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JUDGMENT SHEET

LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

Writ Petition No.41067/2023

Agritech Limited Versus Federation of Pakistan, etc.

J U D G M E N T

Date of Hearing:	31.10.2023
Petitioner by:	Mr. Sarfraz Ahmad Cheema, Advocate.
Respondents by:	Mirza Nasar Ahmad, Addl. Attorney General, Pakistan. Mr. Muhammad Anwar Khan, Assistant Attorney General. Mr. Ahmed Pervaiz, Advocate for the respondent-FBR.

Anwaar Hussain, J. Through the present petition, under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**the Constitution**"), challenge has been laid to the pre-refund audit proceedings and the consequent show-cause notice dated 09.06.2023 issued by the respondent-FBR, with the averments that the same be declared illegal, unlawful and violative of the provisions of Section 10 of the Sales Tax Act, 1990 ("**the Act**"). Prayer has also been made that respondent No.3 be directed to refund the excess amount of input tax paid by the petitioner amounting to Rs.2,214,825,246/-.

2. By way of factual background, it has been noted that the petitioner is a Public Limited Company, registered under the law, and is engaged in manufacturing of fertilizers, prominent of which being Urea and Granulated Single Super Phosphate (GSSP). It is the case of the petitioner that the petitioner pays input tax applicable at 17% whereas the output tax is charged, on the goods (fertilizers), at the reduced rate of 2% by virtue of Eighth Schedule to the Act and hence, the petitioner is entitled to the above referred amount of tax refund for

the period of January, 2021 to June, 2022; however, the refund claims remained pending for payment with the respondent-FBR despite timely filing of the same along with the requisite documents that constrained the petitioner to file constitutional petition, bearing W.P. No.21823/2023, before this Court for the payment of differential amount of input tax paid by the petitioner, which was disposed of, *vide* order dated 03.04.2023, with the direction to respondent No.2 to treat the said constitutional petition as a representation of the petitioner and decide the issue in hand, after providing proper hearing to the petitioner, strictly in accordance with the relevant provisions of the Act read with the Sales Tax Rules, 2006 ("**the Rules**"), through a speaking order, within a period of three weeks from the receipt of certified copy of the order.

3. Mr. Sarfraz Ahmad Cheema, Advocate, learned counsel for the petitioner submits that an application was submitted on 05.04.2023, with respondent No.2 along with the order of this Court dated 03.04.2023, for the decision in the matter, in accordance with law, and particularly by following the provisions of Section 10 of the Act read with Chapter V of the Rules, however, respondent No.2 neither decided the representation of the petitioner nor issued the refund claim and the petitioner was again constrained to file Crl. Org. No.39078/2023 before this Court in which notices were issued by this Court but in the meanwhile, the respondents had initiated pre-refund audit proceedings in terms of Rule 30(3) of the Rules, 2006, which was objected to by the petitioner by way of filing objections. Adds that instead of deciding the objections, respondent No.3 issued show-cause notice dated 09.06.2023, which has been impugned through the present petition. Further contends that the respondent-FBR has failed to decide the refund application of the petitioner within time stipulated in Section 10 of the Act, which in the first place has been fixed as 45 days and only in case of any discrepancy, the same is required to be decided within a period of 60-days or within a period of 120-days as contemplated under Section 10(3) of the Act that never happened despite direction of this

Court dated 03.04.2023. Further adds that filing of contempt petition bearing Crl. Org No.39078/2023 has sparked hostility and antagonistic approach on the part of the respondent-FBR towards the petitioner, as a consequence whereof the respondent-FBR has initiated multiple proceedings against the petitioner in order to frustrate the lawful refund claims of the petitioner and the impugned show-cause notice is part thereof to delay and frustrate the same. Concludes that the manner in which the refund application of the petitioner company has been dealt with violates the true import of Section 10 of the Act and is also violative of the *dicta* laid down by the Supreme Court of Pakistan in the cases reported as "*The Collector of Sales Tax, Gujranwala and others v. Messrs Super Asia Mohammad Din and sons and others*" (**2017 SCMR 1427)** and "*Province of Punjab through Conservator of Forest, Faisalabad and others v. Javed Iqbal*" (**2021 SCMR 328**).

4. Conversely, Mr. Ahmed Pervaiz, Advocate, learned counsel for the respondent-FBR objects to the maintainability of the present petition, on the ground that the department has merely initiated pre-refund audit proceedings and issued show cause notice and at present, no adverse order has been passed against the petitioner and hence, the petition is pre-mature. Adds that even otherwise, petition is not maintainable against a show-cause notice. Places reliance upon case reported as "*Commissioner of Inland Revenue, Zone-III, Reginal Tax Office, Islamabad v. Messrs Pearl Security (Pvt.) Limited*" **(2022 PTD 1876)** in support of his contentions. On merits, contends that the time frame envisaged under the provisions regarding refund in general and Section 10 of the Act in particular, are not mandatory in nature as no consequences thereof have been contemplated under the law and it cannot be interpreted in a manner that after lapse of 45-days or such other period, under the Act, the refund claim automatically stands approved. Avers that even otherwise, the case of the petitioner does not fall under Section 10(1) as the supplies of the petitioner are neither zero rated nor exports made during the relevant tax period, rather, the case of the petitioner is covered under the first proviso of Section 10(1) of

the Act since admittedly the supplies are on reduced rate, which brings the case under the clutches of the Rules framed thereunder where no such time period of 45-days has been contemplated by the legislature.

5. Learned Additional Attorney General while responding in terms of notice issued by this Court, under Order XXVII-A of the Code of Civil Procedure, 1908, also submits that the case of the petitioner does not fall under Section 10(1) of the Act and is to be dealt with by first proviso thereunder and no time frame is given under the Act for deciding the claim of those taxpayers who do not fall under the zero-rated and within the purview of Section 10(1) of the Act, however, states that the needful is required to be done expeditiously, within a reasonable time. He further contends that the law envisages the consequences of the delay occurring in deciding the refund claims of the taxpayers like the petitioner and a taxpayer whose claim is not timely decided is to be conferred benefit envisaged under Section 67 of the Act.

6. In rebuttal, learned counsel for the petitioner submits that the manner in which the department has dealt with the matter makes the mandatory provisions of Section 10 in general and sub-Sections (1) and (3) thereof in particular redundant, which is not permissible under the law. Responding to the second objection on merits of the case submits that even though the supplies of the petitioner do not fall under zero-rated local supplies or export, however, the same fall under the Third Category which pertains to supplies on the reduced rates, and the proviso to Section 10(1) of the Act is being misinterpreted inasmuch as the said proviso benefits the petitioner enabling the petitioner to carry forward the claim to the following month, which is not possible as the petitioner is charging output tax on reduced rate and refund claim of the petitioner merits expeditious decision. Concludes that a constitutional petition is maintainable against a show-cause notices where important question of law is required to be interpreted and/or the department has acted with illegality and places reliance on cases

reported as "*Messrs Karachi Golf Club (Private) Limited through Manager Accounts and Finance and others v. Province of Sindh through Director Sindh Revenue Board and others*" **(2021 PTD 558)**, "*Commissioner of Income Tax v. Messrs Eli Lilly Pakistan (Pvt.) Ltd.*" **(2009 SCMR 1279)** and "*Commissioner Income Tax Companies II and another v. Hamdard Dawakhana (waqf) Karachi*" **(PLD 1992 SC 847)**.

7. Arguments heard. Record perused.

8. The following legal questions arise out of the factual layout of the case and call for the opinion of this Court:

i) What is the scope of Section 10 of the Act and whether the elapse of time stipulated thereunder *ipso facto* renders the refund claim admissible and due?

ii) What are the consequences of delay in deciding the refund claim?

iii) Whether in the facts and circumstances of the case and the scope of Section 10 of the Act, the present petition having been filed against a show-cause notice issued, premised on pre-refund audit proceedings against the petitioner, is maintainable?

9. Before answering the above formulated questions, it would be advantageous to reproduce Section 10 of the Act that reads as under:

> **"10. Refund of input tax.–** (1) If the input tax paid by a registered person on taxable purchases made ***during a tax period exceeds the output tax on account of zero rated local supplies or export made during that tax period***, the excess amount of input tax shall be refunded to the registered person ***not later than forty-five days of filing of refund claim*** in such manner and subject to such conditions as the Board may, by notification in the official Gazette specify:
>
> ***Provided that in case of excess input tax against supplies other than zero-rated or exports, such excess input tax may be carried forward to the next tax period, along with the input tax as is not adjustable in terms of sub-section (1) of section 8B, and shall be treated as input tax for that period and the Board may, subject to such conditions and restrictions as it may impose, by notification in the official Gazette, prescribe the procedure for refund of such excess input tax***.
>
> Provided further that the Board may, from such date and subject to such conditions and restrictions as it may impose, by

> notification in the official Gazette, direct that refund of input tax against exports shall be paid at the fixed rates and in the manner as notified in such notification.
>
> (2) If a registered person is liable to pay any tax, default surcharge or penalty payable under any law administered by the Board, the refund of input tax shall be made after adjustment of unpaid outstanding amount of tax or, as the case may, default surcharge and penalty.
>
> (3) ***Where there is reason to believe that a person has claimed input tax credit or refund which was not admissible to him, the proceedings against him shall be completed within sixty days.*** For the purposes of enquiry or audit or investigation regarding admissibility of the refund claim, ***the period of sixty days may be extended up to one hundred and twenty days by an officer not below the rank of an Additional Commissioner Inland Revenue and the Board may, for reasons to be recorded in writing, extend the aforesaid period which shall in no case exceed nine months****."*
>
> ***(Emphasis supplied)***

For the purpose of carrying out the mandate of Section 10 of the Act, it is Chapter V of the Rules, which have been formulated. The relevant rules are reproduced as under:

> **28. Filing and processing of refund claims**.−(1) For all the refund claims under section 10 and 8B of the Act, for the tax period July, 2019 and onwards, the data provided in the monthly return shall be treated as data in support of refund claim and no separate electronic data shall be required. The amount specified in column 29 of the return, as prescribed in the form STR-7, shall be considered as amount claimed for the purposes of claim under section 10 of the Act, once the return has been submitted along with all prescribed annexures thereof:
>
> Provided that, in case of claims arising from zero-rated supplies including exports, the claimant shall be able to submit his return without Annex-H and the same may be filed separately at any time but not later than one hundred and twenty days of submission of the return without Annex-H. The date of submission of Annex-H shall be considered as the date of filing of refund claim. In other cases of refund, ***the date of submission of form STR-7A shall be considered as date of submission of refund claim and the same shall be filed within one hundred and twenty days of submission of relevant return***:
>
> .....
>
> (2) The registered person claiming refund in the aforesaid manner shall maintain and keep all the paper documents relating to the refund claim, such as invoices, credit notes, debit notes, goods declarations, bank credit advice, banking instruments etc. in his office and may not submit the same along with the refund to the

concerned Regional Tax Office or Large Taxpayers' Unit. ***The same shall be presented to the said offices if so required by the officer-in-charge for processing of the refund claim or post-refund scrutiny.***

29. Risk management system (RMS).−(1) After submission of refund claim, in the aforesaid manner, the same shall be processed by Risk Management System (RMS) of FBR's Computerized System. Based on the parameters in RMS, a refund claim shall be routed to any of the following three channels as described below, namely:−

(a) …
(b) …
(c) …

30. Processing through STARR channel.− (1) For the claims or part of claims, as routed to STARR channel, the Computerized System shall cross match the data on soft copy with the data available in the system and process the claim by applying the risk parameters and generate analysis report indicating the admissible amount as well as the amount not validated along-with the objections raised by the system.

(2) The processing officer shall forward the claim file along-with the analysis report referred to in sub-rule (2) to the officer-in-charge for further necessary action along with his recommendations.

(3) ***Where the Processing Officer or the officer-in-charge is of the opinion that any further inquiry or audit is required in respect of amount not cleared by the STARR channel or for any other reason to establish genuineness and admissibility of the claim, he may make or cause to be made such inquiry*** or audit as deemed appropriate, after seeking approval from the concerned Additional Commissioner and inform the refund claimant accordingly.

(4) ***On receipt of analysis Report and refund payment order for the amount verified by the system and found admissible by the processing officer, the officer in-charge shall sanction the amount so determined and issue the Refund Payment Order (RPO) electronically as well as a paper copy thereof to be signed and kept on record***.

(5) The RPO shall be electronically forwarded to CSTRO for payment.

31. Payment by CSTRO…
32. Omitted.
33. Extent of payment of refund claim…

34. Refund of excess input tax not relating to zero-rated supplies.—(1) The refund of excess unadjusted input tax relating to supplies other than zero-rated shall be claimed and sanctioned in the cases mentioned below, namely:--

> (a) the[***] [gas transmission and distribution companies,] ***manufacturers of fertilizers*** [, cotton ginners], electric power producers and electric power distribution companies may claim refund of excess input tax over output tax in any tax period;
>
> [(b) ***]
> (c) .....
> (i) .....
> (ii) .....
> (d) .....
>
> Provided that the amount of refund claim in all such cases shall not exceed the excess of total input tax over the total output tax, as declared in the relevant returns, for the period in respect of which the claim has been filed and shall not include any excess input tax declared prior to the said period.
>
> (2) The registered person, after submission of return in which refund is claimed, shall file refund claim electronically in the form STR-7A, within the period as specified in rule 28:
>
> Provided that, if applicable, a statement along with annual audited accounts as envisaged in clause (i) of sub-section of (2) of section 8B of the Act shall also be uploaded.
>
> (3) The refund of excess input tax under this [rule] shall be [processed, sanctioned and paid] in the manner as provided in rules 29 and 30.
>
> ***(4) The refund of excess input tax provided in clauses (c) and (d) of sub-rule (1), excluding the cases of claims by registered persons, whose accounts are subject to audit under the [Companies Act, 2017 (XIX of 2017)], as referred to in section (2) of section 8B of the Act, shall be sanctioned as found admissible after a departmental audit of records maintained by the registered person and after a certificate is recorded by the [Inland Revenue officers] auditing the records that actual value addition during the period involved was not found sufficient to require a net payment of tax for the reasons mentioned in the audit report:***
>
> ***(Emphasis supplied)***

10. Section 10(1) of the Act relates to refund claim of taxpayers who fall under the category of zero-rated local supplies or the exports. The claim of such taxpayers is to be decided in 45 days. However, if the respondent-FBR has reason to believe that the refund claim was not admissible, then audit and/or inquiry proceedings can be initiated and are to be concluded within sixty days that can be extended up to one hundred and twenty days by the Additional Commissioner and by the Board up to nine months. Meaning thereby that pre-refund audit

proceedings can be initiated even in case of taxpayers of all categories whether falling under Section 10(1) and/or the first proviso thereof. However, the time frame after initiation of the audit proceeding is to be regulated in terms of Section 10(3). The initial time period within which refund claim of taxpayers falling under proviso to Section 10(1) of the Act is to be decided is not provided, however, it has to be carried out within reasonable time.

11. Insofar as the first legal question formulated hereinabove is concerned, it is evident from bare reading that Section 10(1) of the Act deals with the refund claim of zero-rated local supplies and/or the exports. Proviso to Section 10(1) deals with category of cases other than those provided under Section 10(1). It is also imperative to note that there is no second opinion to the legal position that the case of the petitioner does not fall within the purview of Section 10(1) of the Act, rather, the same is covered by the proviso to Section 10(1). While the time period envisaged under Section 10(1) pertains to the excess input tax adjustment emanating out of zero-rated local supplies or exports, proviso to Section 10(1), deals with claim of the other taxpayers. It is the case of the petitioner that in any claim for refund under the Act, once no objection is raised by the respondent-FBR, within the stipulated time period provided under the law (i.e., Section 10 of the Act), the claim of the claimant/tax-payer (the petitioner in the instant case) crystalizes into verified and approved claim and cannot be retracted from or denied subsequently by the department and only post refund audit proceedings can be initiated. By this, the petitioner wants this Court to construe Section 10 as a self-containing and executory provision and failure to object to the claim of the petitioner within the stipulated time to operate as a deeming provision. Argument is misconceived to say the least. Section 10(3) of the Act empowers the respondent-FBR to initiate and carry out enquiry, audit and/or investigation into any claim for input tax credit or refund in cases where the tax authorities have reason to believe that the claim for input tax credit or refund is not admissible to the claimant. It will be

imperative to mention that the Rules have been promulgated to actualize and operationalize the provisions of law contained in Section 10 of the Act and Chapter V contains the relevant provisions. This in itself connotes that Section 10 is not a self-containing and self-executory provision rather the admissibility of the refund claim is required to be determined before approving the same. It is further fortified by the words used in Section 10(1) i.e., "*in such manner and subject to such conditions as the Board may, by notification in the official Gazette specify*", shows that the provision is not self-executory rather the same is to be actualized in such manner and subject to such conditions as the Board may specify.

12. This brings the Court to examine the point as to whether the departmental functionaries can sit over the rights of taxpayers [falling under first proviso to Section 10(1)] for indefinite period firstly by their inactions and subsequently by initiating pre-refund audit proceedings to determine the admissibility of the claim and not concluding the same within reasonable time and what are consequences of delay in deciding the tax refund claim. It is admitted feature of the case that the petitioner cannot carry forward the input tax refund to the next tax period as the petitioner is charging the output tax at a reduced rate. Hence, refund claim of the petitioner merits expeditious decision. Moreover, it is evident that the legislature has provided a specific time-period under Section 10(3) of the Act which is sixty (60) days extendable to one hundred and twenty (120) days by an officer not below the rank of Additional Commissioner and thereafter, extendable to a maximum period of nine (9) months by the Board by setting out the reasons in writing as to the extension of time period to conclude pre-audit proceedings. Nothing has been stated as to whether such extension was obtained in the present case and if the same has not been sought, such a practice on the part of the department is deprecated as this clearly amounts to blatant, if not wilful, disregard for the legislative and statutory ordains. This, on the one hand, amounts to depriving the taxpayers form their money and, on the other hand, amounts to unjust enrichment of the State, *albeit* temporarily, and

concomitant unjust impoverishment of the taxpayers. Therefore, it is imperative for the respondent-FBR to ensure that all the proceedings to determine the admissibility of the tax refund envisaged in terms of Section 10(3) of the Act are not only initiated promptly but also run through within the stipulated time in order to nurture confidence of the taxpayers and citizens in the fairness on the taxing system of the State. Question arises as to what are the consequences of the delay in allowing the tax-refund whether falling under Section 10(1) or the first proviso thereto. In this regard, learned Additional Attorney General has referred to Section 67 of the Act, which is reproduced as under:

> "**Delayed Refund**.– Where a refund due under section 10 is not made within the time specified in section 10 from the date of filling of refund claim, there shall be paid to the claimant in addition to the amount of refund due to him, a further sum equal to KIBOR per annum of the amount of refund due, from the date following the expiry of the time specified as aforesaid, to the day preceding the day of payment of refund:
>
> *Provided that where there is **reason to believe** that a person has claimed the refund which is not admissible to him, the provision regarding the payment of such additional amount shall not apply till the investigation of the claim is completed and the claim is either accepted or rejected.*
>
> Provided further that where a refund due in the consequence of any order passed under section 66 is not made within forty five days of date of such order, there shall be paid to the claimant in addition to the amount of the refund due to him, a further sum equal to KIBOR per annum of the amount of refund, due from the date of the refund order."
>
> (***Emphasis supplied***)

Perusal of Section 67 indicates that while an additional sum equal to KIBOR per annum has been provided on the delayed refund, the same is also circumscribed by the first proviso thereto that where there is "reason to believe" that a person has claimed the refund which is not admissible to him, the penal consequences under Section 67 would not come into play till the investigation of the claim is completed and the claim is either accepted or rejected. This further accentuates and explicates the legislative intention that the refund claim on the lapse of period provided under Section 10 would *ipso facto* not crystalize into

undisputed and payable as there is no express deeming provision to this extent and the department is vested with the power to determine the admissibility or otherwise of the claim.

13. As a matter of fact, there is no consequence for the non-adherence to the time-limit provided for conclusion of pre-refund audit proceedings under Section 10(3) have been provided which hands out a tool to the officials of the respondent-FBR to delay the rights of the tax payers. As a result, the respondent-FBR and its officials may continue to linger on and protract the pre-audit proceedings for unlimited and unrestricted time period leaving the tax payers not only in limbo but also depriving the taxpayer of his property in violation of the Article 23 and 24 of the Constitution. It is also noted that while Section 11 and other enabling provisions of law in *vogue* provide for the additional tax and/or penalty for non-payment and/or short payment of tax by the tax payers, Section 67 obligates that failure to make payment within the time period provided under Section 10 would entitle the taxpayer to an additional sum equal to KIBOR on so much of the amount of refund which is not paid within the time stipulated. However, the first proviso to Section 67, as spelled out above, is a limiting proviso which eclipses the applicability of Section 67 till the proceedings (pre-refund audit) as to admissibility of the refund is accepted or rejected and thus takes back to the significance of Section 10(3) and the time-limit provided therein.

14. Insofar as the maintainability of the present petition is concerned, it is the case of the petitioner that the entire process is automated and once the application for refund was filed, the necessary validation takes place every week and reports are generated by the system and nothing is hidden from the department and therefore, the department is obligated to conclude the same within stipulated period of time and in case, at any subsequent stage, it transpires that some wrong doing has been committed by the refund claimant (the petitioner in the present case), post-refund audit proceedings can be initiated.

Perusal of the record reveals that the claim of the petitioner was routed through the Sales Tax Automated Refund Repository Channel ("**STARR channel**") based upon its parameters for the purpose of cross-matching the data provided with the one contained in the system and the analysis report highlighted certain discrepancies/objections. Through letter dated 20.04.2023, the petitioner was intimated about the analysis and the discrepancies/objections in the following terms:

> "***It is crystal clear from the above-mentioned table that there is a difference value of sales declared in sales tax & federal excise returns and value of sales declared in financial accounts***. Hence these areas will be scrutinized in pre-refund audit inquiry under Rule 30(3) of Sales Tax Rules 2006.
>
> In view of the above, it is necessary that pre-refund audit be initiated under Rule 30(3) of Sales Tax Rules 2006. The crux of the matter is that the output tax on sales of the company is subject to reduced rate so the supply of fertilizers thereof is to be taxed at reduced sale tax rate. ***The main reasons for arising of refund of the registered person is that, main input constituents of finished products include Sui Gas supplied by SNGPL, Chemicals, high speed diesel, packing material and other basic raw materials etc which are subject to standard rate of sales tax except sui gas which is on reduced rate of sales tax resulting a sale tax refund 2,214,825,246/- related to tax periods from January, 2021 to June, 2022. In order to determine the veracity of the claim of the RP, pre-refund audit is warranted for the period mentioned supra.***"
>
> ***(Emphasis supplied)***

Rule 30(3) of the Rules clearly empowers the Processing Officer or Officer-In-charge to issue show cause notice if it is found that further inquiry or audit is required in respect of the amount not cleared by the STARR Channel that is precisely the position in the instant case. Hence, the impugned show-cause notice was rightly issued. Moreover, perusal of the above mentioned provisions of the Act and the Rules made thereunder indicates that once a refund claim is received by the department, depending upon the status of the taxpayer as to whether the same falls under zero-rated local supplies etc., or otherwise, the same is to be processed in accordance with the procedure envisaged under the provisions of the Rules in general and Rules 28 to 34 in particular, through one of the three particular computerized channels. It is worth

mentioning that both sides admit that the case of the petitioner falls under the STARR Channel, in terms of Rule 30 reproduced hereinabove. The petitioner has filed the refund claims and admittedly, the petitioner does not fall under zero-rated category or part of the export-oriented industry and its case does not fall under Section 10(1) of the Act, therefore period of 45 days envisaged thereunder is not applicable as it is first proviso to Section 10(1) of the Act that caters for all other categories including the petitioner. In case of the petitioner it is procedure under Rule 30 read with Rule 34 quoted hereinabove that deal with the process, which is to be traversed through for the refund of the excess input tax under the Rules and once such proceedings are initiated Section 10(3) comes into play.

15. It has been contended with vehemence that the petition is maintainable in cases involving important question regarding interpretation of law and where statutory functionary acted in an oppressive manner. In the most recent judgment, reported as *Commissioner IR v. Jahangir Khan Tareen* (**2022 SCMR 92**), the Supreme Court of Pakistan held as under:

> "10……..Seemingly, the show cause-notice was issued after fulfilling and complying with requisite formalities, even so, if the respondent no. 1 had any doubts in mind, the issue of jurisdiction or alleged non-existence of delegated powers should have been raised first before Additional Commissioner IR, Large Taxpayer Unit rather than challenging show cause notice in the writ jurisdiction.
>
> 11. A show cause notice is delivered to a person by an authority in order to get the reply back with a reasonable cause as to why a particular action should not be taken against him with regard to the defaulting act. By and large, it is well defined and well-structured process to provide the alleged defaulter with a fair chance to respond the allegation and explain his position within reasonable timeframe. Even in case of an adverse order, the remedies are provided under the tax laws with different hierarchy and chain of command. The court may take up writs to challenge the show cause notice if it is found to be barred by law or

> abuse of process of the court. The abuse of process is the use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive."

The case law relied upon by the petitioner side as to the maintainability of the petition is distinguishable and not applicable to the case of the petitioner. It is settled law which has been re-affirmed and reiterated by the Supreme Court in case of *Commissioner IR, supra* that the show-cause notice is an opportunity to a person to explain a particular position, which in itself, is actualization of the principle of *audi alterm partem* lying on the larger spectrum of principles of natural justice. Constitutional petition against a show-cause notice can be filed only if the same is barred by law or amounts to abuse of process of the Court. As discussed above, in the present case, the show-cause notice issued to the petitioner is not barred by law rather the provisions of law provide for the pre-refund audit if the department has reasons to believe that claim of input tax credit or refund is not admissible. The term "reason to believe" has been repetitively interpreted by the Superior Courts as something on a higher pedestal than mere suspicion and/or allegations that is tangible to trigger a prudent mind to develop reasons in his mind on a tentative pedestal fulfils the test of "reason to believe". This takes this Court to the impugned show cause notice which spells out the issues the explanation and/or reply whereupon has been sought from the petitioner to explain its position. The issues highlighted in show-cause notice dated 09.06.2023 read as under:

> "6. …
>
> **A. Summary of Sales and Purchases with analysis:**
>
> The registered person declared the total supplies at Rs.17,306,409,666/- against the total purchases at Rs.33,790,195,870/- there is no nexus with the excessive declaration of the purchases at Rs.16,483,786,204/- (in percentage 95%) for the tax periods under consideration. Refund in respect of goods supplied shall be paid to the extent of the input tax claimed on purchases that are actually consumed in such goods as supplied for claiming of sales tax refund under section 7 of Sales Tax Act, 1990. …

7. Following sales tax discrepancies/observations were found under the Sales Tax Act, 1990:

i. **Inadmissible input tax claimed due to violation of section 8:**

The registered person claimed inadmissible input tax at Rs.636,334,472/- in tune of sales tax refund claimed against the goods and services not related to the taxable supplies made by the registered person in terms of section 8 of the Sales Tax Act, 1990 in its monthly sales tax returns for the tax periods January, 2021 to June, 2022. Even, the registered person has also failed to verify the admissibility of input tax claimed in respect of verification of payment proofs as required under section 73 of the Sales Tax Act, 1990. The registered person claimed inadmissible input tax at Rs.636,334,472/- under the Sales Tax Act, 1990. Detail of inadmissible input tax is attached at Annex-A.

ii. **Inadmissible input tax claimed on closing balances as on 30.06.2022 of raw materials as per consumption sheet filed with sales tax refund claims:**

……

iii. **Inadmissible input tax claimed on closing balances as on 30.06.2022 of Work-in-Process and Finished Goods:**

……

iv. **Suppression of Supply (Opening stock difference between Income Tax Return and consumption sheet filed for claiming of sales tax refund:**

……

v. **Excessive claimed of sales tax refund based on negative value addition**.

……

8. Therefore, the registered person is called upon to explain, as to why sales tax at Rs.2,594,839,002/-, further tax at Rs.48,044,298/- along with default surcharge (to be calculated at the time of recovery) and penalties at Rs.132,144,165/- under sections 34(1)(a) and 33(5) respectively may not be recovered or the refund equivalent to that amount may not be rejected under section 11(2) and 11(4) of the Sales Tax Act, 1990. The registered person is, therefore, charged with the violation of the provisions of sections 3, 3(1A), 6, 7, 8, 10, 13, 22, 23, 26 and 73 of the Sales Tax Act, 1990 and read with Rule 33 titled "Extent of payment of refund claim", Rule 34 titled "Refund of excess input tax not relating to zero-rated supplies" and Rule 37 titled "Action on inadmissible claims" of Chapter-V titled “Refund” of the Sales Tax Rules, 2006 notified by SRO 555(1)/2006 dated 5th June,

> 2006 and Rule 25(2) of Chapter-IV titled "Apportionment of Input Tax" of the Sales Tax Rules, 2006 notified by SRO 555(I)/2006 dated 5th June, 2006."
>
> ***(Emphasis supplied)***

The above quoted operative part of the impugned show-cause notice reveals that the same has been issued on the basis of pre-refund audit proceedings and the petitioner has been given an opportunity to explain its position. The petitioner is vested with the right to rebut the said issues and the same certainly cannot be ironed out by this Court in the constitutional jurisdiction. This Court would stop short of going into the detail and/or merits of the issues lest it may prejudice the case of any of the parties.

16. In view of the above discussion, this Court is of the opinion that;

i) Section 10 of the Act is not a self-containing and self-executory provision rather the admissibility of the tax refund claim is required to be determined in a case where there is reason to believe that the refund claim is not admissible;

ii) the respondent-FBR and its officials cannot sit over the rights of the taxpayers in relation to the tax refund claims for indefinite period and must conclude the pre-refund audit proceedings by strictly following the mandate of Section 10(3) of the Act;

iii) in view of the facts and circumstances of the present case and the scope of first proviso to Section 10(1) of the Act, the present petition is misconceived and pre-mature inasmuch as the impugned show-cause notice issued by the department has been premised on the pre-refund audit proceedings and no adverse order has been passed against the petitioner;

iv) the respondent-FBR is directed to proceed with the present matter, strictly in accordance with law, keeping in view the mandate of Section 10(3) of the Act and if in the

instant case, there has been no approval obtained from the Board for the conclusion of pre-audit proceedings within nine (09) months, *ex-post facto* approval must be obtained, before proceeding further;

v) Section 67 of the Act is only applicable and the additional amount is payable to the taxpayer when the refund is held due and is not made within the time specified in Section 10 of the Act but the said provision is to be applicable after the investigation of the claim, or so much of the claim as, is accepted and for the said purpose mandate of Section 10(3) is to be strictly adhered to; and

vi) non-adherence by the respondent-FBR to the time-limit envisaged under Section 10(3) of the Act in concluding the refund claims amounts to concomitant violation of the fundamental rights of the tax-payers guaranteed under Articles 23 and 24 of the Constitution. No consequences of such non-adherence have been envisaged under the Act. This aspect of the matter is a policy issue and requires legislation, which is for the Federal Government to examine on priority basis. Therefore, the Federal Government is directed to consider the possibility of initiating necessary legislation on the subject by providing the consequences of non-adherence to the provision of Section 10(3) so that the rights of the tax payers can be safeguarded.

17. **Disposed of** in above terms.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting

Judge

Announced in open Court on 15.12.2023.

Judge

Maqsood