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Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Case No: ICA 855 of 2014.

The Federal Board of Revenue etc. **Versus** M/s Chenone Stores Ltd.

JUDGMENT

Date of Hearing:	17.11.2017.
Appellant(s)/ department by:	Mr. Sarfraz Ahmad Cheema, Advocate. M/s Liaquat Ali Chaudhary, Raja Sikandar Khan, Muhammad Asif Hashmi, Kausar Parveen, Foziya Bukhsh, Muhammad Asif, Imran Rasool, Mian Yusuf Umar, M. Shahid Usman, Umair Awan, Irshad Ullah Chatha, Shahid Sarwar Chahil, Sohail Zahid Butt, Hafiz Shahzad Ahmad Cheema, Ch. Muhammad Yasin Zahid, Waqar A. Sheikh, Rana Muhammad Mehtab, Javed Akhtar, Amjad Hussain Malik, Sultan Mahmood, Malik Abdullah Raza, Muhammad Asif Butt, Shagufta Ijaz, Muhammad Akram Awan and Abdul Rehman Khalil, Advocates for the appellant-department in connected appeals. Barrister Imran Aziz Khan, Tahir Mahmood Khokhar and Mian Irfan Akram, Deputy Attorney Generals for Pakistan. Dr. Ishtiaq Ahmad Khan, Director (Law), FBR, Lahore. Dr. Hamid Attiq Sarwar, Commissioner Inland Revenue, Lahore.
Respondent(s)/ Taxpayers by:	Mr. Shahbaz Butt, Advocate. M/s Mansoor Usman Awan, Naved A. Andrabi, Imtiaz Rashid Siddiqui, Barrister Shehryar Kasuri, Barrister Qadir Buksh, Ali Sibtain Fazli, Rana Muhammad Afzal, Muhammad Ajmal Khan, Khurram Shahbaz Butt, Muhammad Humzah, Raza Imtiaz, Jamshid Alam, Qadeer Kalyar, Muhammad Imran Rasheed, Salman Zaheer, Shahid Hussain Ch., Zafar Iqbal, Yawar Mehdi Naqvi, Mirza Mubashar Baig, Ch. Wasim Ahmad, Muhammad Mansha Sukhera, Muhammad Mohsin Virk, Muhammad Ahsan Virk, Abdul

	Qadoos, Ch. Imran Masood, Dr. Ilyas Zafar, Syed Nasir Ali Gillani, Waheed Shahzad Butt, Shehzeen Abdullah, Asghar Leghari, Hussain Ibrahim, Muhammad Younas Khalid, Muhammad Akram Saleh, Asghar Ahmad Kharal, Muhammad Shabbir Hussain, Muhammad Ijaz Ali Bhatti, Omar Tariq Shamim, Mudassar Shuja-ud-Din, Ali Hasnain, Tahir Naeem, Waseem Ahmad Malik, M. Iqbal Hashmi, M. M. Akram, Muhammad Tahir Amin, Nadeem Mehmood, Sheikh Aqeel Ahmad, Zargham, Muneeb Zafar, Salman Ahmad, Ehsan-ur-Rehman Sheikh, Monim Sultan, Nasir Khan, Barrister Pirzada Aurangzaib, Syed Ali Imran Rizvi, Rasheed Ahmad Sheikh, Shoaib Ahmad Sheikh, M. Waseem Chaudhry, Zeeshan Ali, Aurangzeb Tahir, Muhammad Naeem Munawar, Muqtedir Akhtar Shabir, Sh. Aqeel Ahmed, Muhammad Shahid Baig, Rana Hammad Aslam, Ch. Muhammad Ali, Salman Ahmad, Muhammad Masud Akhtar, Sohail Raza, Mian Haseeb-ul-Hassan, Irtaza Naqvi, Javed Iqbal Qazi, Usman Javed Qazi, Rana Munir Hussain, Sayyid Ali Imran Rizvi, Abdul Waheed Habib, Zaeem-ul-Farooq Malik, Salman Hasan, Ahmad Farooq, Saleem Iqbal Rathore, Munawar-us-Salam, Agha Sarfraz Ahmad, Muhammad Aleem Irshad, H.M. Majid Siddiqi, Sajid Ijaz Hotiana, Iftikhar Ahmad Khan, M. Shahid Mukhtar Chandia, Mirza Anwar Baig, Jan Muhammad Chaudhry, Shahzad Mahmood Butt, Muhammad Saqib Sheikh, Zurgham Lukhesar, Syed Murtaza Ali Zaidi, Mian Abdul Ghaffar, Muhammad Amir Malik and Rana Muhammad Aslam, Advocates for the respondents taxpayers in connected appeals.

Shahid Jamil Khan, J:- This judgment shall decide two sets of appeals filed respectively against two judgments delivered by different learned Single Benches of this Court. Common question of Commissioner's powers to select for audit, under three Federal Taxing Statutes, is involved. Lists of the appeals, respectively, are annexed as Annexures A & B.

Appeals listed in Annex-A are filed by Revenue Department assailing judgment dated 10.05.2012 in Writ Petition No.393 of 2012, ("**Chenone Stores**"); whereas, the appeals listed in Annex-B are filed by Taxpayers against judgment dated 27.05.2015 in Writ Petition No.4691 of 2012 ("**Kohinoor Sugar Mills**").

2. Both the judgments are contended to be at variance;

In *Chenone Stores'* judgment notices of selection for audit, issued, after amendments through Finance Act 2010, by Commissioner under Section 177 of the Income Tax Ordinance 2001 **("Ordinance of 2001")**; Section 25 of the Sales Tax Act 1990 **("Act of 1990")** and Section 46 of the Federal Excise Act 2005 **("Act of 2005")**, were declared illegal and without lawful authority, after striking down first proviso to the Section 177 (1).

The *Kohinoor Sugar Mills'* judgment had also dealt with validity of notice of selection for audit, issued by Commissioner under Section 177, after amendments through Finance Act 2010. The Explanations inserted, during proceedings, through Finance Act 2013, were treated to have retrospective effect, therefore, the selection by Commissioner was held to be in accordance with law.

3. Earlier; *Chenone Stores'* judgment was assailed directly before Supreme Court of Pakistan through Civil Appeal No.1032 of 2012 along with connected Civil Appeals. The appeals were remanded, with consent of the parties, by the August Court to this Court, directing to treat them as appeals against original order and issue notice to the Attorney General under Order XXVII-A CPC. Operative part of the order is reproduced:-

> "4. We agree with the learned counsel but at the same time, we are mindful of the objection of non issuance of notice to the learned Attorney General by the learned High Court could have been taken up as one of the question before the ICA Bench seized with the matter, which too could have itself issued a notice to the learned Attorney General because after admission of the ICA, the proceedings shall be considered to be in continuation of the proceedings before the learned Single Judge by way of first appeal Striking down the provisions of law, being *ultra vires* the Constitution, obviously requires examination and interpretation of the

> provisions of the Constitution with the assistance of the learned Attorney General after due notice in terms of the provisions of Order XXVII-A Rule 1 CPC, therefore, the learned counsel for the appellants as well as the respondents in the appeals noted hereinabove, agree that the instant appeals be sent back to the ICA Bench treating the same, as the appeals against the original order and for decision after issuing notice to the learned Attorney General in order to save the parties from the agony of protracted proceedings and also to ensure that further time is not consumed in the legal proceedings, as the question in the appeals, involves Public Revenue, therefore, the interest of both the parties would also be protected in this manner."
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> [*emphasis supplied*]

The remanded cases were treated as appeals and notice under Order XXVII-A CPC, as directed, was issued on 26.01.2015. In response to the notice Mr. Imran Aziz Khan, Deputy Attorney General represented the Attorney General's Office. Objections on maintainability of appeals were raised by Mr. M. M. Akram Advocate, which were turned down, through an independent order dated 29.03.2017, in light of the directions, *ibid*, by Apex Court.

4. Learned counsels for both the parties are heard; Counsels for the Revenue Department have argued in favour of Commissioner's power to select for audit, contending that this power was available since inception of the Ordinance of 2001; remained intact after amendment through Finance Act 2010 and has so been clarified by the Explanations inserted through Finance Act 2013.

Learned counsels for the taxpayers argued that scheme of law has been changed after amendments through Finance Act 2010, therefore, only Federal Board of Revenue **("FBR")** can and Commissioner cannot select for audit. On insertion of Explanations; it is argued first; that these shall not have retrospective effect and secondly that the Explanations have not removed the defects pointed out in *Chenone Stores'* judgment, therefore, are ineffective.

Relevant arguments, point wise, shall be addressed in body of the judgment as and where felt necessary.

5. Heard. Record perused.

6. Historic overview of Commissioner's power to select for audit, the controversy, in backdrop of the changes in relevant law, is necessary. Every attempt to select and audit the tax affairs, after self-assessment, was subjected to litigation since erstwhile Income Tax Ordinance, 1979 ("**Repealed Ordinance**"). Challenge to selection for total audit, by Regional Commissioner, of returns filed under Self-assessment Scheme was laid to rest through judgment in *Commissioner of Income Tax and others v. Messrs* ***Media Network*** *and others* **(2006 PTD 2502);** Policy guidelines, issued by the then CBR, after filing of returns under the Self-assessment Scheme, were challenged, contending that the guidelines should have been issued before filing of returns under Self-assessment Scheme. Single Bench of this Court allowed the writ petitions, however, on appeal, the selection was upheld with the findings that the guidelines, being administrative in nature, had not taken away any vested right. Infringement of the principle of natural justice, claimed by taxpayer's side was answered by holding that it was not mandatory during the course of preliminary inquiries or investigations. Relevant excerpts are reproduced:

> *" 22. … … The C.B.R. specifically directed that before making a final selection, the Regional Commissioners of Income Tax must confront the assessees, provide them opportunity of being heard and must indicate the basis of their proposed selection in the notices to be communicated to them.* ***These guidelines were administrative in nature meant for the internal consumption of the Income Tax functionaries which did not create any rights nor did they impose any obligations.*** *Those instructions had not taken away any vested right of the assessees and would not govern the adjudicatory proceedings of quasi-judicial in nature.* However, it could not be said that the guidelines were, in any way, extraneous, irrelevant or unfair to the object to be achieved by the process of selection of cases for total audit. In our view, the procedure of selection of cases for total audit as provided by paragraphs 9 and 10 of the Scheme was not nullified or whittled down by the policy guidelines, dated 17-12-2002."
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> "26. ***The rules of natural justice are not inflexible.*** They yield to and change with the exigencies of different' situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible. They can be adopted and

> modified by the Statutes. The need to act in an emergency may also exclude at least a prior hearing or where a decision affects so many people that a hearing would be impracticable. In some cases there may be collective right, of hearing, or to be consulted although not necessarily a hearing in individual cases. Depending upon the facts and circumstances of each case, ***there is no mandatory requirement of natural justice that in every case the other side must be given a notice before preliminary steps are taken***. It might suffice if reasonable opportunity of hearing is granted to a person before an adverse action or decision is taken against him. However, ***it is not possible to lay down an absolute rule of universal application governing all situations as to the exclusion or otherwise of the audi alteram partem rule during the course of preliminary inquiries or investigations.***"
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> [*emphasis supplied*]

7. The challenge to Commissioner's powers to select and conduct audit under Section 177 of the Ordinance of 2001, was laid initially, when these provisions were invoked for the first time. Relevant part of Section 177, as it stood then, is reproduced for facility of understanding the issue:-

> "**177. Audit.---**(1) The Commissioner may select any person for an audit of the person's income tax affairs having regard to--
>
> (a) the person's history of compliance or non-compliance with this Ordinance;
> (b) the amount of tax payable by the person;
> (c) the class of business conducted by the person; and
> (d) any other matter that the Commissioner considers relevant."

The selection was challenged before this Court under constitutional jurisdiction and through judgment in ***Ch. Muhammad Hussain*** *and others v. Commissioner of Income-Tax* **(2005 PTD 152)**, it was declared that non-issuance of notice, disclosing reason for selection, was illegal. The matter went in appeal before the Hon'ble Supreme Court. The Apex Court in *Commissioner of Income Tax and others v.* ***Fatima Sharif Textile***, *Kasur and others* **(2009 PTD 37)** ordered for modification of the judgment in *Muhammad Hussain's Case*; Learned Attorney General of Pakistan agreed to abide by the directions for issuance of notice by the High Court if findings, that selection for audit was prejudicial to the taxpayer, were expunged.

The portion, containing the findings, was deleted and matter was remanded with direction to issue fresh notices disclosing criteria/ reasons for selection. Relevant part is reproduced:-

> "5. In view of the above arrangement between the parties, the appeals are disposed of with consent, consequently, the portions of impugned judgment reproduced hereinabove are deleted with the observation that *let appellants issue fresh notices to the respondents in terms of section 177 of the Ordinance, as it was prevailing at the relevant time,* ***disclosing criteria/reasons for selecting their cases for purpose of audit***. As far as the cases in respect whereof observations have been made hereinabove relating to Circular C. No.1(1)S(ITAS)/2004 or otherwise if the returns have been revised and payment has been made by the assessees no further action shall be taken against them. The parties are left to bear their own costs."
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> [*emphasis supplied*]

8. An amendment was introduced in Section 177 through Finance Act 2004, whereby CBR (now FBR) was given power to lay down criteria for selection of cases by the Commissioner. Relevant parts of the amended Section are reproduced:-

> "**177. Audit.**---(1) The Board, ***may lay down criteria for selection of any person for an audit*** of person's income tax affairs, by the Commissioner.
>
> (2) The *Commissioner shall select a person for audit in accordance with the criteria laid down by the Board* under subsection (1).
>
> (3) The Board shall keep the criteria confidential.
>
> (4) ***In addition to*** the selection referred to in subsection (2), the Commissioner ***may also*** select a person for an audit of the person's income tax affairs *having regard to* --
>
> (a) the person's 'history of compliance or non-compliance with this Ordinance;
>
> (b) the amount of tax payable by the person;
>
> (c) the class of business conducted by the person; and
>
> (d) any other matter which in the opinion of Commissioner is material for determination of correct income."
>
> [*emphasis supplied*]

9. Notices under the amended Section 177, were challenged before this Court; contending again that selection could not have been made without disclosure of criteria for selection before filing of returns. The direction by Apex Court in *Fatima Sharif's* judgment,

ibid, i.e., "*let appellants issue fresh notices to the respondents in terms of section 177 of the Ordinance, as it was prevailing at the relevant time,* ***disclosing criteria/reasons for selecting their cases for purpose of audit***" was referred in support. Learned Single Bench of this Court through judgment in *Messrs* ***Syed Bhais*** *(Pvt.) Ltd. through Director v. Central Board of Revenue, Islamabad through Chairman and another* **(2007 PTD 239)** dismissed the petitions, relying upon the judgment in *Media Network's Case*, *supra*, besides referring to the Section 177(3), *ibid*, to hold that publication of criteria before filing of returns was not mandatory; The amended provisions of Section 177 were declared to have two parts; *first*, related to selection on the criteria to be laid down by the Board and the *second* was dealing with selection by Commissioner directly under subsection (4) of Section 177; The words "*in addition to*" and "*may also*", used in this subsection, were emphasized. It was held that criteria before selection was relevant only if so provided by CBR. It was clarified that in *Fatima Sharif's Case* direction was for Commissioner to disclose reasons in the notices for selection and not before filing of returns. The impugned notices, after examination, were held to have met the direction by Apex Court and requirements under the Section 177(4)(d). Operative part from the judgment is reproduced:-

> "14. Now I will revert to objection of the petitioner as to the **selection** for audit, ***without laying down objective criteria before filing of returns***. *As mentioned in the preceding para that section 177 comprises of two parts and authority of Commissioner to select a case, is separate under each part.* ***In case the C.B.R. has laid down a criteria, then the Commissioner is bound to select the case of that person on the basis of the criteria.*** **Previous publication of criteria/ guidelines in the objective form is not the requirement of law, nor it is justified.** *Firstly, for the reason that according to provisions of section 177(3) of the Ordinance, 2001 C.B.R. has to keep the criteria confidential. Secondly, as observed by the Hon'ble Supreme Court of Pakistan in the case of Messrs Media Network (Supra) previous publications of criteria/guidelines will be instrument in hands of taxpayers, who by knowing before hand that their cases will not be selected or scrutinized, will take full benefit of the situation.* Previous publication of criteria, will fore arm the taxpayer to evade tax. Issuance of criteria either before or at the time of announcement of scheme would frustrate the very object of provision of section 177(3). Revenue and various respondents, entered into arrangement before the Apex Court (in Appeals Nos. 1962 to 2205 of

2005) whereby the appeals were disposed of by consent as a result thereof, ***Hon'ble Supreme Court, observed that fresh notices in terms of section 177 of Ordinance, 2001 be issued, disclosing criteria/reasons for selection their cases for the purpose of audit. Revenue is bound to follow the arrangement and slightest departure from the observation/ direction of the Apex Court cannot be expected.*** The question whether the impugned notice, in any manner, negates the said arrangement, as the notices were served without laying down a criteria, the answer is obviously a big "No". **Disclosure of criteria *was only relevant when the cases were selected for audit on the basis of criteria laid down by C.B.R. in terms of section 177(1) and (2). Since the cases of the petitioners were selected under section 177(4), therefore, the Commissioner was to disclose reasons that while selecting the cases for audit, due regard was given to the provisions of section 177(4)(a) to (d).*** The judgment of the Hon'ble Court (in Civil Appeals Nos. 1962 to 2205 of 2005) requires from the Revenue the disclosure criteria/reasons in the notice. The examination of impugned notices, challenged through these petitions, reveal that reasons for selection were duly conveyed, which are:

Writ Petition No.5471 of 2006	Decrease in gross profit from 21.18% to 17.6%
Writ Petition No.5398 of 2006	Decrease in gross profit from 14.64% to 12.49%
Writ Petition No.5473 of 2006	Decrease in gross profit from 20% to 16.34%
Writ Petition No.5417 of 2006	Receivables/debts were written-off, it was to examine that receivable were irrecoverable. Secondly interest on Rapco was merged in sale of investment examination.
Writ Petition No.6331 of 2006	Gain on shares, interest on share merged in profit on sale of investment.
Writ Petition No.5472 of 2006	Wrongly allocating the profits from local business to presumptive tax regime.

15. The above reasons, disclosed in the impugned notices, sufficiently meet the requirement of section 177(4)(d). The cases of the petitioners are not selected for audit under section 177(1) and (2), therefore, ***disclosing criteria in the impugned notices is not relevant.*** The issuance of notice for selecting the case of the petitioners for audit does not infringe the arrangement arrived at between the Revenue and various taxpayers. The notices comply with the observation of the Hon'ble Supreme Court of Pakistan.

16. Coming to the objection of petitioners that ***selecting a person for audit, would unduly put the petitioners to the vigours of audit and process of audit without any benefit to Revenue, will unfairly cause hardship.*** Further the objections that *selection of a case for audit without laying an objective criteria, is discriminatory and capable of arbitrary application, for the reason that it confers unbridled power on Commissioner to pick and choose*, was thoroughly examined by Hon'ble Supreme Court in Messrs Media Network case (Civil Appeals Nos. 233 to 315 of 2004). ***The Apex Court has held, these objections, not tenable.*** The selection of case for audit, in view of the aforementioned decision of the Hon'ble Supreme Court, is

> open to exception ***only when selection involves personal bias; mala fide or suffers from unfair treatment.*** No element of bias or mala fide either exists or has been pleaded by the petitioners. Additionally, the taxpayer is legally and morally bound to furnish true declaration of income in his/its return. The taxpayer, while filing the return makes a declaration under section 114(2)(b) to the effect that relevant record along with other particulars is kept. A true statement in the return has been made and the record is maintained as per declaration. ***No prejudice is caused to a taxpayer on being selected for audit, if he makes true statement and maintaining record as per declaration."***
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> [*emphasis supplied*]

10. Subsequent notices of selection for audit, by Commissioner, under the amended Section 177, *ibid*, were again challenged before this Court and the petitions were decided by two learned Single Benches through judgments at variance. First judgment was delivered in ***Mohsin Raza*** *v. Chairman, Federal Board of Revenue and others* **(2009 PTD 1507)**, accepting the petitions, mainly, for the reason that Commissioner could not invoke the provisions of Section 177(4) in absence of criteria to be laid down by CBR under Section 177(1), besides holding that Commissioner had to form an opinion that income declared under Section 120 was incorrect. The other judgment was delivered subsequently in *Messrs* ***Sadar Anjuman-e-Ahmedia*** *through General Attorney v. Commissioner of Income Tax (Audit Division), Faisalabad and 3 others* **(2010 PTD 571)**, wherein it was held that powers of Commissioner under Section 177(4) were independent of Section 177(1) & (2); *Fatima Sharif's Case* was relied upon, besides putting emphasis on the words "*in addition to*" and "*also*", used in the Section 177(4).

Both the judgments, being challenged before August Supreme Court, were decided through judgment in *Chairman, F.B.R. and others v.* ***Idrees Traders*** *and others* **(2012 PTD 693)**. Leaned Counsel for appellant department was confronted with letter dated 14.01.2010, whereby notices for selection had been withdrawn. It was confronted to respondent taxpayer, based on judgment in *Commissioner of Income Tax v. Messrs* ***Eli Lilly Pakistan*** *(Pvt.) Ltd.* **(2009 SCMR 1279 = 2009 PTD 1392)**, that constitutional jurisdiction could not be

availed without resorting to departmental remedies. Consequently both the assailed judgments i.e., *Mohsin Raza* and *Sadar Anjuman-e-Ahmedia*, were set aside in following words:-

> "When confronted with the contents of the above letter, Mr. Muhammad Ilyas Khan and other learned counsel appearing for the revenue department could not make categorical statement, however, learned counsel for the respondents stated at bar that in view of the above policy the letters have already been withdrawn and instant discussion is nothing but an academic exercise as the relief has already been given to the tax payers by the competent authority following the above policy.
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> 5. After having heard the learned counsel and having gone through the relevant contents of the judgments under challenge as well ratio decided in the case of Eli Lilly Pakistan (ibid) and the policy letter noted above we proceed to decide the appeals as follows:--
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> (i) In all the appeals listed above both the judgments dated 14th July, 2009 and 22nd October, 2009 are set aside.
>
> (ii) The department is directed to follow the policy in letter and spirit, which has been reproduced hereinabove and if the letters have not been withdrawn, reasons should be assigned and after providing opportunity to the respondents, it be clearly pointed out to them that their cases are not covered under the policy and they may apply afresh if need be.
>
> (iii) If the department intends to proceed, then sufficient opportunity be given to the tax payers to put up the pleas so that no prejudice may cause to them in any manner."

11. It is important to note that the judgment in *Syed Bhais' Case*, *supra*, was not set aside, therefore, holds the field, in light of law laid down by Apex Court in *Fatima Sharif* and *Media Network's Cases*.

Disclosure of objective criteria/reasons, before filing of returns, for selecting a case for audit has consistently been claimed by taxpayers, since selection for total audit under the Repealed Ordinance, despite existence of the law laid down in *Media Network's Case* that '*non-disclosure of guidelines to select for audit does not take away any vested right*' and that for preliminary inquiries/investigations, non-disclosure does not infringe the principles of natural justice. In *Fatima Sharif's Case* Commissioner was directed to issue fresh notice for selection, disclosing criteria/reasons because the provisions of Section 177(1), as existing

at relevant time, were so interpreted in *Muhammad Hussain's Case*, however, deletion of paragraphs from its judgment; contain finding that selection for audit is prejudicial to taxpayer, was in consonance with the earlier finding in *Media Network's Case* that selection for audit does not take away any vested right and that audit proceedings, being administrative in nature were not prejudicial. *Syed Bhais'* judgment, by this Court, ratified the law that publication of criteria before filing of returns was not mandatory. It was clarified that selection for audit by Commissioner on the criteria by FBR, under the Section 177(1), was different from the Commissioner's independent power to select for audit under the Section 177(4). The direction, through *Fatima Sharif's Case*, of disclosing criteria/reasons, was held as mandatory for selection by Commissioner independently. The law holding field, till this stage i.e. before amendments through Finance Act 2010, can conclusively be summarised as under:

i) Guidelines (Selection criteria) are not required to be disclosed before filing of returns under Self-assessment; *(Media Network's Case)*

ii) Commissioner is bound to disclose the reasons/criteria in the notice if selecting the cases for audit independently; *(Fatima Sharif's Case)*

iii) Commissioner is bound to follow the criteria of selection, if laid down by the FBR; *(Syed Bhai's Case)* and

iv) Commissioner has independent power to select for audit under Section 177(4) and his power to select on the criteria given by FBR is different. *(Syed Bhai's Case)*

Notwithstanding the law, *ibid*, taxpayers once again pleaded, in the petitions, decided through *Chenone Stores' Case*, that absence of objective criteria had offended the equality clause as Commissioner had exercised unguided and unbridled discretion by picking and choosing the taxpayer for audit.

12. Through Finance Act 2010; FBR has been given powers, for the first time under the Ordinance of 2001, to select for audit by inserting Section 214C in it. Commissioner is entrusted with power to call for record and conduct audit, by substituting subsection (1) and omitting subsection (4) from Section 177. This power is qualified through first proviso by stipulating that the record shall be called after recording reasons and the reasons shall be communicated to the taxpayer. The first proviso is not applicable, under subsection (2) of Section 214C, if the selection is made by FBR. The substituted subsection (1) of Section 177 and Section 214C are reproduced:-

> "**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."
>
> "**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.
>
> (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."
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> [*emphasis supplied*]

The FBR is given similar power to select for audit under other Taxing Statutes i.e., by inserting Section 72B in the Act of 1990 and Section 42B in the Act of 2005. Provisions of these inserted Sections are, *mutatis mutandis*, similar to language used in the Section 214C.

13. The phrase '*call for record*' in the substituted subsection (1) of Section 177, in absence of word '*selection*', became the basis of controversy. It was pleaded during argument in *Chenone Stores*' Case, that Commissioner's independent power to select for audit has been compromised particularly when; the FBR has been vested with the power to select for audit through the inserted Section 214C. It was contended that '*selection of a taxpayer for audit of its tax affairs without an objective criteria offends the equality clause and thus not permissible under the law'*; It was averred that Commissioner can call for record only after selection for audit by FBR under the Section 214C. The gist of challenge was that Commissioner's unguided and unbridled power to pick and choose the taxpayer for audit, being *ex facie* discriminatory, is violative of the fundamental right guaranteed under Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 **("the Constitution")**. Similar assertions were made to challenge Commissioner's power to select for audit under other Federal Taxing Statutes, after insertion of Section 72B in the Act of 1990 and Section 42B in the Act of 2005.

14. Learned Single Bench examined various provisions of the Ordinance of 2001 to hold that selection for audit is a neutral, impartial and equitable function, therefore, use of audit provision for investigation, would give the department a license to carry out a roving inquiry into the affairs of any taxpayer and to fish for defaults. It was held that '*Legislative policy of the Ordinance cannot equip the Commissioner with naked power to pick and choose according to his*

whims and wishes. Even though the Commissioner may be the best person in the system to identify a tax default, he cannot enjoy unguided discretion but only exercise discretion which is under a legislative guideline showing structured, uniform and transparent exercise of discretion". In this backdrop of discussion, the first proviso to Section 177 was struck down and second proviso was declared as redundant. Operative part from the impugned judgment is reproduced:-

> "40. I am, therefore, inclined to save the statute and read down section 177(1) (except its first proviso) and interpret it to be subservient to section 214C. Therefore, while the substantive power to select a person for audit is provided in section 214C, the machinery provision providing procedure for conducting the audit is in section 177. The taxpayer will first be selected for audit under section 214C by the Federal Board of Revenue and only then would the Commissioner conduct its audit in accordance with procedure given in section 177. Reliance is also placed on Muhammad Umer Rathore v. Federation of Pakistan (PLD 2009 Lah 268), Federal Steam Navigation Co. Ltd. and another v. Department of Trade and Industry (1974) 2 All E R 97), Delhi Transporate Corporation v. D.T.C. Mazdoor Congress and others (AIR 1991 SC 101), Sunil Batra v. Delhi Administration and others (AIR 1978 SC 1675) and Jagdish Pandey v. The Chancellor, University of Bihar and others (AIR 1968 SC 353).
>
> 41. ***The first proviso to section 177(1)*** i.e., 177(1)(a) and (b) is different from section 177(1). Unlike section 177(1), it stands excluded for the purposes of section 214C and therefore ***assumes an independent role of empowering the Commissioner to practically select a taxpayer for audit without any guidelines***. **Hence**, ***the said first proviso equips the Commissioner with the arbitrary power to pick and choose any taxpayer for audit of its tax affairs, which as discussed above, is ex facie discriminatory***. Second, the impugned notice shows (and as admitted by the departmental representative) the power is not being used for audit but to hold a roving inquiry into the affairs of the petitioner as an investigative tool which is also offensive to the overall scheme of self assessment and the legislative policy behind the Ordinance. The first proviso, therefore, acts to ***efface the legislative policy of self assessment*** and voluntary compliance running through the Ordinance and tries to turn back the clock of legislative history resulting in nullifying the concept of deemed assessment and reintroducing regular assessment of the erstwhile Income Tax Ordinance of 1979. *The first proviso to section 177(1) of the Ordinance is, therefore, inherently discriminatory hence violative of Article 25 and Articles 10A, 18 and 23 of the Constitution besides being* ***inconsistent to the scheme of the Ordinance***. The first proviso to section 177(1) of the Ordinance

> cannot be read down, however, it can be severed from the statute in order *to protect the legislative theme behind the Ordinance* and to maintain the constitutionality of the remaining statute. ***For the above reasons, first proviso to section 177(1) of the Ordinance is struck down as being unconstitutional and illegal. With this declaration the second proviso to section 177(1) becomes practically redundant and ineffective."***
>
> [*emphasis supplied*]

The ratio of discrimination, unstructured and unbridled powers was applied for holding that Commissioner has no power to select for audit, independent of selection by FBR, under respective provisions of the other Taxing Statutes.

15. Under *Kohinoor Sugar Mills' Case*, the notices under Section 177 of the Ordinance of 2001 were for Tax Year, 2009. Most of the assailed notices were issued after 01.07.2010 when amendments brought through Finance Act, 2010 were in field, however, some of the notices were issued between the period; from 28.02.2009 till 30.06.2010, when certain amendments were brought through Finance (Amendment) Ordinance 2009 and Finance (Amendment) Ordinance, 2010, however, could not be ratified by placing them before the Parliament, therefore, the amendments lost the status of law. Mr. Naved A. Andrabi, Advocate pointed out that in some of the petitions notice were issued in the interregnum period, *ibid*, for which a direction was given to Commissioner for disclosing reasons. He read Paragraph No.41 of the *Kohinoor Sugar Mills'* judgment in support. In Paragraph No.41 the Commissioner was asked to give reasons for selection of petitioners' cases for audit, since this direction was not assailed by department in appeal, therefore, the writ petitions were converted into representations and sent back to the Commissioner with the same directions, through a separate order.

The notices for audit, issued after 01.07.2010, for Tax Year 2009 were assailed almost on same grounds as were raised in *Chenone Stores' Case* with an additional ground that amendment brought through Finance Act, 2013 could not be applied retrospectively. Through Finance Act 2013 few Explanations were

inserted in Section 214C and Section 177 of the Ordinance of 2001. Similar Explanations were inserted in the other Taxing Statutes also. The insertions were brought during proceedings of *Kohinoor Sugar Mills' Case* and were consequential to the judgment in *Chenone Stores' Case*, to clarify and declare that Commissioner has independent power to call for record and conduct audit.

16. Through judgment in *Kohinoor Sugar Mills*, the Explanations were held to be declaratory; having clarified that Commissioner has independent power to select for audit, under Section 177, in presence of FBR's power under Section 214C. It was held that legislature was competent to clarify its intent by inserting the Explanations. As the notices issued after 01.07.2010 were carrying reasons for calling record to conduct audit, therefore, were declared to have validly issued by the Commissioner. Reliance was placed upon the judgments in *Syed Bhais'* and *Fatima Sharif's Cases, supra*. It was observed that provisions of Section 177 are machinery in nature, therefore, are effective retrospectively. It was opined that language of Section 177 clearly confers a power on Commissioner to call for any record or documents including books of accounts, maintained under the Ordinance, for conducting audit of income tax affairs. The ambiguity, if any, was declared to have been clarified. Paragraphs No. 23 and 24 of *Kohinoor Sugar Mills' Case* are reproduced hereunder:-

> "23. It is common ground between the parties that the impugned notices were issued by the Commissioner under Section 177 of the ITO as substituted vide Finance Act, 2010 in view of the fact that it was the applicable law at the time of issuance of such notices. In my humble opinion, the language of Section 177 clearly confers a power on the Commissioner to call for any record or documents including books of accounts, maintained under the Ordinance for conducting audit of Income Tax affairs of a person. The argument of the learned counsel for the Petitioners that this power of the Commissioner was taken away by virtue of insertion of Section 214C through Finance Act, 2010, is misconceived and not supported by the language of Sections 177 and 214C. If at all there was any ambiguity in the matter, the legislature itself clarified and explained the same by inserting the aforenoted explanation where for removal of doubt it was declared that the powers of the Commissioner under Section 177 were independent of the powers of the Board under Section

> 214C and nothing contained in Section 214C restricted the power of the Commissioner to call for the record or documents including books of accounts of the taxpayer for audit and to conduct audit under Section 177 of the ITO. It is settled law that where any statutory law is changed, there is a presumption that it affects change in the legal rights to the extent provided by such amendment and the amending provisions have to be read alongwith un-amended provisions as they are part of the same Act. Reliance in this regard is placed on ***State Life Insurance Corporation of Pakistan vs. Mercantile Mutual Insurance Company Limited*** (1993 SCMR 1394).
>
> 24. Even otherwise, powers available to the Commissioner under Section 177 are independent and exercisable subject to a different set of conditions on the basis of record before him as compared to the powers available to FB R in terms of Section 214C, which are not record based, consist of power to select by random or parametric ballot and not subject to the same conditions, checks, balances and an obligation to confront and disclose reasons and provide an opportunity to the taxpayer to defend himself, as have been imposed on the Commissioner. In my view these are two independent powers, fundamentally different in nature, genesis, origin, antecedents and conditions. They can coexist independently and be exercised independent of each other. They are not mutually exclusive and are not meant to be so as clearly and unambiguously declared by the legislature by way of the aforenoted explanation inserted through Finance Act, 2013. I do not find any conflict or inconsistency between Section 177 and Section 214C that may require reconciliation."
>
> [*emphasis supplied*]

17. In our opinion, both the judgments are given under different legal positions, therefore, we would examine first; whether the Explanations, inserted through Finance Act 2013, had cured the defect or cause of declaring the first proviso of Section 177(1) as *ultra vires* by examining the case law referred and available on this issue.

Supreme Court of Pakistan, under somewhat similar situation, delivered judgment in ***Molasses Trading*** *& Export (Pvt.) Limited v. Federation of Pakistan and other* **(1993 SCMR 1905)**; when Section 31-A was inserted in Customs Act, 1969 **("Act of 1969")** as a consequence of decision by August Court in ***Al-Samrez*** *Enterprise v. Federation of Pakistan* **(1986 SCMR 1917)**; whereby it was held that enhanced customs duty, due to withdrawal/modification of exemption, could not be demanded if contract between the importer and the

foreign supplier had concluded and all necessary steps for import of goods had been taken. The Section 31-A envisaged charging of enhanced customs duty notwithstanding any other law or decision by any Court. Section 5(2) of Finance Act, 1988, whereby Section 31-A was inserted, gave it retrospective effect by use of words that the Section *'shall be deemed always to have been so inserted'*. The Apex Court held that the Section 31-A has eclipsed the rule laid down by the August Court in *Al-Samrez's Case*. Relevant excerpt (at page 1922) is reproduced:-

> "……The language of section 31-A, as discussed above, clearly envisages and stipulates that the consequences that flow from the act of withdrawal or modification of an exemption notification, shall take effect with reference to the date of its issue, irrespective of the fact that the contract for the import of goods and the L.C. had come into existence prior to such date. *This effect has been now prescribed by a mandatory provision of law by legislative fiat, to use the phrase earlier mentioned. The Courts would therefore have to give effect to it notwithstanding the decision in the case of Al-Samrez Enterprise.*
>
> There is **another aspect** of the matter which may also be mentioned. *The exposition of law made in the case of Al-Samrez Enterprise took into consideration the law as it stood on the date when that decision was rendered.* As shown hereinabove, ***the law has changed by the insertion of the new section 31-A materially affecting the enunciation of the law made therein.*** Therefore the changed state of law that has come into effect was not contemplated in that decision and it cannot therefore be urged with any justification, that the principles laid down therein would still apply to the interpretation of the provisions of law discussed therein. In this view of the matter the argument that the deeming clause takes back the insertion of section 31-A to the time of enforcement of the Act in 1969 and therefore the non obstante clause will not eclipse the decision in the case of Al-Samrez Enterprise, loses all force.
>
> My conclusion therefore is that ***section 31-A has effectively achieved the purposes for which it was enacted as explained above…."***
>
> [emphasis supplied]

Before giving the verdict, *ibid*, principles governing legislative power to validate a taxing provision, declared as illegal by a Court, were discussed in following words:-

> "Before considering this question it would be appropriate to make certain general observations with regard to the power of validation possessed by the legislature in the domain of taxing statutes. *It has*

> *been held that when a legislature intends to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively.* It will not be sufficient merely to pronounce in the statute by means of a non obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the judicial power, which is not within the domain of the legislature. *It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances.* One of the accepted modes of achieving this object by the legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. **The legislature can even give its own meaning and interpretation of the law under which the tax was collected and by "legislative fiat" make the new meaning binding upon Courts. It is in one of these ways that the legislature can neutralise the effect of the earlier decision of the Court.** The legislature has within the bounds of the Constitutional limitations, the power to make such a law and give it retrospective effect so as to bind even past transactions. In ultimate analysis therefore the primary test of validating piece of legislation is whether the new provision removes the defect which the Court had found in the existing law and whether adequate provisions in the validating law for a valid imposition of tax were made."
>
> [emphasis supplied]

18. The law declared and principles enunciated in *Molasses Trading's Case* were endorsed through a subsequent elaborate judgment in ***Fecto Belarus*** *Tractor Ltd. v. Government of Pakistan through Finance Economic Affairs and others* (**2005 P T D 2286).** The Legislature was held to have power of removing the basis on which the judgment was founded; any ambiguity or doubt, in respect of a law, can be removed through a declaratory legislation. Judgment in ***Tofazzal Hossain*** *and others v. The Province of East Pakistan and others* **(PLD 1963 SC 251)** was discussed wherein it was held, "***The power of the Legislature is not affected by the pendency of a proceeding before a Court or the existence of judgment by a Court"***. *Messrs* ***Mamu Kanjan Cotton Factory*** *v. The Punjab Province and others* ***(PLD 1975 SC 50)*** was cited wherein division of sovereign power, amongst the principle organs of the State, was expounded by saying that '*the executive, the Legislature and the judiciary, each*

being the master in its own assigned field under the Constitution'. It was held that Legislature is competent to legislate on a particular subject, to undertake any remedial or curative legislation after discovery of defect in an existing law as a result of the judgment of a Superior Court in exercise of its Constitutional jurisdiction. ***Shri Prithvi Cotton Mills** Ltd., etc. v. Broach Borough Municipality and others* **(AIR 1970 SC 192)** was cited from Indian jurisdiction, wherein the principles of validation by legislature to obliterate the effect of a judgment by Superior Court were discussed extensively. Relevant paragraph (at pages 194 & 195 of the Judgment) is reproduced:-

> "4. Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about **validating statutes** in general. When a legislature sets out to validate a tax declared by a Court to be illegally collected under ineffective or an invalid law, *the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively.* The most important condition, of course, is that the ***legislature must possess the power to impose the tax***, for, if it does not, the action must ever remain effective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are *so fundamentally altered that the decision could not have been given in the altered circumstances.* Ordinarily, a Court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. ***Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon Courts.*** *The legislature may follow any one method or all of them and while it does so it may neutralize the effect of the earlier decision of the Court which becomes in-effective after the change of the law.* Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. ***If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so***

> ***as to bind even past transactions.*** The validity of a Validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax."
>
> [emphasis supplied]

19. August Supreme Court in *The Province of East Pakistan v. MD. **Mehdi Ali Khan*** **(PLD 1959 SC 387)**, held that a law can be declared *ultra vires* for two reasons, ***first*** that it offends a fundamental right and ***second*** for want of legislative competence. In later situation, such legislature cannot bring a validating statute. The law needs to be re-enacted even if the legislative competence is granted subsequently. However, in former case, a provision of law, declared as *ultra vires*, can be validated, because declaration of a law as 'void', being in conflict with any fundamental law, does not repeal it but renders it as inoperative. Various judgments from American, Canadian, Australian and Indian jurisdiction were discussed before enunciating the principles in following words:-

> "To sum up, *the law described to be void* by Article 4 *by reason of its conflict with a fundamental right cannot be said not to have been in force merely by reason of the whole or any portion of it having been in conflict with a fundamental right.* The law was in force not only because there were persons and territories to which the fundamental rights did not extend and in respect of such territories and persons the law had full operation but because ***it was void only in the sense that in the decision of a particular case which brought it into conflict with a fundamental right it had to be ignored or disregarded.*** The moment the fundamental right was taken away by an amendment of the Constitution the law again became operative without its being re-enacted. That this was the sense in which the word `void' was used by the framers of the Constitution becomes perfectly clear from Article 192 of the Constitution which envisages a position where by an order of the President the right to move the Court for the enforcement of a fundamental right is temporarily suspended. On such suspension being ordered the law becomes immediately operative without its being re-enacted. If the law was void ab initio, that is to say, if it did not exist on the statute book, it would require reenactment on the making of an order suspending the operation of fundamental rights. Mr. Suhrawardy has gone to the extent of contending that the effect of word `void' as used in Articles 4 and 110 of the late Constitution is that the conflicting law can never be deemed to have been in existence and that if by an amendment of the Constitution or by the

> making of an order by the President suspending the fundamental rights or by the repeal of the conflicting central legislation the inconsistency, repugnancy or contravention is removed, the law must be re-enacted afresh. He is driven to this result by the logic of his own argument, only to find that the position in which he thus lands himself is wholly unsustainable and directly opposed to the entire trend of authority. The contention, if given effect to, would lead to startling results and the most unmanageable situation, which were far beyond the contemplation of the framers of the Constitution. *The position may be, and is indeed, different where the legislature suffers from an inherent lack of power to enact a law. Such law is void ab initio and must be deemed never to have been enacted, and if it exists on the statute book, it has no legal sanction and is essentially of the nature of an unauthorised writing on the statute book. Even if the defect of lack of jurisdiction is removed by a subsequent conferment of the requisite legislative power, the law enacted when no such power existed will continue to be void and will create no rights or obligations unless it be re-enacted.* ***There is thus a fundamental difference between a law that is made by an incompetent legislature and a law made by a competent legislature but which is in conflict with a fundamental right***, the former being void on general principles the letter being void only to the extent of the repugnancy, in the sense that it cannot be applied to a particular case. ***The former remains void unless re-enacted by a competent legislature, the latter requires no re-enactment and as pointed out in the Australian cases cited above, becomes fully operative when the inconsistency or repugnancy is removed by an amendment of the Constitution or the central law…***."
>
> [emphasis supplied]

20. For validation of any law, ***Competence of the Legislature*** is a precondition. A law declared *ultra vires* for want of legislative competence will have to be re-enacted even if the competence is supplied latter. Article 8 of the Constitution provides that any law inconsistent with the fundamental rights shall be void "***to the extent of such inconsistency***". A law declared as void or invalid, being inconsistent with any fundamental right, remains a valid enactment, however, becomes ineffective or inoperative to the extent of inconsistency. As soon the inconsistency is removed, it becomes effective and operative without being re-enacted.

Different methods of validation are deducible from the law discussed *ibid*:-

First method is that the defect or cause of invalidity, declared in a judgment, must be removed by the validating statue, before the validation can said to have taken place effectively.

Second method is that the provision declared as invalid is so fundamentally altered that the decision could not have been given in the altered circumstances.

As was held in *Molasses Trading's* judgment that by insertion of section 31-A, the law had so changed that *Al-Samrez's* judgment could not have been delivered in its presence.

Third method is that the legislature gives its own meaning and interpretation of the law and by legislative fiat makes the new meaning binding upon Courts.

It is held that the legislature may follow any one method or all of them to neutralize the effect of an earlier decision of Court which becomes in-effective after the change brought through validating statute.

21. Our Superior Courts have also held a law as *ultra vires*, if it *ex facie* offends the equality clause under Article 25 of the Constitution. However, in case of a law capable of administered discriminately, the action under such law can be declared invalid and not the law. Following excerpts from *Federation of Pakistan v. **Shaukat Ali Mian*** (**PLD 1999 SC 1026**) can be referred in support:-

> "24. We may also point out that there is a marked distinction between a provision of a statute which may be ex facie discriminatory and a, provision thereof which may be capable of being pressed into service in discriminatory manner. The former would be liable to be struck down on the ground of violation of Article 25 of the Constitution, but the latter provision cannot be struck down on the ground that it is capable of being used in discriminatory manner. However, any discriminatory action which may be taken pursuant to such provision can be struck down. In this regard, reference may be made to the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445), in which it was contended that since section 34 of the Anti-Terrorism Act, 1997 (Act XXVII of 1997) conferred on the Government the power to amend the Schedule to the said Act so as to add any entry thereto or modify or omit any entry therein by a notification, the

same was ultra vires the Constitution as it was capable of being misused by the Government. The above contention was repelled as under:

> "(iv) It may be observed that the learned counsel for the petitioners urged with vehemence that the power given under section 34 of the Act to the Government to amend the Schedule to the Act so as to add any entry thereto or modify or omit any entry therein by a notification is ultra vires the Constitution. It has been further urged by them that the above power has been abused inasmuch as many offences have been included which have no nexus with the object of the Act or with the offences covered by sections 6, 7 and 8 thereof. In this regard, it may be pertinent to mention that delegation of such power to the Government by the Legislature is not an unusual phenomenon. In order to implement the object of a statute or to work out certain detail, such power is normally delegated. In this regard, reference may be made to the case of Zaibtun Textile Mills Ltd. v. Central Board of Revenue and others (PLD 1983 SC 358). In the above case, the Legislature had conferred power on the Central Board of Revenue to formulate guidelines to determine rate of production, capacity tax and even to levy tax under section 3(4), (5), (6), (7) of the Central Excises and Salt Act, 1944, as amended by the Finance Act, 1966. The above provision was assailed but this Court held that the Legislature was competent to employ proper agency to accomplish its legislative purpose. Reference may also be made to the case of Muhammad Hussain Ghulam Muhammad and another v. The State of Bombay and another Ishwarbhai Becharbhai and others, Intervenes (AIR 1962 SC 97), in which also such delegation was upheld by the Indian Supreme Court."

This view has been endorsed in *Lahore Development Authority v. **Imrana Tiwana*** (**2015 SCMR 1739**) in following words:-

> "71. This Court has on several occasions held that where the statute is not ex facie repugnant to Fundamental Rights but is capable of being so administered it cannot be struck down unless the party challenging it can prove that it has been actually so administered:"

In this judgment, the August Court also narrowed down the guidelines, spreading over the judgments mentioned therein, to be followed and taken care of while dealing with a case where vires of a law is challenged, which are:-

> "65. … … the rules which must be applied in discharging this solemn duty to declare laws unconstitutional. These can be summarized as follows:--
>
> I. There is a *presumption in favour of constitutionality* and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;
>
> II. Where more than one interpretation is possible, one of which would make the law valid and the other void, *the Court must prefer the interpretation which favours validity*;
>
> III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A *reasonable doubt must be resolved in favour of the statute being valid*;
>
> IV. If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;
>
> V. The Court will not decide a larger constitutional question than is necessary for the determination of the case;
>
> VI. The Court will *not declare a statute unconstitutional* on the ground that it violates the spirit of the Constitution *unless it also violates the letter of the Constitution*;
>
> VII. The Court is *not concerned with the wisdom or prudence of the legislation* but only with its constitutionality;
>
> VIII. The Court *will not strike down statutes* on principles of republican or democratic government *unless those principles are placed beyond legislative encroachment* by the Constitution;
>
> IX. Mala fides will not be attributed to the Legislature."

22. In light of the law discussed above; now we revert to examine the effect of the Explanations, inserted in the Federal Taxing Statues through Finance Act 2013, in consequence of the *Chenone Stores'* judgment:

To start with; Federal Legislature's Competence to enact/insert the Explanations has neither been challenged in the petitions nor against it has been declared in the *Chenone Stores*' judgment, hence the precondition of '***Legislative Competence***' to bring any validating statute stands satisfied.

Now to see whether defects, cause or reasons given in *Chenone Stores'* judgment are dealt with; It is important to note that principle of reading down was employed, while interpreting the Legislative Policy after amendments through Finance Act 2010, to hold that the

Section 177(1) (except first proviso) is subservient to the Section 214C. It is held that FBR has been vested with substantive power to select and after being so selected only, the Commissioner can conduct audit in accordance with procedure given in the Section 177.

In our opinion; the Legislature has adopted *third method* of validation, *supra*, of giving its own meaning and interpretation to the provisions of law through the Explanations; which have effectively clarified the Legislative Policy and declared that powers of Commissioner, under the Section 177, are independent of FBR's power under the Section 214C and that nothing contained in the latter section shall restrict the powers of Commissioner to call for record for audit and to conduct audit under the former Section. For reference, the Explanations inserted in the Ordinance of 2001 are reproduced:-

> **Section 177:**
>
> **"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."
>
> **Section 214C:**
>
> **"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."

Similar Explanations, *mutatis mutandis*, are inserted in the other Taxing Statutes. We are convinced, in light of law laid down by Apex Court in *Molasses Trading* and *Fecto Belarus* Cases, that meanings given and interpretation made by the Legislature are binding upon the Courts. After the clarification and declaration of Legislative Policy that Commissioner's power to select and conduct audit are independent of FBR's power to select for audit, the binding force of the judgment in *Chenone Stores'* Case has effectively been obliterated.

The first proviso to Section 177(1) was struck down with an observation that '*it equips the Commissioner with the arbitrary power to pick and choose any taxpayer for audit*', which shows, itself, that the discretion given is capable of being misused. The provision of law cannot said to be *ex facie* discriminatory merely because the discretionary power given by it, can be used arbitrarily. To be dealt in accordance with law, due process, fair trial and being treated indiscriminately are fundamental rights enforceable through Court by invoking extraordinary Constitutional jurisdiction. The act of picking and choosing arbitrarily can always be taken cognizance of by Courts and declared to be in violation of fundamental right, but the law cannot be declared *ultra vires* for being misused, as has been held in *Shaukat Ali Mian's* Case. In *Imrana Tiwana's* Case, besides endorsing this view, it is held that '*Courts must prefer the interpretation which favours the validity'* and that '*reasonable doubt must be resolved in favour of the statute being valid'*.

23. Purpose of audit has been discussed in number of cases by the Superior Courts and is held that after extending the facility of self-assessment, to audit a taxpayer's declaration in the return filed under it, is the right of Tax Administrator. It is discernable from the law laid down by August Supreme Court in *Media Network* and *Faitma Sharif* Cases that selection and conduct of audit, being administrative in nature, is not detrimental to the interest of a taxpayer. State, through FBR, has a right to audit, against taxpayer's corresponding duty to make correct declarations and comply with the statutory commands under three Federal Taxing Statutes. Findings in *Chenone Stores'* judgment that *'use of audit provisions for investigation, would give the department a license to carry out a roving inquiry into the affairs of any taxpayer and to fish for defaults'* is against the basic concept of audit. The concept of audit, as being internationally accepted, has traveled beyond mere verification of correct reporting by taxpayer and raising revenue. Besides creating deterrence by punishing the

defaulting taxpayer, an effective audit program pinpoints noncompliant trends; defects in system, ambiguities in practice and the law. On the basis of gathered information and intelligence from an effective audit, and its publication, future Tax Administration can be reshaped; necessary steps can be taken to suggest curative legislation and clarifications of ambiguous practices. The results achieved from effective audit program may help to improve risk management techniques and determine 'Parameters' for future selection of high risk cases for audit.

Nevertheless, we are in agreement with the observation in *Chenone Stores'* judgment that '*Even though the Commissioner may be the best person in the system to identify a tax default, he cannot enjoy unguided discretion'.* It has already been declared in *Media Network's* Case that Commissioner shall give criteria/reasons in the notice for selection. Following the laid down law, first proviso to the Section 177(1) requires that reasons shall be given by the Commissioner before calling the record for audit. Yet in our opinion, his discretion to call for record to conduct audit need to be structured for avoiding its potential misuse. This discretion should not be used to call a taxpayer consecutively to meet budgetary targets of collecting tax. In subsection (7) of the Section 177, though the legislature has authorized audit of a taxpayer in the next and following tax years but only where there are reasonable grounds for doing so. These reasonable grounds need to be confronted, in addition to the reasons for selection required under the first proviso. Commissioner can call for last six years record for audit, as is deducible from the second proviso, therefore, collective reading would show that the Legislature deprecates, as a rule, selection or calling for record of a taxpayer every year. Calling for record in the next or following year should be in exceptional circumstances on very sound reasons. Structuring of discretion, liable to be misused, has been ordained by Supreme Court of Pakistan in ***Amanullah Khan*** *and others v. The Federal*

Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others **(PLD 1990 SC 1092)**, *Government of NWFP through Secretary and 3 others v.* ***Majee Flour Mills*** *(Private) Limited* **(1997 SCMR 1804)**, and ***Muhammad Amin Muhammad Bashir*** *Limited v. Government of Pakistan through Secretary Ministry of Finance, Central Secretariat, Islamabad and others* **(2015 SCMR 630)**.

24. The judgment reach by us, *ibid*, is due to able assistance by learned counsels from both sides, as most of the authoritative pronouncements, discussed above, were cited by them in support of their respective arguments, relevant of which have been discussed;

Mr. Sarfraz Ahmad Cheema Advocate, led arguments from department's side, He referred to various judgments from High Courts of other Provinces, wherein *Chenone Stores'* judgment is either not followed or has been disagreed; However, his arguments, supported by judgments that the Explanations have cured the ambiguity, if any, and that Commissioner shall have independent power to select for and conduct audit; and that the first proviso was not *ex facie* discriminatory, have found favour.

We have found force in the arguments, from department's side, by Mr. Muhammad Asif, Advocate that a provision of law, being inconsistent with a fundamental right, envisaged in Article 8 of the Constitution, can be declared void, but remains on the statute book, therefore, cannot be struck down. This argument was advance on a specific query from the Court, whether Explanation could be inserted for a provision, which has been struck down by a Court. This proposition has already be dealt with eloquently by the August Court in *Mehdi Ali Khan's Case*, *supra*, holding that it remains on the statute book as a valid enactment, however, being declared void becomes ineffective; As soon the fundamental right is taken away, or the areas for which fundamental right not extended, it becomes or remains effective.

Barrister Imran Aziz Khan, Deputy Attorney General for Pakistan, responding to notice under Order XXVII-A of CPC, took us through the history of controversy regarding Commissioner's power to select for audit and concluded that law laid down in *Syed Bhais' Case, supra*, holds the field for the period before amendments through Finance Act 2010. His arguments, regarding competence of the Legislature to insert Explanation, have also found favour. However, he did not respond to Court's query whether Commissioner's discretionary power to select for audit has been structured, therefore, we have directed for structuring of the discretion.

The argument, by Mr. Shahbaz Butt Advocate, appearing for taxpayer's side, that proviso was declared *ultra vires* being in conflict with audit scheme and historical perspective has already been answered against. However, his argument that Commissioner already had power to call for record under Section 176 of the Ordinance of 2001 needs to be addressed. Bare perusal of Sections 177 and 176, if juxtaposed, would reveal that call for record in both the Sections is under different circumstance; under Section 177 record can be called only for conducting audit after being selected by Commissioner or FBR. Whereas, under Section 176 record can be called for obtaining information or evidence from any person, as is evident from the caption of the Section. The purpose and manner of requiring information or evidence, in any shape, is enumerated in the provisions contained in this Section. Commissioner's power to call for record under Section 177(1) is for distinct and specific purpose, therefore, the argument fails. His next argument; that word *'Selection'* has deliberately been used in the Section 214C and omitted from the Section 177(1), also fails after insertion of the Explanations, whereby intent of the Legislature has been clarified and declared. His argument, that stereotype reasons are given, in the notices for selection issued to different taxpayers, is not being addressed for the reason that this objection can, at the first instance, be raised in reply to the impugned notices before the Commissioner or Taxation Officer and in case of adverse decision, alternate remedy under Section 7 of

the FBR Act, 2007 is available. It has been held in number of judgments, particularly in *Idrees Traders' Case*, *supra*, that constitutional jurisdiction could not be availed without resorting to departmental remedies.

The argument by Mr. Mansoor Usman Awan Advocate, that the Explanations shall have retrospective effect till 01.07.2010, is found correct on the face of it because the provisions of law being interpreted, clarified and so declared through the Explanations have attained current shape after amendment through Finance Act 2010 having effect from the date *ibid*. Yet it does not mean that Commissioner did not have such power before these amendments. The law, as discussed above, had been settled till 30.06.2010 i.e., Commissioner's power to select for audit as per the criteria given, under the then Section 177(1), by FBR was different from his power to select independently and conduct audit under the Section 177(4) as these subsections were existing before amendments through Finance Act 2010.

25. Appeals filed by department (listed in Annex-A) are ***allowed*** to the extent and in the manner as discussed above, by declaring that the Explanations inserted, in the Federal Taxing Statutes, through Finance Act 2013, have effectively obliterated binding force of the judgment in *Chenone Stores' Case*.

The judgment in *Kohinoor Sugar Mills'* Case, being in consonance with legislative declaration and clarification under the Explanations inserted in the Ordinance of 2001, through Finance Act 2013, is upheld. The appeals filed by taxpayers (listed in Annex-B) are ***dismissed***.

(Masud Abid Naqvi)
Judge

(Shahid Jamil Khan)
Judge

APPROVED FOR REPORTING.

A.W.

Judge Judge

Annexure-A

Sr. No.		Case No.
1.	ICA	58 of 2013
2.	ICA	144 of 2013
3.	ICA	190 of 2013
4.	ICA	191 of 2013
5.	ICA	192 of 2013
6.	ICA	193 of 2013
7.	ICA	194 of 2013
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37.	ICA	382 of 2013
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163.	ICA	583 of 2013
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166.	ICA	587 of 2013
167.	ICA	591 of 2013
168.	ICA	468 of 2014
169.	ICA	198 of 2014
170.	ICA	578 of 2014
171.	ICA	821 of 2014
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177.	ICA	827 of 2014
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212.	ICA	895 of 2014
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217.	ICA	901 of 2014
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219.	ICA	903 of 2014
220.	ICA	963 of 2014
221.	ICA	964 of 2014

222.	ICA	965 of 2014
223.	ICA	966 of 2014
224.	ICA	968 of 2014
225.	ICA	969 of 2014
226.	ICA	970 of 2014
227.	ICA	160 of 2016

(Masud Abid Naqvi)
Judge

(Shahid Jamil Khan)
Judge

A.W.

Annexure-B

Sr. No.		Case No.
1.	ICA	1067 of 2015
2.	ICA	1068 of 2015
3.	ICA	1158 of 2015
4.	ICA	1159 of 2015
5.	ICA	1160 of 2015
6.	ICA	1162 of 2015
7.	ICA	1164 of 2015
8.	ICA	1200 of 2015
9.	ICA	1448 of 2015
10.	ICA	1449 of 2015
11.	ICA	1450 of 2015
12.	ICA	1451 of 2015
13.	ICA	1485 of 2015
14.	ICA	1490 of 2015
15.	ICA	1552 of 2015
16.	ICA	1651 of 2015
17.	ICA	1822 of 2015
18.	ICA	261 of 2016
19.	ICA	262 of 2016
20.	ICA	263 of 2016
21.	ICA	264 of 2016
22.	ICA	266 of 2016
23.	ICA	267 of 2016
24.	ICA	268 of 2016
25.	ICA	269 of 2016
26.	ICA	270 of 2016
27.	ICA	273 of 2016
28.	ICA	275 of 2016
29.	ICA	276 of 2016

30.	ICA	277 of 2016
31.	ICA	278 of 2016
32.	ICA	477 of 2016

(Masud Abid Naqvi)
Judge

(Shahid Jamil Khan)
Judge

A.W.