (1) of section 177, shall apply accordingly.

(3) For the removal of doubt it is hereby declared that Board shall be deemed always to have had the power to select any persons or classes of persons for audit of Income Tax affairs.

Explanation.— For the removal of doubt, it is declared that the powers of the Commissioner under section 177 are independent of the powers of the Board under this section and nothing contained in this section restricts the powers of the Commissioner to call for the record or documents including books of accounts of a taxpayer for audit and to conduct audit under section 177.”

11. A conscious and careful reading provides that these are independent powers with independent schemes as enumerated thereunder. The purpose of Section 214C is to ensure general compliance with the law by the taxpayers whereas Section 177 examines the veracity of a specific taxpayer's return based on Commissioner's own understanding and determination that the return requires such scrutiny and examinations. It is by now a settled law that the powers of the Commissioner to select a person for an audit under section 177 are independent of the powers of FBR to select a person for an audit under section 214C of the Ordinance 2001. Though there is no cavil to such proposition, the question being raised and answerable is whether any direction given by the Board, which may question the independence of the Commissioner's role entrusted to him under section 177, could also be legitimized on the strength of Section 213, 214 and 214C of the Ordinance 2001 and/or other provisions including section 4 of FBR Act 2007.

12. Under section 177 Commissioner is required to apply his mind and provide reasons for selection whereas under section 214C FBR may select a person through random parametric ballot. If a taxpayer is not selected in balloting then it (FBR) cannot direct the commissioner to select a taxpayer for an audit as this would defeat entire legislative scheme of

separating the powers of the Commissioner and FBR in relation to audit selection by directing the commissioner to select certain taxpayer for audit. FBR in a situation of ballot failure would be seeking to do indirectly what it cannot do in the faced situation, by directly and effectively taking over the powers of the Commissioner under section 177 as perhaps this predatory attitude is a bold attempt to usurp the powers available section 177 which are in fact entrusted to the Commissioner by statute, to be exercised without any influence or coercion.

13. In the present bunch of cases the notices impugned by the petitioners though seem to have been issued under section 177(1) of Ordinance 2001 but in fact have been issued pursuant to sectoral audit selection letters issued by FBR to the Commissioner. The letters which followed the main letter of sectoral audit, then contain detailed directions to its officers and set out strict timeline for selection and completion of audit of the sectors which include refineries, oil marketing companies, manufacturer/importer of electronic goods, automobiles, oil & Ghee, beverage and cement etc. The timeline provided specific dates by which:

- (i) taxpayers must be selected for audit;
- (ii) audit reports must be issued;
- (iii) show-cause notices must be issued;
- (iv) assessment orders be passed and
- (v) final report provided to the FBR. The audit notices were issued to the petitioners for multiple tax periods in accordance with this timeline.

14. The separation of powers of the Commissioner and the FBR has been codified through explanation provided to section 177. The explanation is read as under:-

Explanation.— For the removal of doubt, it is declared that the powers of the Commissioner under this section are

independent of the powers of the Board under section 214C and nothing contained in section 214C restricts the powers of the Commissioner to call for the record or documents including books of accounts of a taxpayer for audit and to conduct audit under this section."

15. Although substantially it clarifies further that 214C does not in any manner restricts the powers of Commissioner to call for record, but it has to be its own independent call and not under coercion of Section 214C of Ordinance 2001. Under section 214C the FBR selects numerous taxpayers for an audit each year in accordance with its audit policy which process ensures that taxpayers are generally complying with the law whereas audit under section 177 served a different purpose which is to examine veracity of a specific taxpayer's return based on commissioner's logical and mindful reasons.

16. In the Pfizer's case⁸ this Court discussed purpose of granting the Commissioner powers under section 177 for selecting a person for audit. Paragraph 6 of the judgment provides as under:-

"6. The power to impose tax vests in the State. A taxpayer is accountable to the State for his incomes so that the leviable tax can be collected. State has every right to ensure that tax is properly calculated and paid. This obligation of a person to pay correct amount of tax means that a vested right has accrued to the State to examine the account books of a taxpayer. Audit of accounts is the most effective mode of determining the correct liability of tax. Right to conduct audit being absolute, it is hard to imagine that such a right could be left mainly to chance i.e. computer balloting or as and when the Board decides. The power of the Board to choose persons for audit is a general power which is in addition to the power of the Commissioner under Section 120(1A). How then could we hold that when the Commissioner wants to select a specific person to conduct audit, he does not have the discretion to do so under any provision of the Income Tax Ordinance, 2001. If the Commissioner is unable to select a person to conduct audit under Section 120(1A) then there would be no other provision in the Income Tax Ordinance, 2001, which would facilitate the taxing

⁸ 2016 PTD 1429 (Pfizer Pakistan Ltd. v. Deputy Commissioner) Relevant pages 1435A to 1436B

authority to examine a tax return and if circumstances suggest conduct person-specific audit. If we accept the interpretation of petitioner's counsel then a person-specific audit can never be possible even though a tax return may be required by the taxing authority to be scrutinized in detail. It may be true that frequent audit of the same person at times become a nuisance for him but to make such an effective tool to determine correct income inoperative just because Section 214C exists cannot be accepted. The Commissioner then would never be able to select a particular person for conducting audit though circumstances may exist where such a decision has to be taken. This can never be the intention of the legislature. Such an interpretation of Section 214C would make the provisions of Section 120(1A) utterly redundant. In this regard, following example can be quoted with considerable advantage. Example: Mr. X, a businessman is thought by the tax authorities to be involved in tax evasion. The Commissioner serves notice on him. Mr. X takes the stand that he is running his business at a loss which claim is not accepted. The Commissioner needs to audit his accounts in order to ascertain true income of Mr. X's business. If the Commissioner had to depend on the computer balloting or on the decision of the Board under Section 214C to conduct audit and does not have discretion of his own under any provision of Income Tax Ordinance, 2001 to select a person for audit then Mr. X's account may never come under scrutiny. If the power to conduct audit under Section 177 is made contingent upon only on Board's decision exercised under Section 214C then it means that Mr. X can lawfully deny audit of his account books unless his name appears in the selection made by the Board. Such an interpretation of Sections 120(1A) and 214C would lead to disastrous consequences. No provision of Income Tax Ordinance, 2001 suggests that the power to select a person for audit, only vests with the Board of Revenue. Thus after examining the provisions of Sections 120(1A), 122(5), 177 and 214C of the Income Tax Ordinance, 2001, it clearly appears that the law visualizes two distinct situations for conducting audit. The first is provided under Section 120(1A) which, in our view, is based on exercise of discretion on the part of the Commissioner and the other is the power of the Board to select persons or class of persons under Section 214C. We are therefore of the view that by invoking Section 120(1A) any person can be called upon by the Commissioner in his discretion to submit accounts for audit if reasonable grounds exist for doing so. Hence no case for interference under Article 199 is made out."

17. The example set out by this Court in the aforesaid case establishes that the purpose of Section 177 is something more than

simply ensuring general compliance of the law by taxpayers and further empowers checking the veracity of returns where Commissioner believes that the return has not been properly filed or to check the instances of tax evasion and tax fraud.

18. The purposive approach to express the intent of legislature while explaining Section 177 and 214C of Ordinance 2001 should not be left eroded as has been discussed in the cases of Dr. Tariq Iqbal⁹, Saif-ur-Rehman¹⁰, Muhammad Nawaz Chandio¹¹, Dilawar Hussain¹², Director General FIA¹³.

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 Telecom¹⁴.

20. We do not agree with the contention of Mr. Metlo, relying on Indus Sugar¹⁵ 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

⁹ 2019 PLC (CS) 821 (Dr. Tariq Iqbal v. Government of Khyber Pakhtunkhwa) relevant page 825A

¹⁰ 2018 SCMR 1885 (Saif-ur-Rehman v. Additional District Judge) relevant page 1889A

¹¹ 2016 SCMR 875 (Muhammad Nawaz Chandio v. Muhammad Ismail Rahu) relevant page 886G

¹² PLD 2016 SC 514 (Dilawar Hussain v. Province of Sindh) relevant page 525 to 530

¹³ 2016 SCMR 447 (Director General FIA v. Kamran Iqbal) relevant page 447 to 449C

¹⁴ 2019 PTD 1030 (Wateen Telecom Ltd. v. Sindh)

¹⁵ WP No.37213 of 2020 (Indus Sugar Mills Ltd. v. Federation of Pakistan)

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 Pharmaceuticals¹⁶ 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

¹⁶ CP No.D-715 of 2018 Celandgene Pharmaceuticals International v. Federation of Pakistan Para 4 and 5)

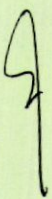
¹⁷ 2018 SCMR 1328 (Commissioner of Inland Revenue v. Allah Din Steel & Rolling Mills)

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.

22. The judicial review of such actions being unreasoned, illogical and unjustifiable is an inevitable requirement of law. To judicially review such actions, the Courts must be able to scrutinize the reasons based on which the authority has acted. It appears that the respondents are, in essence, seeking to shield themselves from any form of judicial review of the reasoning to be assigned by the Commissioner while acting in terms of Section 177 of the Ordinance 2001. If such actions are covered as being arbitrary, mala fide and discriminatory, it is amenable to scrutiny.

23. Coming to the point under consideration, since there is no independent application of mind in giving reasons for selection of the petitioners, rather it is dependent on the directions of the FBR, it does not demonstrate a transparent exercise of powers by the Commissioner under section 177 of Ordinance 2001. If the FBR can simply direct the commissioner to select any taxpayer for audit then distinction between Section 177 and 214C would collapse and would make either of the two redundant which principle cannot be applied while interpreting the independent provisions of a Statute¹⁸.

24. The Commissioner would thus become an instrument of the FBR which may act as a predator of the legislative powers of the Commissioner under section 177 to achieve its desired result. The independence of the commissioner and the independent application of mind would lose its transparency which would be against an independent structured mechanism of Ordinance 2001.

 ¹⁸ PLD 2017 SC 718 (Pakistan Telecommunication Employees Trust v. Pakistan)

25. The Islamabad High Court in the case of Pakistan Tobacco (Supra) has also struck down audit selection notices issued by the Commissioner under section 177 which were also issued on the basis of directions of the FBR. Paragraph 25 and 27 of the same is reproduced as under:-

"25. What is clear from the scheme of the Ordinance of 2001, as it now exists, is that FBR has independent power to select taxpayers for audit, which is not contingent upon or correlated with the exercise of audit selection powers by the Commissioner under section 177(1) and vice versa. What FBR cannot do is exercise its powers under sections 206, 213 and 214 of the Ordinance of 2001 in a manner that controls the exercise of discretionary power vested in the Commissioner under section 177(1) of the Ordinance of 2001. Section 206 endows FBR with powers to interpret provisions of the Ordinance and issue circulars for such purpose to provide guidance and directions and such directions are binding on tax authorities. But the power to issue circulars in order to interpret provisions of the Ordinance cannot be employed by FBR to direct the Commissioner to exercise his discretionary authority under section 177(1) to produce certain consequences in relation to individual taxpayers as deemed desirable by the FBR. Likewise, FBR can also not exercise its authority under sections 213 and 214 of the Ordinance of 2001, under the garb of providing guidance, by issuing directions to Commissioners for purposes of section 177(1) in such manner that it controls or fetters the discretionary audit selection authority vested in the Commissioner under section 177(1). It is settled law that when the legislature vests in a public authority the discretion to reach certain decision, it is for such authority to exercise the power vested by law on the basis of relevant considerations and not for any other authority to usurp such power or control the outcome of such discretionary authority. It is a settled principle of administrative law that discretion vested in an authority by law cannot be fettered and that the discretion is to be exercised by the authority it is vested in, in a just, fair and reasonable manner, and that the exercise of discretion for extraneous considerations amounts to unlawful exercise of such authority. In view of the provisions of the Ordinance of 2001, FBR is vested with no authority or jurisdiction under section 206 to control the discretion vested in the Commissioner under section 177(1) of the Ordinance of 2001.

27. The issuance of a circular by FBR in exercise of its authority under section 206, as has admittedly been done in relation to Oil Marketing Companies by letter dated 10.03.2021, by directing the W.P No. 272/2021 Page | 37

4

Commissioner to initiate audit of oil marketing companies in exercise of Commissioner's power under section 177(1) is a breach of the provision of the Ordinance of 2001. The FBR would have been within its right to exercise its powers under section 214C in the manner provided therein. But to the extent that it could not exercise its powers under 214C in a subjective manner identifying certain sectors within which taxpayers were to be audited, it could not force the Commissioners to exercise their independent audit selection powers under section 177(1) to achieve such end. It is a settled principle of law that what cannot be done directly cannot be done indirectly either. The exercise of authority by the Commissioner in such manner is also in breach of the scheme of audit as enumerated above. It has already been explained that the purpose for which audit powers have been vested in the FBR is different from the purpose for which such powers have been vested in the Commissioner under section 177(1). The FBR could exercise its audit powers on an objective basis under Section 214C in the manner prescribed, but could not force the hand of the Commissioners to exercise their subjective powers under section 177(1) to trigger the audit of taxpayers effectively selected by the FBR. It has been admitted that notices to some petitioners who are oil marketing companies were issued by the Commissioner under section 177(1) in view of the circular issued by the FBR. The exercise of authority by the Commissioner in such manner is based on an extraneous consideration not contemplated by section 177(1). The fact that the Commissioner, in compliance with the direction of FBR, selected certain taxpayers for audit and then documented reasons for purposes of section 177(1) establishes that such taxpayers were not W.P No. 272/2021 Page | 38 selected after independent application of mind by the Commissioner for reasons that can be deemed reasonable for purposes of section 177(1). In view of the aforesaid, the audit selection notices issued under section 177(1) in compliance with the circulars issued by FBR under section 206 are found to be based on an extraneous consideration, and such exercise of discretion controlled and directed by the FBR suffers from legal infirmity."

26. Similarly in case of Wazir Ali Industries¹⁹ while dealing with section 25 of the Sales Tax Act, 1990 and sections 45 and 46 of Federal Excise Act, 2005 set aside audit selection notices in pursuance of the same sectoral audit selection letters in the following terms:-

¹⁹ Judgment in CP No.4729 of 2021 in the case of Wazir Ali Industries Ltd. v. Federation of Pakistan.

"39. ...If such directions are given by the FBR to the Commissioner to select a taxpayer or a sector for 20 an audit under section 25 then the two provisions would the collapse and would render either of them redundant and ineffectual.

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 21

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.

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."

27. As far as Sections 213 and 214 of the Ordinance 2001 are concerned, it provides that while being within their respective spheres FBR may "in the course of proceedings under this Ordinance" may provide guidelines to the Commissioner or any taxation officer and they may be assisted, guided or instructed by any income tax authority to whom he is subordinate or any other person authorized in this regard by the Board. This does not mean that the role of Section 214C may also be entrusted to commissioner indirectly while issuing guidelines for proceedings under this Ordinance. Two independent proceedings under the Ordinance cannot be merged on the proposed interpretation of 213/214 of Ordinance 2001. The proceedings under the Ordinance would mean independent proceedings under 177 and 214C. While interpreting Section 213 and 214 of the Ordinance 2001 following orders/directions in terms of 213 and 214 does not mean that Board would trespass or transgress the statutory limits of the authorities as defined under the Ordinance 2001.

28. In relation to Section 4 of FBR Act 2007, as raised by Mr. Abbasi, learned Deputy Attorney General, Section 177(2AA) of Ordinance 2001 is not concerned with the sectoral audit. It merely states that where a taxpayer has been selected for an audit under section 177 but has not provided all the information required by the tax authorities or a sufficient explanation regarding defects in the record, the Commissioner shall determine taxable income on the basis of sectoral benchmark

ratios prescribed by the FBR. Phrase "Sectoral Benchmark Ratio" has been defined in the explanation of Section 177(2AA) in the following terms:

"Explanation.—The expression "sectoral benchmark ratios" means standard business sector ratios notified by the Board on the basis of comparative cases and includes financial ratios, production ratios, gross profit ratio, net profit ratio, recovery ratio, wastage ratio and such other ratios in respect of such sectors as may be prescribed."

29. Sectoral benchmark ratios are therefore figures for various business metrics that must be used by the Commissioner to determine taxable income for a taxpayer where a taxpayer has been lawfully selected for audit but is unable to provide the relevant information, sufficient explanation for the record. Sectoral benchmark ratio does not concern with sectoral audit selection. It only empowers the Commissioner on an event when a taxpayer has failed to furnish record or documents including books of accounts or has furnished incomplete record or books of accounts or is unable to provide sufficient explanation regarding defect in relation to the documents or books of accounts on the basis of an independent procedure of Section 177 of Ordinance 2001. It is at this stage when the guidelines of sectoral benchmark ratios, as prescribed by the Board, could be adhered to.

30. The insistence of the respondents' counsel for the dismissal of these petitions on the ratio of Allah Din's case (Supra) is also misconstrued as the observations therein cannot be read in isolation. The ratio of the Allah Din's case was process of balloting from amongst pool of taxpayers objectively determined by Board whereas in the instant case sectoral audit was desired by Board through Commissioner. Hon'ble Supreme Court at page 1337 paragraph 12 of the aforesaid judgment clearly held that the petitioners therein failed to show that the selection was arbitrary, mala fide or discriminatory. The implication

2

being that if any of these facts exist then such actions are amenable. The present petitions are based entirely on the fact that the selection for the audit is arbitrary, mala fide, discriminatory and predatory in nature as FBR trespassed beyond the statutory limits of Section 214-C directing the commissioner to conduct sector-wise audit, which is not permitted under the law, as discussed above.

31. Upshot of the above discussion is that the petitions categorized sector-wise as per attached list (Annexure-A) are allowed on the above conclusion.

Dated: 18.02.2022

Announced by us

[Signature]
Judge

[Signature]
Judge

[Signature]
(J. M. A Khan)

[Signature]
(J. Agent Ahmed Abbasi) 18/2

ANNEXURE-A
LIST OF CASES SECTOR WISE ATTACHED WITH
Const. P. 5107/2021

Atlas Honda Ltd VS Pakistan and Others

S.No	Case No	Case Title	Sector
AUTO INDUSTRY			
1	Const. P. 3316/2021	M/s Fuso Master Motor (Pvt) Ltd VS Fed. of Pakistan and Others	Auto Industry
2	Const. P. 3378/2021	Lucky Motor Corp Ltd VS Fed. of Pakistan and Others	Auto Industry
3	Const. P. 3482/2021	Master Changan Motors Ltd VS Fed. of Pakistan and Others	Auto Industry
4	Const. P. 3539/2021	M/s Eiffel Ind Ltd VS FBR and Others	Auto Industry
5	Const. P. 3705/2021	Fuso Master Motors (Pvt) Ltd VS Fed. of Pakistan and Others	Auto Industry
6	Const. P. 3758/2021	Al-Haj Faw Motors Pvt Ltd VS Fed. of Pakistan and Others	Auto Industry
7	Const. P. 3791/2021	Automobile Corp of Pakistan VS Fed. of Pakistan and Others	Auto Industry
8	Const. P. 4089/2021	M/s Sara Automobiles Ind VS Fed. of Pakistan and Others	Auto Industry
9	Const. P. 4986/2021	M/s N.J Auto Ind (Pvt) Ltd VS FBR and Others	Auto Industry
10	Const. P. 5050/2021	M/S Raazy Motor Industries (Pvt) Ltd VS Federation of Pakistan & others	Auto Industry
11	Const. P. 5107/2021	Atlas Honda Ltd VS Pakistan and Others	Auto Industry
12	Const. P. 5231/2021	M/s D.S Motor (Pvt) Ltd VS Fed. of Pakistan and Others	Auto Industry
13	Const. P. 5277/2021	M/s Memon Motor (Pvt) Ltd VS FBR and Others	Auto Industry
14	Const. P. 5403/2021	Indus Motor Co. Ltd VS Pakistan and Others	Auto Industry
15	Const. P. 5591/2021	Exide Pakistan Ltd VS Fed. of Pakistan and Others	Auto Industry
16	Const. P. 5592/2021	Exide Pakistan Ltd VS Fed. of Pakistan and Others	Auto Industry
17	Const. P. 6080/2021	Master Motors Corp VS Fed. of Pakistan and Others	Auto Industry
18	Const. P. 6487/2021	M/S Hino Pak Motors Ltd VS Federation of Pakistan & others	Auto Industry
19	Const. P. 6648/2021	Afzal Motors Pvt Ltd VS Fed. of Pakistan and Others	Auto Industry
20	Const. P. 6968/2021	Indus Motor Co. Ltd VS Pakistan & Ors	Auto Industry
21	Const. P. 7121/2021	Dawwoo Pak Motors VS Fed. of Pakistan and Others	Auto Industry
GHEE AND COOKING OIL			
22	Const. P. 4506/2021	M/s W.R Edible Oil Refinery VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
23	Const. P. 4981/2021	Farooq Oil Ind (Pvt) Ltd VS FBR and Others	Ghee and Cooking Oil
24	Const. P. 4392/2021	Dalda Food Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
25	Const. P. 4393/2021	Wazir Ali Ind VS Fed. of Pakistan and Others	Ghee and Cooking Oil
26	Const. P. 4394/2021	Oil Processors & Refiners Pvt Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
27	Const. P. 4395/2021	Ahmed Oil Ind (Pvt) Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
28	Const. P. 4508/2021	Palm Zone (Pvt) Ltd VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
29	Const. P. 4509/2021	Ahmed Vegetable Oil & Ghee Mills VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
30	Const. P. 4510/2021	Ahmed Vegetable Oil & Ghee Mills VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
31	Const. P. 4511/2021	A&Z Agro Ind. Pvt Ltd VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
32	Const. P. 4512/2021	Mapak edible Oils Pvt Ltd VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
33	Const. P. 4513/2021	Pakagro Oil Mills (Pvt) Ltd VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
34	Const. P. 4514/2021	Shujabad Agro Ind. Pvt Ltd VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
35	Const. P. 4541/2021	M/s Paracha Textile Mills Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
36	Const. P. 4542/2021	M/s Paracha Textile Mills VS Fed. of Pakistan and Others	Ghee and Cooking Oil
37	Const. P. 4658/2021	Season Edible Oil VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
38	Const. P. 4659/2021	M.A Oil Pvt Ltd VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
39	Const. P. 4660/2021	Abdull Oil Ind. VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
40	Const. P. 4661/2021	Taqwa Oil Ind. VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
41	Const. P. 4662/2021	Hitech Oil & Ghee Mills Pvt Ltd VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
42	Const. P. 4663/2021	M/s M.H Qasim Ind. VS Fed. of Pakistan & Ors	Ghee and Cooking Oil
43	Const. P. 4757/2021	Pardhan Oil Ind (Pvt) Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
44	Const. P. 4843/2021	Agro Processors & Atmosphere Gases Pvt Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
45	Const. P. 4982/2021	Farooq Oil Ind (Pvt) Ltd VS FBR and Others	Ghee and Cooking Oil
46	Const. P. 4983/2021	Farooq Oil Ind (Pvt) Ltd VS FBR and Others	Ghee and Cooking Oil

47	Const. P. 4984/2021	Farooq Oil Ind (Pvt) Ltd VS FBR and Others	Ghee and Cooking Oil
48	Const. P. 5088/2021	Habib Oil Mills Pvt Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
49	Const. P. 5843/2021	Mezan Eidble Oil (Pvt) Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
50	Const. P. 6083/2021	Western Ind VS Fed. of Pakistan and Others	Ghee and Cooking Oil
51	Const. P. 6084/2021	Oil World (Pvt) Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
52	Const. P. 6333/2021	M/s Pacific Oil Mills Pvt Ltd VS Fed. of Pakitsan and Others	Ghee and Cooking Oil
53	Const. P. 6375/2021	M/s Paracha Textile Mills VS Fed. of Pakistan and Others	Ghee and Cooking Oil
54	Const. P. 6430/2021	M/s Pakistan Oil Mills Pvt Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
55	Const. P. 6431/2021	M/s Pakistan Oil Mills Pvt Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
56	Const. P. 6432/2021	M/s Pakistan Oil Mills Pvt Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
57	Const. P. 6434/2021	M/s Ali Danyal Industries (Pvt) Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
58	Const. P. 6435/2021	M/s Ali Danyal Industries (Pvt) Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
59	Const. P. 6436/2021	M/s Ali Danyal Industries (Pvt) Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
60	Const. P. 6593/2021	Al-Mujtaba Oil & Ghee Ind Pvt Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
61	Const. P. 6721/2021	M/s Zainab Cookingg Mills Pvt Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
62	Const. P. 6722/2021	M/s Al-Noor Oil Extraction Plant Pvt Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
63	Const. P. 6723/2021	M/s Zainab Cooking Oil Mills Pvt Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil
64	Const. P. 6746/2021	Al Noor Agro Oil Pvt Ltd VS FBR and Others	Ghee and Cooking Oil
65	Const. P. 6747/2021	Al Noor Agro Oil Pvt Ltd VS FBR and Others	Ghee and Cooking Oil
66	Const. P. 7094/2021	Mujahid Oil Refinery Ltd VS Fed. of Pakistan and Others	Ghee and Cooking Oil

BEVERAGES

67	Const. P. 4402/2021	Pakistan Beverages Ltd VS Fed. of Pakistan and Others	Beverages
68	Const. P. 4404/2021	Pakola Products Ind VS Fed. of Pakistan and Others	Beverages
69	Const. P. 4809/2021	Pakistan Beverages Ltd VS Fed. of Pakistan and Others	Beverages
70	Const. P. 4810/2021	Pakola Products Ltd VS Fed. of Pakistan and Others	Beverages
71	Const. P. 4844/2021	Popular Food Ind VS Fed. of Pakistan and Others	Beverages
72	Const. P. 4845/2021	Popular Juice Ind (Pvt) Ltd VS Fed. of Pakistan and Others	Beverages
73	Const. P. 4846/2021	Mehran Bottlers (Pvt) Ltd VS Fed. of Pakistan and Others	Beverages
74	Const. P. 4896/2021	Sukkur Beverages Ltd VS Fed. of Pakistan and Others	Beverages
75	Const. P. 5730/2021	De Aar Water Beverages Pvt Ltd VS FBR and Others	Beverages
76	Const. P. 7172/2021	M/s Ittefaq Foods (Pvt) Ltd VS Fed. of Pakistan and Others	Beverages

CEMENT

77	Const. P. 2457/2021	TECTO Cement Ltd VS FBR and Others	Cement
78	Const. P. 2704/2021	Power Cement Ltd VS FBR & Ors	Cement
79	Const. P. 3273/2021	Dadabhoy Cement Industries Ltd VS Fed of Pakistan & Others	Cement

OIL MARKETING COMPANIES/REFINERIES

80	Const. P. 2490/2021	Shell Pakistan Ltd VS Pakistan and Others	Oil Marketing Companies
81	Const. P. 2491/2021	Shell Pakistan Ltd VS Pakistan and Others	Oil Marketing Companies
82	Const. P. 2560/2021	PSO Co. Ltd VS Fed. of Pakistan and Others	Oil Marketing Companies
83	Const. P. 2561/2021	PSO Co. Ltd VS Fed. of Pakistan and Others	Marketing Companies
84	Const. P. 2562/2021	PSO Co. Ltd VS Fed. of Pakistan and Others	Oil Marketing Companies
85	Const. P. 2563/2021	PSO Co. Ltd VS Fed. of Pakistan and Others	Oil Marketing Companies
86	Const. P. 2564/2021	PSO Co. Ltd VS Fed, of Pakistan & Ors	Oil Marketing Companies
87	Const. P. 2584/2021	Shell Pakistan Ltd VS Pakistan and Others	Oil Marketing Companies
88	Const. P. 2585/2021	Shell Pakistan Ltd VS Pakistan and Others	Oil Marketing Companies
89	Const. P. 2597/2021	Puma Energy Pakistan (Pvt) Ltd VS Pakistan & Others	Oil Marketing Companies
90	Const. P. 2598/2021	Be Energy Limited VS Pakistan & Others	Oil Marketing Companies
91	Const. P. 2599/2021	Byco Petroleum Pakistan Ltd VS Pakistan & Others	Oil Marketing Companies
92	Const. P. 2781/2021	Hascol Petroleum Ltd VS Fed. of Pakistan and Others	Oil Marketing Companies
93	Const. P. 2311/2021	National Refinery Ltd VS Pakistan and Others	Oil Refinery
94	Const. P. 2312/2021	National Refinery Ltd VS Pakistan and Others	Oil Refinery
95	Const. P. 2586/2021	National Refinery Ltd VS Pakistan and Others	Oil Refinery
96	Const. P. 2626/2021	Pakistan Refinery Ltd VS Fed. of Pakistan and Others	Oil Refinery