

Form No:HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Case No.W.P.No.32597 of 2015

Nestle Pakistan Ltd. etc.

Versus

The Federal Board of Revenue, etc.

S.No. of order/ Proceedings	Date of order/ Proceedings	Order with signature of Judge and that of Parties of counsel, where necessary.
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06.11.2015. M/s. Imtiaz Rashid Siddiqui, Muhammad Humzah, Jamshaid Azam Advocates for the petitioners.
M/s Nauman Mushtaq Awan, Ijaz Ahmad Awan and Mahvish Tahira and Shahzad Ata Elahi, Advocates for the respondents in connected writ petitions.
Mr. Sarfraz Ahmad Cheema, Advocate for the respondents.
Mr. Tahir Mahmood Khokhar, Standing Counsel for Pakistan.
Syed Ijaz Hussain, Member Audit, Federal Board of Revenue, on Court's call.

After preliminary discussion, the Member Audit, present in Court (on Court's call), when confronted with judgment in Writ Petition No.30253 of 2014 titled Defence Housing Authority v. Commissioner Inland Revenue, etc, has offered that few members from petitioner's counsel or Tax Bar led by Mr. Imtiaz Rashid Siddiqui, Advocate may approach him on 12.11.2015 at 11:00 a.m. and he will ensure, in consultation with the Chairman, to sort out the issue involved in this and connected petitions.

2. The Member Audit, FBR, shall also ensure that no final order is passed, in pursuance of the impugned selection, till next date.

Relist on 24.11.2015.

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ORDER SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Case No. Writ Petition No. 32597 of 2015.

Nestle Pakistan Ltd, etc.

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29.10.2015

Mr. Imtiaz Rashid Siddiqui, Advocate for the petitioner.
Mr. Sarfraz Ahmad Cheema, Advocate, on Court's call.

Petitioner has impugned letter dated 15.10.2015, whereby its case has been selected for audit under Section 72B/25 of the Sales Tax Act, 1990.

Learned counsel for the petitioners submits that selection is made in violation of judgment by this Court in Writ Petition No.30253 of 2014 dated 26.06.2015.

2. Mr. Sarfraz Ahmad Cheema, Advocate, on Court's call, accepts notice on behalf of respondents. He is directed to ensure presence of Member (Audit) on next date of hearing, in whose presence, judgment in above noted writ petition was passed.

3. To come up on 06.11.2015.

C.M. No.1 of 2015

4. The dispensation sought for is allowed subject to all just and legal exceptions. C.M stands disposed of.

C.M. No.2 of 2015

5. Notice for the above date.

Shahid Jamil Khan
Judge

IN THE LAHORE HIGH COURT, LAHORE

Writ Petition No. 32597 /2015

Nestle Pakistan Limited etc

VERSUS

The Federal Board of Revenue etc

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Petitioners

through

Shehryar Kasuri
SHEHRYAR KASURI
BARRISTER AT LAW
Advocate High Court
179/180-A, Scotch Corner,
Upper Mall, Lahore

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IN THE LAHORE HIGH COURT, LAHORE

32597
WRIT PETITION NO. _____/2015

1. Nestle Pakistan Limited, having its registered office at 308-Upper Mall, Lahore, through its Senior Manager Legal, Syed Faisal Raza.
2. Syed Faisal Raza, Senior Manager Legal, Nestle Pakistan Limited, 308-Upper Mall, Lahore.

.....Petitioners

VERSUS

1. The Federal Board of Revenue, through its Chairman, 5 - Constitutional Avenue, Islamabad.
2. The Member Audit, Federal Board of Revenue, 5 - Constitutional Avenue, Islamabad.
3. The Chief Commissioner Inland Revenue, Large Taxpayers Unit (LTU), Tax House, Nabha Road, Lahore.
4. The Commissioner Inland Revenue, Zone II, Large Taxpayers Unit (LTU), Tax House, Nabha Road, Lahore.
5. The Additional Commissioner Inland Revenue, Audit, Zone-II, Large Taxpayers Unit (LTU), Tax House, Nabha Road, Lahore.
6. The Deputy Commissioner Inland Revenue(Audit-10), Zone-II, Large Taxpayers Unit (LTU), Lahore.
7. The Federation of Pakistan through Secretary Revenue, Islamabad.

.....Respondents

CONSTITUTIONAL PETITION under Article 199 of the
Constitution of Islamic Republic of Pakistan, 1973

Respectfully Sheweth:

The following issues of law arise for consideration, by this honourable Court, herein:

- (a) *Whether the ballot for selection of the Petitioner for audit, in terms of section 72-B of the Sales Tax Act, 1990 (the "ST Act"), allegedly conducted by the respondent Board is in direct violation to the judgment titled "DHA Versus the Federal*

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Board of Revenue etc.” by this honourable Court in WP No.30253/2014; all consequent proceedings including notice number LTU/CIR/Zone-II dated 30.09.2015 are void ab-initio and thus bad in law?

- (b) *Whether the selection of the petitioner for audit is discriminatory; thus violative of Articles 18 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973 (the “Constitution”)?*
- (c) *Whether the selection of cases for audit under section 72-B of the Act is not made by the Board, constituted under the Federal Board of Revenue Act 2007, is ultra vires the Ordinance and thus the entire process has been rendered coram non iudice and without lawful authority?*

The Prelude:

1. That tax imposition, assessment and collection, under the ST Act, is an elaborative scheme regulated by various provisions thereof. The system is based on self assessment, by the tax payer; it is supervised, inter alia, through the process of audit. The selection for audit is, thus, a neutral, impartial and equitable function and is dependent on a reliable tax intelligence system.
2. That section 25(1) of ST Act provides for calling of the record by the tax regulator from a taxpayer. In the same sequence, it is section 25(2) of the ST Act which provides that the respondent officers, on the basis of the record obtained under sub-section (1) may, once in a year conduct audit.

However upon the insertion of section 72B through Finance Act, 2010, in the ST Act, the respondent Board has been empowered to select persons for audit of tax affairs through *computerised balloting, the same may be random or parametric*. Nevertheless, power of the respondent Board to select for audit is not unbridled; the discretion has to be exercised justly,

fairly and in transparent manner.

3. That it is the ballot for selection, allegedly conducted by the respondents, which is being challenged herein, along with all consequences thereof. The facts of the case may now be laid before this honourable Court.

The facts of the case:

4. That the petitioner, a public limited listed company, is engaged in production of food, beverages and dairy products, is registered under the tax laws including the Act vide STRN # 0308200900146. The present petition is being instituted and filed by the Company's duly authorized officer, who is well conversant with the facts of the case and can depose in this behalf.
5. That the sales tax returns, for each *tax period*, during the year commencing from July 1, 2013 and ending on June 30, 2014 were filed in terms of section 26 of the ST Act through e-FBR portal.

In addition to the afore, the petitioner in compliance to provisions of section 26 of the ST Act, read with Rule 17 contained in Chapter 2 of the Sales Tax Rules 2006, has also filed a consolidated Annual Statement for the twelve months of the referred period.

6. The respondent Board has exercised, powers under section 72-B of the ST Act; the same is reproduced as follows:

"72B. Selection of audit by the Board.- (1) The Board may selects persons or classes of persons for audit of tax affairs through computer ballot which may be random or parametric as the Board may deem fit.

(2) Audit of tax affairs of persons selected under sub-section (1) shall be conducted as per procedure given in section 25 and all the provisions of this Act shall apply accordingly.

(3) For the removal of doubt, it is hereby declared that the Board shall be deemed always to have had, the power to select any persons or classes of persons for audit of tax affairs under this section."

In the same sequence as required afore, upon selection under section 72B, the procedure for conducting the said audit of tax affairs of the registered person/tax payer is provided in section 25 of the ST Act; the same, for the convenience of this honourable Court, is reproduced as follows:

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

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

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

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

(4) *[deleted]*

(4A) *[deleted]*

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

Provided if a registered person wishes to deposit the amount of tax short paid or amount of tax evaded along with default surcharge during the audit, or at any time before issuance of show cause notice he may deposit

the evaded amount of tax, default surcharge under section 34, and twenty five per cent of the penalty payable under section 33:

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

Explanation.- For the purpose of sections 25, 38, 38A, 38B and 45A and for removal of doubt, it is declared that the powers of the Board, Commissioner or officer of Inland Revenue under these sections are independent of the powers of the Board under section 72B and nothing contained in section 72B restricts the powers of the Board, Commissioner or Officer of Inland revenue to have access to premises, stocks, accounts, records, etc. under these sections or to conduct audit under these sections."

7. That the ST Act provides under section 50 thereof, that the Board will make Rules for facilitating implementation of various provisions of the Act. In this regard although the Board has framed Rules as contained in Chapter 2 of the Sales Tax Rules 2006. However nothing has been done viz. specific reference to section 72B of the Act except that the Board has issued the "Audit Policy 2015".
8. That in the referred perspective, the respondent Board on 14.09.2015, conducted an alleged random ballot in terms of section 72B of the ST Act. As a result of the said ballot, the petitioner was informed by respondent No. 4, through letter bearing LTU/CIR/Zone-II dated 30.09.2015 that the petitioner's case had been selected for audit of its tax affairs. Through the mentioned letter the petitioner was further informed that the said audit would be held in terms of section 25 of the ST Act.
9. That the notice dated 30.09.2015 has been followed up by a letter bearing number C.No.LTU/ST/NPL/Audit-10//2015/2732 dated 15.10.2015,

thereby the petitioner has been asked to furnish record for the purposes of conducting audit in terms of section 25 of the ST Act.

10. That the petitioner submits before this honourable Court that (a) the Audit Policy 2015 in the absence of the Rules under section 50 of the Act does not allow the selection of audit under section 72B and all actions taken by the respondents in terms of the alleged audit thereafter are illegal, unlawful and ab-initio void (b) the Ballot conducted on 14.09.2015 without adhering to the dicta laid in the judgment rendered in WP No.30253/2014 is illegal, unlawful and ab-initio void (c) the Impugned selection of the petitioner on the basis of the random ballot for audit for Tax Year 2014 by respondent Board (the impugned selection) and the consequent notices dated 30.09.2015 and 15.10.2015 (the impugned notices) are illegal and unlawful. The afore are assailed as being unlawful, ab-intio void, patently without jurisdiction and in clear violation of the law declared, inter-alia on the following grounds:

GROUNDS

- a) The Audit Policy 2015, the process of Ballot, the impugned Selection as well as the impugned Notices and all subsequent actions by the respondents are against law and facts.
- b) The audit must be regulated by the respondent Board under the statutory provision of the ST Act; the same requires framing of Rules under section 50 thereof for the purpose of providing the scope and tenure of the audit and the officers who are vested with the powers to conduct such an audit; the Rules for the same, have not been made till date and in the absence

thereof audit as per terms of section 72B of the ST Act cannot be conducted.

- c) The Audit Policy 2015 is only an internal policy, for guideline of the tax officials; it does not overcome and or cover the absence of the required Rules under section 50 so as to able proceedings under section 72B of the ST Act.

It is pertinent to mention that this aspect of absence of the Rules has been noticed by the honourable High Court Lahore in a decision dated 26.06.2015 rendered in W.P. No. 30253/14; the relevant paragraphs thereof are as follows:

“Nevertheless, power of FBR to select for audit is not unbridled, the discretion has to be exercised justly, fairly and in transparent manner. The Apex Court in Government of NWFP through Secretary and 3 others v. Majee Flour Mills (Private) Limited (1997 SCMR 1804), while following its earlier decision in Amanullah Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others (PLD 1990 SC 1092), has reiterated the doctrine of “structuring the discretion”

.....Needless to say that FBR is bound to structure the discretion vested in it under Section 214C of the Ordinance and under parallel provision of Sales Tax Act 1990 and Federal Excise Act 2005. Federal Government, so far, has not been able to frame Rules to regulate FBR’s discretion and FBR has not given any procedure. A taxpayer, selected for audit is left on the mercy of an unskilled audit officer for conducting audit. I am constraint to observe that FBR’s tax year based selection for audit is tainted with an intention to achieve budgetary targets, therefore, is creating panic amongst the taxpayers, who are rushing to Courts after their selection. One of the reasons for challenging each case of selection under audit appears that department has not come out of the mind

set of assessment under the Repealed Ordinance of 1979. After selection of taxpayers, the additions are made on gross-profit and parallel cases basis. Even estimations are made, which are alien to the new concept of amending assessment under Ordinance of 2001.....

.....As ordained by Hon'ble Supreme Court, in the referred cases, FBR needs to frame Rules, keeping in view the doctrine of "structuring the discretion". If FBR fails to rationalize and regulate powers of selecting and conducting audit through Rules, the Courts might intervene more often than is necessary to undo an exercise of power, appearing arbitrary and capricious at times."

- d) In absence of any Rules the respondent Board does not have the power to select a taxpayer for audit of tax affairs for a particular period under section 72B of the ST Act. The phrase of tax affairs is undefined in the statute; the same if understood in the context of monthly returns, under the ST Act, each monthly tax return is a separate and distinct tax period in terms of section 2(43). The annual statement/return is merely reconciliation of the earlier filled returns.
- e) In the same sequence for the purposes of audit by the respondent Board, there does not exist any vesting of powers in the tax officials for the tax audit as no instrument exist under the ST Act for the same.
- f) Indeed unless Rules are framed under section 50 of the ST Act, the entire of selection as contemplated under section 72B read with section 25 of the Act remains an arbitrary exercise of authority. The entire action is unlawful.
- g) The selection for audit has not been made by the Board (FBR) as required under section 72B of the Act. The mentioned provision of law requires that

selection for audit has to be conducted by the Board. However, though for tax year 2014, the procedure of selection has been arranged by the Board but the selection has been done by ballot in the computer at the instance of the Federal Finance Minister and members of the trade bodies; the same is manifest from the press release issued by the respondent Board on 14.09.2015, that too in the absence of *random or parametric* balloting; admittedly the entire process is bad in law.

- h) Without prejudice to the afore, the absurdity of the entire process and the mala fide objective of the same is manifest from a bare perusal of part 5 of the Audit Policy which is reproduced as follow:

“PERFORMANCE EVALUATION

FBR has consistently strived to automate its audit procedures through business process reengineering to increase the audit coverage and to better allocate its resources. To optimise the impact on compliance, resources need to be allocated to balance coverage across tax payer segment and tax types, yet address major risks to compliance. In order to implement the aims and objective of this policy a separate audit operational plan has been prepared. The said plan, which is on an annual basis, is to design to put in place, among other things, a performance monitoring and evaluation mechanism. The said the mechanism lays down qualitative and quantitate indicators for the above purpose. In addition to the performance indictors given below, key performance indicators (KPIs) circulated by the board on 15th April 2015 shall also made a basis of performance evaluation of all tiers of officers cadre engaged in the audit activity.

Quantitative Indicators

- a) No. of cases assigned to each officer
- b) No. of cases disposed of per month, per quarter and per year by each audit officer
- c) Time spent (No. of Hours) per case by each audit officer.
- d) Comparison of disposal by each audit officer against target. Rate of success in meeting monthly, quarterly and annual disposal targets.
- e) No. of field audits conducted.
- f) No. of cases assigned to each RTO/LTU
- g) No. of cases disposed of per month, per quarter and per year by each RTO/LTU

- h) *Comparison of disposal by each RTO/LTU against target. Rate of success in meeting monthly, quarterly and annual disposal targets.*

Qualitative indicators

- a) *Average demand raised per case by each audit officer.*
b) *Average collection of demand per case by each audit officer.*
c) *Amount of demand raised per month, per quarter and per year by each audit officer.*
d) *Amount of collection out of demand per month, per quarter and per year by each audit officer.*
e) *Collection out of demand by each audit officer against target. Rate of success in meeting monthly, quarterly and annual disposal targets.*
f) *Compliance of check lists and other instructions of the board.*
g) *No of cases in demand thereof upheld at first appellant forum.*
h) *Average amount of tax deducted per case through field audit.*
i) *No of cases where avoidance schemes and tax evasion have been identified.*
j) *Amount of demand raised per month, per quarter and per year by each RTO/LTU.*
k) *Amount of collection out of demand per month, per quarter and per year by each RTO/LTU.*
l) *Collection out of demand by each RTO/LTU against target. Rate of success in meeting monthly, quarterly and annual disposal targets.*

The above produced policy shows blatant abuse of the statutory power; the same is based on the amount of demand raised as a result of the audit. Thus officers who cannot create a demand of tax as a result of the audit will be assessed negatively. This entire process is in complete contradiction to the judgment rendered to this honourable Court in WP No 30253/14. This is a classic case of putting the tax payers before officers with unbridled power and discretion, unregulated by any Rules under the Act.

- i) That without prejudice to the foregoing, the selection is contrary to the policy of the respondent Board itself viz. the criteria for selection. In addition thereto, the exclusion of certain classes of persons from the selection process is not only discriminatory and violative of Article 25 of

the Constitution, the same also can be considered as negative parameters for selection.

- j) The statutory process required for delegation of power of the Board to the Chairman, Committee or Member under Federal Board of Revenue Act, 2007 has not been observed as was directed by this honourable Court in the case reported as 2013 PTD 398.
- k) That the requirement of publication of the notification of order or decision of the Board and Member exercising the power of the Board in official gazette in term of Rule 4 of the Federal Board of Revenue Rules, 2007 has not been made. The decision of selection of taxpayer for audit has no legal significance till such decision is published in Official Gazette; it is settled proposition of law laid down in reported judgment PLD 2011 (SC) 347 that issuance of notification has no significance or legal importance till it is published in the Official Gazette. According to section 2(41) of General Clauses Act, 1897, a "notification means a notification published under the proper authority in an Official Gazette". Therefore, the whole process of selection is ultra-vires the provisions and process set out in Federal Board of Revenue Act, 2007 and Federal Board of Revenue Rules, 2007 and hence, without lawful authority and have no legal affect.
- l) That as per section 3 of the Federal Board of Revenue Act, 2007, the Board shall consist of not less than seven members to be appointed by the government, thus any act to be performed by the Board under any law requires that all seven members should participate in the same; unfortunately the selection of cases for audit was not conducted by the

members of the Board (FBR), thus the entire process has been rendered *coram non judice* and without lawful authority.

- m) The selection of the case is against the guarantees given in Article 4, 10-A, 18 and 25 of the Constitution of Islamic Republic of Pakistan, 1973, hence, illegal and without jurisdiction.
- n) It is trite law that the statutory authorities are bound by law to act fairly and justly; they cannot take any action unless the same is supported by law. The impugned selection is in negation thereof; the same is arbitrary and mala fide. The object thereof is nothing but to create a forced demand against the petitioner and that too in absence of any lawful parameters. The impugned action and inaction is based on abuse of statutory authority and the same is without sanctity.
- o) That the petitioner craves leave of this honourable court to raise any further ground at the same time of hearing of this petition
- p) That the petitioner has no efficacious and speedy remedy available against the mala-fide and illegal action of the respondents; hence this Petition.

PRAYER

In view of the facts and circumstances narrated above, it is, therefore, most graciously prayed that this honourable Court be pleased to declare that the Ballot for selection of audit, as conducted by the Federal Board of Revenue on 14.09.2015, for Tax Year 2014 as well as Notice No. LTU/CIR/Zone-II dated 30.09.2015 and letter C.No.LTU/ST/NPL/Audit-10//2015/2732 dated 15.10.2015, issued by the respondents are without lawful authority and of no legal effect; the same be graciously struck down.


It is further prayed that during the pendency of the titled petition, the Notice dated 30.09.2015 be suspended and the respondents be restrained to proceed further in the matter in any manner whatsoever.

Any other relief which this Honourable Court deems fit may also be granted to the petitioner.

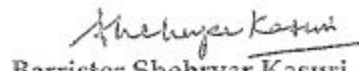

Petitioners




Through


Intiaz Rashid Siddiqui
Advocate Supreme Court

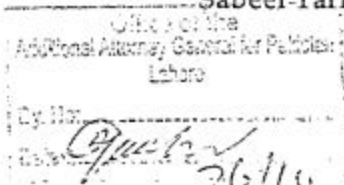

Abdul Bari Rashid
Advocates High Court


Barrister Shehryar Kasuri
Advocates High Court


Sabeel-Tariq Mann
Additional Attorney General for Pakistan
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179/180-A, Scotch Corner,
Upper Mall, Lahore.


Jamshid Alam



CERTIFICATE: As per instructions it is certified that this is the 1st petition against the selection for audit, as detailed in the petition, under section 72B of the Sales Tax Act 1990.


Advocate

CERTIFICATE: This petition seeks constitutional declaration and direction against unlawful audit under section 72B of the Sales Tax Act 1990.


Advocate

List of Books:

1. The Constitution of Islamic Republic of Pakistan, 1973;
2. The Sales Tax Act 1990;
3. The Federal Board of Revenue Act, 2007.