

JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.75402/2023

M/s Pak Hygienic Industries Vs. Federation of Pakistan etc.

Date of hearing	29.11.2023
Petitioner by	M/s Muhammad Ajmal Khan, Omer Wahab and Azeem Ullah Virk, Advocates.
Respondents by	Mrs. Kausar Parveen, Advocate/Legal Advisor alongwith Muhammad Ayaz Nawaz, Deputy Commissioner, Inland Revenue Zone-V, RTO Lahore.

ABID AZIZ SHEIKH, J. This Constitutional Petition is directed against the order dated 04.10.2023 (**impugned order**) passed by respondent No.3 under Section 38(1) and 40 of the Sales Tax Act, 1990 (**Act**), whereby respondent No.4 alongwith his team was duly authorized to make inspection and take into custody the record/documents belonging to petitioner-company. The petitioner has also challenged the search warrant order dated 04.10.2023 (**impugned search warrant**) issued under Section 40 of the Act.

2. Relevant facts are that the petitioner is Manufacturer/Importer/Exporter of various sanitary and hygienic products. Due to alleged concealment of sales, respondent No.4 alongwith his staff/team was authorized, through the impugned order, to inspect the record belonging to the petitioner-company and take into custody such record. Respondent No.4 was also authorized to obtain search warrant under Section 40 of the Act.

Consequently, the impugned search warrant was got issued by the concerned Magistrate and respondent No.4 conducted raid and seized various documents mentioned in Resumption Memo appended as Annexure-B (**Resumption Memo**). The petitioner being aggrieved has filed this Constitutional Petition.

3. Learned counsel for the petitioner submits that under Section 38 of the Act, only routine visit can be carried out to inspect the record and documents, whereas record can only be searched and seized under Section 40 of the Act, if any proceedings under the Act are pending and the record is relevant or useful to said proceedings. He submits that as no proceedings are pending against the petitioner, the record/ documents mentioned in Resumption Memo could not be searched and seized under Section 40 of the Act by respondent No.4.

4. Learned counsel for respondent-department, on the other hand, submits that during desk audit analysis it has been observed that the petitioner is engaged in concealment of sales for amount of more than Rs.340 Million since its registration and consequently evaded sales tax thereon, resultantly, the impugned order as well as the impugned search warrant was issued and the documents were taken into custody in presence of the staff of petitioner as per Resumption Memo, which was also duly stamped and signed by the said staff. She submits that

in view of the desk audit analysis, the impugned order, search warrant and the raid are justified.

5. Arguments heard. Record perused. The legal question require determination in this case is that whether respondent No.4 could conduct raid and seize the documents/record of the petitioner, as per Resumption Memo, under Sections 38 & 40 of the Act. For ready reference, the provisions of Sections 38 & 40 of the Act are reproduced hereunder:

“38. Authorized officers to have access to premises, stocks, accounts and records –(1) Any officer authorized in this behalf by the Board or the Commissioner shall have free access including real-time electronic access to business or manufacturing premises, registered office or any other place where any stocks, business records or documents required under this Act are kept or maintained belonging to any registered person or a person liable for registration or whose business activities are covered under this Act or who may be required for any inquiry or investigation in any tax fraud committed by him or his agent or any other person; and such officer may, at any time, inspect the goods, stocks, records, data, documents, correspondence, accounts and statements, utility bills, bank statements, information regarding nature and sources of funds or assets with which his business is financed, and any other records or documents, including those which are required under any of the Federal, Provincial or local laws maintained in any form or mode and may take into his custody such records, statements, diskettes, documents or any part thereof, in original or copies thereof in such form as the authorized officer may deem fit against a signed receipt.

(2) The registered person, his agent or any other person specified in sub-section (1) shall be bound to answer any question or furnish such information or explanation as may be asked by the authorized officer.

(3) *The department of direct and indirect taxes or any other Government department, local bodies, autonomous bodies, corporations or such other institutions shall supply requisite information and render necessary assistance to the authorized officer in the course of inquiry or investigation under this section.*

(4) *For the purpose of sub-section (1), the Board may make rules relating to electronic real-time access for audit or a survey of persons liable to tax.”*

“40. Searches under warrant.— (1) *Where any officer of Inland Revenue has reason to believe that any documents or things which in his opinion, may be useful for, or relevant to, any proceedings under this Act are kept in any place, he may after obtaining a warrant from the magistrate, enter that place and cause a search to be made at any time.*

(2) *The search made in his presence under sub-section (1) shall be carried out in accordance with the relevant provisions of the Code of Criminal Procedure, 1898 (V of 1898).”*

Emphasis supplied

Plain reading of Section 38(1) of the Act shows that any officer, authorized by the Commissioner Inland Revenue, shall have free excess to the business or manufacturing premises, registered office or any other place where any stock, business record or documents required under this Act are kept or maintained belonging to the registered person or a person liable for registration or whose business activities are covered under this Act or who may be required for any inquiry or investigation in any tax fraud. Under section 38 of the Act, an officer authorized may inspect and also take into custody the record mentioned therein, as he may deem fit, against a signed receipt.

Whereas under Section 40 of the Act, where any officer of Inland Revenue has reason to believe that any document or things which in his opinion, may be useful for, or relevant to any proceedings under this Act are kept in any place, he may, after obtaining warrant from Magistrate, enter that place or cause a search to be made at any time.

6. In this case, admittedly the impugned order and the search warrant in-question are issued in pursuance of the desk audit analysis highlighting concealment of sales but there are no proceedings pending under the Act for which the documents may be useful or relevant, which is a precondition under Section 40 of the Act for issuance of search warrant. The Supreme Court in “Collector of Sales Tax and Central Excise (Enforcement) and another Vs. Messrs Mega Tech (Pvt.) Ltd.” (2005 PTD 1933) held that as per the language employed in Sections 40 & 40A of the Act, the requirement of law appears to be that where an officer of sales tax has reason to believe that any document or things, which in his opinion may be relevant to any proceedings under the Act, are concealed or kept in any place and there is a danger of removal of such documents or records, he may, after obtaining warrant from Magistrate, enter that place and cause a search to be made at any time and the search authorized shall be carried out strictly in accordance with relevant provisions of the Code of Criminal Procedure,

1898 (Cr.PC). However, in the present case, neither any proceedings are pending nor any specific document or thing has been mentioned in the impugned order or impugned search warrant, which is concealed or kept in any place and is in danger of removal. This Court, in “Pakistan Chipboard (Pvt.) Ltd. through Chief Executive Officer Vs. Federation of Pakistan etc.” (2015 PTD 1520), also held that when there are no proceedings pending under the Act, the provision of Section 40 of the Act for search cannot be invoked. The desk audit analysis can at best be treated as inquiry or investigation but does not amount to proceedings under the Act, therefore, the provision of Section 40 of the Act could not be invoked in the impugned order or search warrant, therefore, to that extent the impugned order & search warrant are not sustainable.

7. Now the next moot question is that whether documents, mentioned in the Resumption Memo, could be inspected and taken into custody under Section 38(1) of the Act. As already discussed above, there is no precondition in Section 38 of the Act that proceedings be pending for inspection or taken into custody the record, however, the Division Bench of this Court in “GHULAM HUSSAIN Vs. FEDERATION OF PAKISTAN through Ministry of Finance, Islamabad and 5 others” (2021 PTD 1379) held that purpose of visit, in terms of Section 38 of the Act, is to see whether proper record under the Act, relevant

Rules and Regulations is maintained or not, and the authorized officer in this regard must produce the copy of authorization before commencing the inspection and visit must be confined to inspect the record and documents that are in plain sight or voluntarily made available for inspection by the person(s) present at the premises on request, and consequently only such record can be taken into custody within the meaning of Section 38 of the Act. The Division Bench further held that the officer has no power, under Section 38 of the Act, to compel production of any record or document that is not in plain sight or that has not been voluntarily made available as above.

8. The same view was also expressed by the Sindh High Court in “Messrs Apple Paper Products (Pvt.) Ltd. Through Director Chief Executive Officer Versus Federation of Pakistan through Chairman and 2 others” (2019 PTD 787) in following terms:

“The visit must be confined to inspecting the record and documents that are in plain sight or those that are voluntarily made available for inspection by the person(s) present at the premises on request. Consequently, custody within the meaning of Section 38 can only be taken of such record and documents that are in plain sight or those that have voluntarily been made available for inspection on request. The record and documents taken into custody must be against a receipt signed by the officer. The officer has no power under section 38 to compel the production of any record or document that is not in plain sight or that has not been voluntarily made available as above. Any record or document taken into custody under compulsion cannot be used for any purpose

whatsoever by the department against the person from whose custody the record or document has been taken by an officer into his possession. Whereas, under section 40 of the Act, if the officer of respondent department, has “reason to believe” that it will be useful for or relevant to any proceedings then he may obtain search warrant from Magistrate and carry out search of “any place”. Such search shall be carried out in accordance with Criminal Procedure Code, 1898. What is necessary for the search under section 40 is that “a proceeding” under the Act is pending. Whereas, there is no such requirement of Notice under Section 38 of the Act, before proceeding under Section 40 of the Act.

In another case titled “Agha Steel Industries Ltd. through Authorized Company Secretary and another Versus Directorate of Intelligence and Investigation through Director and 2 others” (2019 PTD 2119), the Sindh High Court held as under:-

“22. Therefore, in view of the above pronouncements of the Hon’ble Supreme Court as well as this Court and the learned Lahore High Court, it could be safely held that the department under the garb of a Notice under Section 38 of the 1990 Act, cannot conduct a search or a raid of the premises as for that purposes, the only recourse available is an action under Section 40 of the Act (ibid). What has happened in this case, is in fact a search or a raid of the premises under the garb of Section 38, which only permits to have access to the record and nothing beyond that. Since I have come to the conclusion that the very validity of the act and action initiated under Section 38 is not proper and lawful.

The same view was also laid down by this Court as well as the Sindh High Court in “Messrs Iqbal and Sons through Authorized Representative Versus Federation of Pakistan through Secretary and 3 others” (2017 PTD 590), “Messrs

Stylo Shoes through Managing Partner and another Versus Deputy Director and others” (2013 PTD 1780), “Z & J Hygienic Products (Pvt.) Ltd. Versus Collector Sales Tax” [(2011) 103 TAX 281 (H.C. Lah.)], “A.M.Z. Spinning & Weaving Mills (Pvt.) Ltd. through Manager Finance Versus Federation of Pakistan through Secretary, Revenue Division/Ex-Officio Chairman, C.B.R., Islamabad and 2 others” (2009 PTD 1083), “Messrs Food Consults (Pvt.) Ltd., Lahore and others Versus Collector (Central Excise & Sales Tax), Lahore and 2 others” (2004 PTD 1731) and “Messrs Ihsan Yousaf Textile Mills (Pvt.) Ltd., Faisalabad Versus Federation of Pakistan through Ministry of Finance, Islamabad and 4 others” (2003 PTD 2037). The Division Bench of this Court in “Director Intelligence & Investigation versus M/s BIOCOS International & 5 others” (PLJ 2020 Lahore 1) upheld the decision of Single Bench of this Court whereby the department was directed to return the data collected under Section 38 of the Act after retaining duplicate copies of the same.

9. In view of above discussion, indeed the respondents could neither invoke the provisions of Section 40 of the Act nor they could compel production of any record or documents that were not in plain sight or had not been voluntarily made available, however, perusal of the copy of Resumption Memo (appended with reply), shows that same has been duly stamped

by the petitioner, as required under Section 38(1) of the Act. Though the petitioner in this petition has challenged the impugned order and impugned search warrant claiming that the respondent No.4 alongwith officials and policemen entered its business premises and took away the record but it is nowhere specifically pleaded that said record was not in plain sight or was forcibly taken into custody by respondents. On the other hand, the respondents in their reply though defended the impugned order and search warrant on legal plane yet nowhere stated that the record was made available voluntarily for inspection and taken into custody on request. This being a factual dispute cannot be decided in this Constitutional Petition, therefore, by following the principle, settled by the Division Bench of this Court in case of “M/s BIOCOS International” *supra*, the respondents are directed to return the data and record as per Resumption Memo to the petitioner after retaining the duplicate copies thereof.

10. For what has been discussed above, this Writ Petition is **partially allowed** in above terms.

(ABID AZIZ SHEIKH)
JUDGE

Approved For Reporting

JUDGE