

In the Hon'ble Lahore High Court, Lahore.

W.P. No. _____/2014

**M/S. STAR LABORATORIES (Pvt.) LIMITED,
23-K.M. Multan Road, near Chung, Lahore**

Through

**MUHAMMAD ASRAR HUSSAIN MALIK,
— Chief Executive**

— PETITIONER/TAX-PAYER

VERSUS

1. THE FEDERATION OF PAKISTAN,

through

The Secretary,
Ministry of Finance & Economic Affairs,
Islamabad.

2. THE FEDERAL BOARD OF REVENUE,
Constitution Avenue, Islamabad.

through

THE CHAIRMAN, F.B.R.;

3. THE COMMISSIONER INLAND REVENUE,
Zone-IX, Regional Tax Office-II,
Tax House, Syed Mauj Darya Road, Lahore; and
4. THE DEPUTY COMMISSIONER INLAND REVENUE,
Enforcement & Collection Unit-07, Zone-IX,
Regional Tax Office-II,
Tax House, Syed Mauj Darya Road, Lahore.

— RESPONDENTS

**PETITION UNDER ARTICLE 199 OF THE
CONSTITUTION OF THE ISLAMIC REPUBLIC
OF PAKISTAN, 1973 FOR ISSUANCE OF AN
APPROPRIATE WRIT / DIRECTION AGAINST /
TO THE RESPONDENTS**

Respectfully submitted:-

- I. That this Petitioner is a Private Limited Company engaged in the business of manufacturing and sales of medicines, and is assessed to income tax at N.T.N. 1297574-5 in the Regional Tax Office-II, Lahore *which* is under the administrative control of the Ministry of Finance & Economic Affairs, Govt. of Pakistan (Respondent No. 1) *via* Federal Board of Revenue, Islamabad (Respondent No. 2).
- II. That the Board of Directors of this Petitioner/Company has resolved to file the instant Writ Petition in this hon'ble Court *vide* Resolution, dated 23.12.2014 (*Annex- 'A'*).
- III. That this Petitioner/Tax-payer filed Return of Income in respect of Tax Year 2013 declaring an income of Rs. 4,383,851, *which* was accepted as such u/s 120(1) of the Income Tax Ordinance, 2001. Copy of the Return is at *Annex- 'B'*.

- IV. That it was communicated by the learned C.I.R., Zone-IX, Regional Tax Office-II, Lahore *vide* his Letter No. CIRZone-IX/Audit-TY-2013/2014, dated 03.10.2014 (*Annex- 'C'*) that this Petitioner/Tax-payer's case had been selected by the F.B.R. u/s 214-C of the Income Tax Ordinance, 2001 for audit into its tax affairs for the Tax Year 2013

whereupon

this Petitioner/Tax-payer requested the learned Commissioner Inland Revenue/Respondent No. 3 *vide* Letter dated 28.10.2014 (*Annex- 'D'*) to disclose the basis/criteria of selection for audit.

- V. That pending reply by the Respondent No. 3, the Respondent No. 4 issued Notices u/s 177 of the Income Tax Ordinance, 2001 bearing —
- (1) No. 1, dated 'NIL' — *Annex- 'E'*;
 - (2) No. 1-a, dated 05.11.2014 — *Annex- 'F'*; and
 - (3) No. 219, dated 14.11.2014 — *Annex- 'G'*,

to which

this Petitioner made Reply on 24.11.2014, *copy whereof* is at *Annex- 'H'*.

- VI. That later on this Petitioner/Tax-payer was confronted with the alleged 'basis' of selection *through* the C.I.R.'s Letter No. 2276, dated the 04.12.2014 (*Annex- 'I'*) stating as under:-

“..... your case was selected for audit in exercise of powers conferred under section 214C of the Income Tax Ordinance, 2001 by the Federal Board of Revenue through Computer random Ballot for conducting audit u/s 177 of the Income Tax Ordinance, 2001.

The computer random ballot was held on 25.09.2014 and before this occasion the Audit Policy was well published in the print media by the Federal Board of Revenue.”.

VII. That the selection of this Petitioner/Tax-payer's case by the F.B.R./Respondent No. 2 for audit into its income tax affairs *through computer random ballot* u/s 214-C of the Income Tax Ordinance, 2001 as communicated by the learned Commissioner Inland Revenue/Respondent No. 3 *through* Letter No. CIRZone-IX/Audit-TY-2013/2014, dated 03.10.2014 (*Annex- 'C'* — the IMPUGNED ORDER) is unconstitutional, illegal, arbitrary, discriminatory, violative of the norms of natural justice, blind exercise of discretionary powers, and without lawful authority, *hence*, the same is liable to be declared and quashed as such on the following amongst other

GROUND S

(1) That *though* Section 214-C of the Income Tax Ordinance, 2001 empowers the F.B.R./Respondent No. 2 to select a case for audit *through computer random ballot*, *yet* it is contrary to the provisions of Section 24-A of the General Clauses Act, 1897, *which* provides that —

- (i) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person, such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.
- (ii) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be, for issuing the direction and shall provide a copy of the order or, as the case may be, the direction to the person affected prejudicially.

As the impugned selection for audit *through computer random ballot* is shorn of any reasons/bases, the power exercised by the F.B.R./Respondent No. 2 cannot be said to be 'exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment', *hence*, the same is arbitrary, and in conflict

with Section 24-A of the General Clauses Act, 1897, and in turn violative of the provisions of Articles 4 and 5(2) of the Constitution of the Islamic Republic of Pakistan, 1973.

- (2) That a learned D.B. of this hon'ble Lahore High Court has *held* in I.C.A. No. 116/2013, dated 23.05.2013 reported in **2013 PTD 1274** that:

“21. 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.”,

but

contrary to the above crystal-clear directions of this hon'ble Court, the Respondent No. 2 / F.B.R. did not make public any Audit Policy for the Tax Year 2013 *prior to* the impugned selection of cases for audit,

which

not only amounts to blatant contempt of Court, *but also* manifests the height of mal-administration, arbitrariness, and disrespect / dis-loyalty to the law and Constitution on the part of the Respondent No. 2 / F.B.R.

- (3) That public functionaries are duty bound to apply law equally to all the persons *whose* cases are exactly similar. This principle is enshrined in Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973.

Selecting some Tax-payers for audit *without any reason*, and sparing a large number of Tax-payers *without any reason* is in flagrant transgression of the provisions of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973, *hence*, the impugned selection of the Petitioner/Tax-payer's case *through computer random ballot* is unsustainable in the eyes of law.

- (4) That the provisions of Section 214-C of the Income Tax Ordinance, 2001 empowering F.B.R. to select cases of Tax-payers *through computer random ballot* without any reason are liable to be struck down being unconstitutional and illegal.

It has been *held* in the case reported as **2008 MLD 1377** that 'any authority or office *if empowered* to make order or give any direction, such power is required to be exercised reasonably, fairly, justly and for advancement of the purpose of enactment, and giving reason for making such order and further that public functionaries have to decide controversy between parties with reasons'.

- (5) That the giving of reasons is one of the fundamentals of good administration. The condition to record reasons introduces clarity and excludes arbitrariness and satisfies the party concerned against whom order is passed. To provide a safeguard against the arbitrary exercise of power by the public functionaries the condition of recording reasons is imposed on them after addition of section 24-A in the General Clauses Act. If the statute requires recording of reasons, it becomes a statutory requirement, and there is no scope for further inquiry. But even when statute does not impose such an obligation, it is necessary for quasi judicial authority to record reasons, as it is the only visible safeguard against the possible injustice and arbitrariness and affords protection to the person who is adversely affected. The

reasons are the links between materials on which certain conclusions are based and actual conclusions. They disclose how the mind was applied to the subject-matter for a decision, whether it is purely administrative or quasi-judicial. They should reveal rational nexus between the facts considered and conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. Courts insist upon disclosure of reasons in support of order on the following grounds:

- a) The party aggrieved has the opportunity to demonstrate before the appellate, or revisional Court that the reasons which persuaded the authority to reject his case are erroneous;
 - b) The obligation to record reasons operate as a deterrent against possible arbitrary action by executive authority invested with judicial power; and
 - (c) It gives satisfaction to the party against whom the order is made.
- (6) That the rule requiring reasons to be given in support of order is, like principle of *audi alteram partem* — a basic principle of natural justice, which must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. State functionaries are expected to act fairly and justly in a manner which should not give to any one any cause of complaint on account of discriminatory treatment or otherwise.

Outright selection of a case *through computer random ballot without assigning any reason whatsoever* is, *thus*, in blatant transgression of the principle of *audi alteram partem*, infraction whereof renders the impugned action *void ab initio*, illegal, and without lawful authority, *as* held by the hon'ble Supreme Court of Pakistan in the following cases:-

- (a) **PLJ 2008 SC 1088;**
- (b) **2007 SCMR 330;**
- (c) **2005 SCMR 678;**
- (d) **2005 SCMR 1814;** and
- (e) **PLD 2004 SC 441.**

- (7) That by allowing the F.B.R. to select cases *through computer random ballot*, the F.B.R. has been equipped with unfettered discretionary powers to select any case for audit without any rhyme or reason, *which* is against the hon'ble Supreme Court's verdict in **1997 SCMR 1804**. Relevant excerpt is reproduced hereunder:-

“The general principles that discretionary decisions should be made according to the rational reasons means; (a) that there be findings of primary facts based on good evidence, and (b) that decisions about the fact be made for reasons which serve the purposes of the statute in an intelligible and reasonable manner..... The actions which do not meet these threshold requirements are arbitrary, and may be considered a misuse of powers.” [at p. 1810]

“Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion..... The structuring of discretion only means regularizing it, organizing it, producing order in it, so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are **open plans, open policy statement, open rules, open findings, open reasons, open precedents and fair informal procedure**. Somehow the wide-worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first

instance but where the authorities fail to rationalize it and regulate it by rules, or policy statements of precedents, the courts have to intervene more often than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times.” [at p. 1810]

The above-enunciated principle of law has to be adhered to in letter and spirit by the F.B.R. *while* making selection of a person or class of persons for audit, *as* it is the command of Article 4 r/w Articles 189, 190 and 201 of the Constitution of the Islamic Republic of Pakistan, 1973, and any deviation from the law laid down by the hon’ble Supreme Court of Pakistan renders the impugned action *void ab initio*, illegal and without lawful authority.

The impugned selection of this Petitioner/Taxpayer’s case for audit through *computer random ballot* without any reasons is, *thus, void ab intio*, illegal and without lawful authority.

- (8) That even if the impugned selection for audit through *computer random ballot* is presumed to be an executive order, it too could not be made *without valid reasons*.

It has been *held* in the case reported as **2005 CLD 126** that ‘public functionaries are obliged to pass the order even on the executive side with reasons’.

Another judgment reported as **2003 YLR 2736** says that ‘an order not containing any reasons and passed without proper application of mind is not sustainable in the eyes of law’.

In **PLD 2010 Lah 230**, it has been laid down as under:-

“44.the Ministry of Interior never applied its mind before placing the name of the petitioner on the ECL as the impugned order is a result of dictation from the Finance Division/State Bank of Pakistan. Discretion exercised under dictation, without reasons,

based on irrelevant facts is not lawful exercise of discretion and therefore placing the name of the petitioner on the ECL in the present case shows that he has not been dealt with in accordance with law as provided in Articles 4 and 9 of the Constitution. Not to furnish reason for the decision violates the principle of fairness, procedural propriety and natural justice besides section 24-A of the General Clauses Act, 1897. The impugned Memorandum fails to meet the requirement of procedural due process.”.

There is no concept of “unfettered discretion” in the laws of this Land, and arbitrary exercise of discretionary power has to be struck down by the Courts *as held in 1999 MLD 3001.*

- (9) **That selection of a case through *computer random ballot* smacks arbitrariness, *which* makes the selection u/s. 214-C of the Income Tax Ordinance, 2001 clearly discriminatory and oppressive adversely affecting the liberty and property of the Tax-payers selected for audit, *whereas* other similarly situated Tax-payers have been spared.**

It has been *held in 2001 SCMR 256* that discretion becomes an act of discrimination *when* it is improper or capricious exercise or abuse of discretionary authority and the person against whom that discretion is exercised faces certain appreciable disadvantages *which* he would not have faced otherwise.

In another case reported in **1999 SCMR 467**, the hon’ble Supreme Court *held* that the Government is not supposed to discriminate between the citizens and its functionaries cannot be allowed to exercise discretion at their whims, sweet-will or as they please, rather they are bound to act justly.

Improper, capricious exercise or abuse of discretionary authority is subject to judicial review.
[Ref: **1992 CLC 219**]

- (10) That when two modes of doing a thing are provided, and one of the two is arbitrary, and the other corresponds to the reasons, law, justice and equity favours adoption of the mode which corresponds to the reasons.

In the instant case, random balloting is a blind and arbitrary mode of selection,

whereas

parametric selection does correspond to the reasons, and the Tax-payer committed to audit does have a right to know the reasons of such selection. That's why parametric selection is considered to be more sound, neutral, fair and reasonable, and would be for the advancement of the purposes of the enactment.

- (11) That the impugned selection for audit *through* random balloting is *mala fide*. It has been instituted in order to nullify the higher Judicial Fora's decisions on the parametric selection for audit,

which

required that the Audit Policy should, *not only* 'be open, lucid, transparent and self-explanatory', *but also* it was made clear in **2013 PTD 1274** that —

“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 parameters framed by the FBR as it was not challenged before us and can be looked into in some other case.”

but

instead of doing the needful, the Respondent No. 2/F.B.R. has resorted to a blind and arbitrary mode of selection, *which* spells out the malicious intent of the F.B.R.

In this way, *not only* the Tax-payers have been subjected to a process of audit without pointing out any fault on their part, *but also* the Courts of law have been debarred from making judicial review of the selection for audit.

When malice is manifest on the face of an action, it becomes illegal and untenable, howsoever solemn it is.

(12) That the Audit u/s. 177 of the Income Tax Ordinance, 2001 prejudicially affects a Tax-payer.

It subjects a tax-payer to the unbridled discretionary power of the Commissioner *as well as* the Deputy/Assistant Commissioner (Audit).

There is no right of appeal *either* against the order u/s. 214-C of the Income Tax Ordinance, 2001, *or* the audit report.

VIII. That there is no other remedy available to this Petitioner/Tax-payer *except* invoking extra-ordinary Constitutional jurisdiction of this hon'ble Court.

Moreover, the matter involves the determination of *vires* of the provisions of Section 214-C of the Income Tax Ordinance, 2001 *viz-a-viz* Section 24-A of the General Clauses Act, 1897, and Articles 4, 5(2) and 25 of the Constitution of the Islamic Republic of Pakistan, 1973.

PRAYER:

Under the circumstances, it is respectfully prayed —

- (1) that the provisions of Section 214-C of the Income Tax Ordinance, 2001 empowering F.B.R. to select persons or classes of persons for audit *through computer random ballot* may kindly be struck down being in conflict with the provisions of Section 24-A of the General Clauses Act, 1897 r/w Articles 4, 5(2) and 25 of the Constitution of the Islamic Republic of Pakistan, 1973; and
- (2) that the impugned selection of this Petitioner/Tax-payer's case for the Tax Year 2013 by the F.B.R. / Respondent No. 2 u/s. 214-C of the Income Tax Ordinance, 2001 for audit u/s. 177 of the Income Tax Ordinance, 2001 *through computer random ballot* may kindly be set at naught.

Pending disposal of this Writ Petition, the Respondent No. 4 may kindly be restrained from proceeding with the audit of this Petitioner/Tax-payer's tax affairs in pursuance of the impugned selection for audit.

Any other relief to which the Petitioner/Tax-payer is found entitled to may also be granted.

This Writ Petition may kindly be allowed with costs.

(MUHAMMAD ASRAR HUSSAIN MALIK)
 Chief Executive,
 M/s. Star Laboratories (Pvt.) Limited, Lahore.
 — Petitioner/Tax-payer

Through

(SAYYID ALI IMRAN RIZVI)
 Advocate High Court,
 (C.C. No. 16672)
 ALI ALI LAW INN,
 Advocates,
 186-New Anarkali, Lahore.

Dated: 26.12.2014

CERTIFICATE

Certified that no W.P. on the subject-matter of this W.P. has been moved earlier by this Petitioner.

It is also certified that this W.P. has arisen from non-fulfilment of legal and Constitutional obligation of the Respondents to act in accordance with law, and give equal protection of law guaranteed by Articles 4, 5(2) and 25 of the Constitution of the Islamic Republic of Pakistan, 1973 to the Writ Petitioner.

ADVOCATE

LIST OF BOOKS

1. Constitution of the Islamic Republic of Pakistan, 1973;
2. Income Tax Ordinance, 2001, and the Rules made thereunder, and relevant Circulars and Letters issued by the F.B.R;
3. General Clauses Act, 1897; and
4. Relevant citations from the law Reports.

ADVOCATE

NOTE:

This W.P. may be placed before his Lordship of Mr. Justice Syed Mansoor Ali Shah, *who* has already been hearing the identical W.Ps. in respect of Tax Year 2012.

ADVOCATE