

[Multan Bench Multan]

Present: SYED MANSOOR ALI SHAH AND ABID AZIZ SHEIKH, JJ.

M/s. ITTEFAQ RICE MILLS, HARRAPPA SAHIWAL--Appellant

versus

FEDERATION OF PAKISTAN through Revenue Division Government
of Pakistan and 4 others--Respondents

I.C.A. No. 116 of 2013 in W.P. No. 4266 of 2013, decided on 23.5.2013.

Malik Mumtaz Hussain Khokhar, Advocate for Appellant.

Mr. Asif Rasool, Additional Commissioner Inland Revenue for
Respondents.

Date of hearing: 23.5.2013.

JUDGMENT

Syed Mansoor Ali Shah, J.--This judgment shall decide this appeal, as well as, I.C.A. No. 119/2013 as both raise identical questions of law and facts.

2. The appellant has assailed Letter dated 20.03.2013 issued by the Commissioner, Inland Revenue, Sahiwal Zone, Sahiwal whereby the appellant has been selected for audit for the Tax Year 2011. Learned counsel for the appellant submits that the risk parameters for the selection of cases for audit framed in the Meeting of Federal Board of Revenue's Board-in-Council ("Meeting") held on 14.02.2013 under Section 214-C of the Income Tax Ordinance, 2001 ("Ordinance"), Section 72-B of the Sales Tax Act, 1990 and Section 42-B of the Federal Excises Act, 2005 offend the understanding arrived at between the taxpayer and the FBR before this Court in *Premier Industrial Chemical Manufacturing Co, v. Commissioner Inland Revenue, etc.* [(2013) 107 Tax 21]. Elaborating his contention he points out that according to the Minutes of Meeting dated 15.2.2013 ("Minutes") the aim is to audit "high risk cases" and unless and until high risk cases are indentified through an open and transparent mechanism, the parametric ballot cannot be held. He further submits that in order to qualify as a 'high risk case' ALL the risk parameters must apply to a taxpayer. He contends that as impugned Letter dated 20.3.2013 mentions only four risk parameters to have been attracted in the case of the appellant it is not likely that the appellant falls in the high risk category. Hence the appellant does not qualify to be considered for parametric balloting under Section 214-C of the Ordinance.

3. Learned counsel for the appellant further adds that subsequent decision of FBR reflected in Letter dated 05.04.2012 issued by the Chief (Taxpayers Audit), FBR supports the case of the appellant, inasmuch as, the latter decision of the FBR establishes that the mechanism of segregation of 'high risk cases' provided in the Minutes required that ALL risk parameters should apply to the case of a taxpayer. He further submits that for this reason the department

tabulated a RISK SCORE for every taxpayer. It is prayed that for the above reasons the impugned selection of the appellant for audit under Section 214-C of the Income Tax Ordinance, 2001 be set aside. He further submitted that the learned Judge in Chamber has failed to consider the above contentions while dismissing the petition of the appellant in limine.

4. Mr. Asif Rasool, Additional Commissioner, Inland Revenue has appeared on behalf of respondent FBR and submitted that the Minutes are at best an internal document of the FBR and except the risk parameters framed by the Board, the remaining contents of the Minutes, especially Para 2 confers no right on the assessee to maintain this petition. He contended that calculation of "high risk" is not a legal requirement under Section 214-C of the Ordinance, which only provides for the mode of balloting to be either random or parametric. When asked to explain the meaning of the term "high risk case" used in the Minutes of the FBR, he replied that attraction of even one parameter to a case may constitute 'high risk case' as risk can be gauged with multiple factors including the amount of revenue involved. Therefore, the policy of the FBR, as given in the Minutes is to segregate cases of taxpayers for the purposes of parametric ballot where even a single parameter is attracted. He submits that the subsequent Letter of the FBR, cited above, is no more than a clarification of the Minutes and does not alter the policy in any manner whatsoever.

5. He explained that there are only two categories of cases in the field i.e., High Risk and Low Risk cases. In order to qualify under the high risk cases, the following formula has been evolved by the FBR to determine the RISK SCORE. Except where there is a risk score of 'ZERO,' all other cases fall under 'high risk cases' and are segregated for the purposes of selection through ballot.

$\frac{\text{No. of Variables in YES}}{\text{No. of Variables in (YES \& NO)}} \times 10000$
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6. He further submits that the selection has been in accordance with the arrangement arrived at between the taxpayers and the FBR before this Court in *Premier Industrial Chemical Manufacturing Co. case (supra)*. He explained that selection of cases has been through balloting on parametric basis in terms of Section 214-C of the Ordinance. The parameters have been framed by the FBR after a deliberative process as recorded in the Minutes of the Meeting of the FBR's Board-in-Council dated 15.02.2013.

7. We have heard the learned counsel for the parties and have gone through the record of the case.

8. The understanding arrived at between taxpayers and FBR regarding selection of cases for audit for Tax Year 2011 has been recorded in the judgment reported as *Premier Industrial Chemical Manufacturing Co. v. Commissioner Inland Revenue, etc.* [(2013) 107 Tax 21] in the following manner:--

*2. After arguing the case at some length, the parties have arrived at the following consensus;

- (a) That notices for selection of audit for Tax Year 2011, which have been impugned in the instant petition, as well as, in the petitions mentioned in Schedule-A may be set aside and the process of audit be initiated afresh by the FBR after framing the parameters for selection of audit, keeping in view the following guidelines:
 - (i) That Federal Board of Revenue in terms of Section 214-C of the Income Tax Ordinance, 2001, Section 72-B of the Sales Tax Act, 1990 and Section 42-B of the Federal Excise Act, 2005, shall frame three separate sets of parameters for selection of cases for audit under the three tax laws;
 - (ii) That after the selection process has been carried out independently under all the three tax laws, if the Federal Board of Revenue wishes to further narrow down the selection through carrying out risk analysis (as already done in these cases) the same may be done separately under each tax law;
 - (iii) That a day or so prior to the selection of cases for audit the Federal Board of Revenue shall publicize the parameters settled, in the manner above, for the concerned tax year in the print media, as well as, upload the same on the website of FBR to facilitate the taxpayers;
 - (iv) That notices (separate notices under different tax laws) issued to the taxpayers selected for audit shall clearly specify the parameters attracted in their cases in order to make the process;
 - (v) The Federal Board of Revenue will also consider establishing a Grievance/Review Panel to attend to the issues/questions arising out of the audit

selection process. This will alleviate the anxiety of the taxpayers and may also avoid further litigation."

9. FBR's Board-in-Council in its Meeting held on 14.02.2013 has approved the "risk parameters for selection of cases for audit" under Income Tax Ordinance, 2001, Sales Tax Act, 1990 and Federal Excise Act, 2005 pertaining to Tax Year 2011. Para 2 of the said Minutes provide as follows:--

"2. Federal Board of Revenue will select cases for audit on the basis of these parameters aimed at auditing high risk cases and promoting voluntary compliance culture. This will also minimize personal involvement in selection of cases which will result in reducing any possible harassment to the taxpayers." (emphasis supplied)

10. The summary of commitments made by FBR in Premier Industrial Chemical Manufacturing Co. case is as follows:--

- a. To frame three separate sets of parameters for the selection of cases for audit under the three tax laws.
- b. To narrow down the selection through risk analysis, if the FBR so wishes.
- c. To publicize the parameters in print media and on the website of the FBR.
- d. To clearly specify, in the notice to the taxpayer, the parameters attracted in their case.
- e. Establishment of the Grievance/Review Panel.

11. Perusal of the Minutes of the Meeting of the FBR's Board-in-Council dated 15.02.2013 reveal that the FBR has honoured the commitments recorded in the above cited judgment of this Court.

12. The statutory obligation of the FBR regarding selection of cases for audit under Section 214-C of the Income Tax Ordinance, 2001, Section 72-B of the Sales Tax Act, 1990 and Section 42-B of the Federal Excises Act, 2005 is to conduct a ballot which may be random or parametric. Section 214C-(1) of the Ordinance, which is identical to the other aforementioned provisions, to this extent, provides:

214-C (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. (emphasis supplied)

The law clearly provides for selection of 'persons' or 'classes of persons' for audit. Selection of 'persons' is conveniently done through random balloting while selection of "classes of persons" can only be through parametric balloting. It is axiomatic that in a parametric audit, the application of risk parameters to the taxpayers will automatically segregate a group of taxpayers, for convenience, referred to as the 'parametric group'. It is this parametric group of taxpayers which is put through computer balloting (also parametric balloting) and a limited number from amongst them selected for audit as per institutional capacity and requirement.

13. The real issue before us in this case is the scope and mechanism of the process of segregation of the taxpayers for developing a parametric group before it is funneled through the process of balloting. The nature and character of the 'parametric group' will depend on the mode and manner of application of the risk parameters to the taxpayers. This architecture and design of risk analysis forming part of the audit strategy/policy, for a particular tax year, is the sole prerogative of the FBR. The weightage of risk attached to a parameter falls within the technical and expert domain of the FBR. The Courts may judicially review the audit policy announced by the FBR in order to satisfy itself regarding its fairness, openness and transparency besides ensuring that the audit policy has been fairly applied to the taxpayers across the board. Needless to say that FBR has to show that the risk parameters have been duly framed by FBR and have been publically advertised for the sake of taxpayers convenience alongwith the risk strategy adopted by the FBR (reference commitment made by FBR in Premier Industrial Chemical Manufacturing Co. case).

14. Now coming to the facts of the present case. The Minutes of the Meeting of the FBR's Board in Council dated 15.02.2013, which quintessentially is the audit policy of the FBR for Tax Year 2011, lays down risk parameters of all the three tax laws separately. Para 2 of the Minutes provides as follows:--

"2. Federal Board of Revenue will select cases for audit on the basis of these parameters aimed at auditing high risk cases and promoting voluntary compliance culture. This will also minimize personal involvement in selection of cases which will result in reducing any possible harassment to the taxpayers."

15. This has been followed by Letter dated 05.04.2013 issued by the Chief (Taxpayers Audit), communicating the decision of the Board to the field formation of FBR, after the selection of cases for audit, in the following terms:

To,	All Chief Commissioner Inland Revenue, LTU's/RTO's.
Subject:	<u>SELECTION OF AUDIT BY THE BOARD THROUGH PARAMETRIC COMPUTE BALLOTING FOR TAX YEAR 2011.</u>
<p>I am directed to refer to subject cited above and to say that some of the field formation have made enquires that in the some cases criteria's on which the cases have been selected by the board all parameters do not specifically apply on the cases. The issue has been considered by the Board and it has been decided that even if a single parameter attracts a particular case, LTU's/RTO's shall proceed for audit of the case under the law.</p>	
<p>Sd/- (Najeeb Qadir) Chief (Taxpayers Audit) Fax:051-9219649</p>	

16. Based on the terminology employed in Para 2 of the Minutes it has been urged before this Court that only "high risk cases" have to be audited which can only be identified and segregated for the purposes of balloting if all the risk parameters are attracted to a particular case of a taxpayer or by selecting the high risk score only.

17. It is important to dispel this impression harboured by the learned counsel for the appellant regarding "high risk cases." It is the understanding of the appellant that "high risk cases" necessarily mean cases which have a "high risk score" calculated on the basis of the formula mentioned above. Perusal of the risk parameters show that every parameter is independent and self-contained. The impression gathered by the learned counsel for the appellant that there is a symbiotic relationship between the parameters and unless a basket of risk parameters is attracted to a case, the case does not qualify as a high-risk case is erroneous. Multiple factors determine risk e.g., the nature of the risk parameter, the number of the risk parameters attracted in a case, the quantum of revenue involved, etc. Therefore, even a single risk parameter can identify a high risk case.

18. The Additional Commissioner representing the FBR has taken pains to explain that under the audit policy reflected in the Minutes of the Meeting dated 15.02.2013, 'high risk cases' mean cases to

which even a single parameter is attracted. In the wake of this submission, the RISK SCORE formula employed by the FBR is only to help separate high risk cases from low risk cases. Low risk cases being cases to which not a single parameter applies. There is no other purpose or a deeper meaning attached to the Risk Score tabulated by the FBR. Once again it is reiterated that FBR is the best judge to perceive and quantify 'risk'. In this case the representative of the FBR has made it clear that according to Para 2 of the Minutes even a single risk parameter constitutes "high risk".

19. After segregation, all the cases other than ZERO risk score cases have been funneled through parametric ballot and out of these cases a limited number of cases have been selected, including the appellant, according to the auditing capacity of the FBR and its field formation. Even otherwise Para 2 of the Minutes which simply states that "these parameters are aimed at auditing high risk cases" does not mean that application of ALL the parameters will constitute high risk cases. It actually means that even a single risk parameter, from amongst the framed risk parameters, can identify high risk cases.

20. Letter dated 05.04.2012 issued by the Chief (Taxpayers Audit) communicating the decision of the Board to its field formation is no more than a clarification supporting the view taken by FBR in the Minutes discussed above. Additionally, we find that the enquiries put up in this letter by the field formation before the FBR are misconceived besides being contumacious, because after the selection of cases by FBR for audit through holding parametric balloting, the field formation cannot conceivably question the said selection or mechanism of segregation. The said letter is, therefore, inconsequential and does not advance the case of the appellant or weaken the case of the FBR.

21. Before parting with the judgment we wish to observe that FBR has been some what causal in framing the Audit Policy as is evident from the drafting of the Minutes and Letter dated 05.04.2013 issued by the Chief (Taxpayers Audit). Audit Policy is a serious matter and affects a large number of taxpayers in the country. Such a policy must be open, lucid, transparent and self explanatory. We find it odd that the Audit Policy for the Tax Year 2011 is in the shape of Minutes of the Meeting of the FBR's Board-in-Council and has not been formalized into a policy document and uploaded as such on the website of the FBR.

22. FBR shall ensure that in future, the Audit Policy carrying the risk parameters and the mode and manner of segregation through risk analysis for the purposes of parametric balloting is clearly laid out in a policy document. This will help avoid litigation and will also allay the apprehensions of the taxpayers which stem from lack of openness and clarity. It is clarified that we have not gone into the neutrality or the fairness of the individual risk parameter framed by the FBR as it was not challenged before us and can be looked into in some other case.

23. For the above reasons, we find no illegality or error in the selection for audit of the appellant for the Tax Year, 2011 through letter dated 20.3.2013 issued by Respondent No. 3. For the same reasons, the order of the learned Judge in chambers does not call for any interference. This appeal is, therefore, dismissed with no order as to costs.

24. Appellant is, however, free to approach the Review Panel or the Regional Review Panel as the case may be, in case the appellant is aggrieved with the application of any risk parameter to the case of appellant on merits.