IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

Present:
Mr. Justice Gulzar Ahmed
Mr. Justice Maqbool Baqar
Mr. Justice Munib Akhtar

CIVIL APPEAL NO. 116-K OF 2016
(On appeal from the judgment dated 13.8.2015 passed by the High Court of Sindh at Karachi in C.P.No.D-3977 of 2014)

Commissioner Inland Revenue, Karachi

… Appellant

vs.

Pakistan Beverages Limited, Karachi

… Respondents

For the Appellant: Mr. Muhammad Siddiq Mirza, ASC

Respondent: Ex-parte.

Date of Hearing: 14.06.2018

ORDER

Munib Akhtar, J.: The present appeal raises issues as regards the proper interpretation and application of s. 40B of the Sales Tax Act, 1990 ("1990 Act"). The petition (filed by the respondent) was dismissed by the High Court by a short order on 13.08.2015. However, the appellant (the Commissioner Inland Revenue) is aggrieved by certain observations made in relation to s. 40B in the reasons subsequently released (on 28.08.2015) in support of the order (together, "the impugned judgment"). In particular, the learned High Court observed that the power granted by s. 40B could only be exercised within a timeframe to be given by the authority exercising the power. In the leave petition the appellant contended that the section itself did not contain any such requirement, and therefore no such limitation could be read or imported into the provision. Reference was also made, for comparative purposes, to s. 45(2) of the Federal Excise Act, 2005 ("2005 Act"). Leave was granted to consider this point. It will be convenient to set out these provisions at the outset:

> "**40B. Posting of Inland Revenue Officer.–**Subject to such conditions and restrictions, as deemed fit to impose, the Board, or Chief Commissioner may post Officer of Inland Revenue to the premises of

registered person or class of such persons to monitor production, sale of taxable goods and the stock position:

Provided that if a Commissioner, on the basis of material evidence, has reason to believe that a registered person is involved in evasion of sales tax or tax fraud, he may, by recording the reason in writing, post an Inland Revenue to the premises of such registered person to monitor production or sale of taxable goods and the stocks position.

Explanation.-- For the removal of doubt, it is declared that the powers of the Board, Chief Commissioner and Commissioner under this section are independent of the provisions of section 40."

"**45. Access to records and posting of excise staff, etc.—** …
(2) Subject to such conditions and restrictions, as deemed fit to specify, the Board or Chief Commissioner may, post officer of Inland Revenue to the premises of registered person or class of such persons to monitor production, removal or sale of goods and the stock position or the maintenance of records:

Provided that if a Commissioner, on the basis of material evidence, has reason to believe that a registered person is involved in evasion of duty, he may, by recording the reason in writing, post an officer of Inland Revenue to the premises of such registered person to monitor production, removal or sale of goods and the stocks position or maintenance of records."

2. The respondent (which was proceeded against before us *ex parte*) is a company engaged, inter alia, in the manufacture of aerated waters (i.e., soft drinks). It appears that by order dated 17.07.2014, an audit of the respondent's operations was carried out under the 1990 Act. Thereafter, by order dated 23.07.2014, made under s. 40B, Inland Revenue officers were posted at the respondent's factory. No timeframe was given, nor any period or limit set for the duration of the officers' posting. It was this order that was challenged before the High Court. The respondent took a number of objections, both as to the constitutionality of s. 40B and also on the legal plane, but none of them found favor with the High Court. However, it was noted in the impugned judgment that the power was conferred to "monitor" the "production, sale of taxable goods and stock positions". The High Court, quoting from the *Oxford Advanced Learners' Dictionary* (8th ed.), observed that to monitor meant "to watch and check something over a period of time in order to see how it develops, so that you can make any necessary changes". On such basis, it was concluded as follows:

"7. As we have noted above, that 'monitoring' of any place cannot go on forever, there must be a time frame till it remains in force unless revised or terminated. Since the impugned order does not reflect for how long the officers of the Inland Revenue would remain posted in the premises of the petitioner, it would be in the interest of justice and in the circumstances of the case to make it time-bound. Accordingly, the impugned order shall remain in the field for a period of one year from the date of deployment of

> officers unless revised or recalled by the Authority in accordance with law. These are the reasons in support of our short order dated 13.08.2015 whereby we dismissed this petition along with pending applications."

It is this paragraph in particular that is of concern to the appellant, and which has been challenged by means of the present appeal.

3. Before us, learned counsel for the appellant submitted that the High Court had erred materially in making the exercise of the power conferred by s. 40B time bound, by introducing the element of a timeframe or period. It was submitted that on the face of it the section contained no such limitation. Thus, the order of 23.07.2014 posting Inland Revenue officers at the respondent's factory, insofar as it contained no time limit, was unexceptionable. The High Court ought not to have made the order time bound by adding a limit therein that it considered appropriate. It was prayed that the appeal be allowed by making a suitable declaration or observation to this effect. For comparative purposes, reference was also made to ss. 45(2) and 43 of the 2005 Act. We may note that during the hearing a specific query was put to learned counsel that, since the period stipulated by the High Court had obviously expired by the time the appeal came on for hearing, whether the power under s. 40B had been exercised to extend the period, or a fresh order made in terms thereof. Learned counsel stated that he had no instructions in this regard.

4. We have considered the matter. Section 40B confers a discretionary power on the authorities named therein, being the Board or the Chief Commissioner or (in terms of the specific situations of sales tax evasion or tax fraud) a Commissioner of Inland Revenue. We begin by noting that it is well settled that the law recognizes no such thing as an unfettered discretion. All discretionary power, especially that as conferred by statute, must be exercised in terms of well established principles of administrative law, which are of longstanding authority and have been developed, enunciated and articulated in many judgments of this Court. There is no need to rehearse those principles here save only to note one aspect. This is that a discretionary statutory power can only be exercised on a ground or to achieve an object or purpose that is lawfully within the contemplation of the statute. Now, as correctly noted by the High Court, the power under s. 40B has been granted to "monitor" the "production, sale of taxable goods and stock positions" of a registered person or class of such persons, by posting Inland Revenue officers at the relevant premises. But the monitoring can only be for some object, ground or purpose that is legitimately and lawfully within the contemplation of the 1990 Act. The proviso to the section

itself identifies two such situations, namely sales tax evasion and tax fraud. Undoubtedly, there are others. But the monitoring is not intended to be indefinite. Indeed, this is clear from the very fact that power conferred is discretionary; the monitoring has not been made mandatory. Once the purpose has been served or object achieved or the ground stands exhausted, the monitoring must come to an end. However, it cannot be left to the unfettered discretion of the Board, the Chief Commissioner or the Commissioner (as the case may be) to determine when the purpose has been served or object achieved. Any such conclusion would run against the grain of the core principles that regulate the exercise of discretionary power. It is for this reason that the High Court concluded, again correctly, that the exercise of the power conferred by s. 40B is time bound in the sense that some timeframe or period must be given in any order made under the section. Of course, it will always be open to the authority exercising the power to reassess the situation at or near the conclusion of the period. If there are legitimate grounds for extension, then a further period may be granted. And equally, it will be open to the concerned person to challenge any exercise of the statutory power or any extension in the period, in accordance with law. However, to contend, as was in effect done by learned counsel before us, that the period or timeframe is entirely at the discretion and will of the concerned authority, and that therefore any order made under the section need not contain any provision in this regard, is beyond the contemplation of law. We may note that this conclusion is not the addition of words to the section or the importation of an element that is not otherwise to be found therein. The conclusion arrived at by the High Court, and affirmed here, follows from the very nature of how discretionary power can be lawfully exercised. Any submission to contrary effect cannot be accepted. We are therefore, with respect, unable to agree with learned counsel that the observations made in the impugned judgment, and especially its paragraph 7, require any reconsideration or interference by this Court.

5. Before concluding, two comments may be made. Firstly, in an earlier part of the impugned judgment, the learned High Court observed that the power of the Board or the Chief Commissioner is “unqualified”. This statement, unless read in context, may cause some confusion. It is clear that what the High Court was concerned with was to contrast the power conferred on the Board or the Chief Commissioner on the one hand, and on the Commissioner in terms of the proviso on the other. As noted above, the Commissioner can act in only two situations and not otherwise. Neither the Board nor the Chief Commissioner is so constrained. It is only in contradistinction with the position of the Commissioner that the power of the former is “unqualified”. The High Court must not be

understood as having held that the Board or the Chief Commissioner has been conferred an unfettered discretion by the section. That would, for reasons already stated, be contrary to law. Secondly, although learned counsel referred to certain provisions of the 2005 Act, and s. 45(2) thereof appears to be very similar to s. 40B, we have refrained from any consideration of the former. The reason is that those provisions were not directly involved in the present case. It would, in the circumstances, be inappropriate to consider sections not specifically invoked by the authorities, even though they are to be found in a cognate statute.

6. Since the point taken before us has, with respect, been found to be without merit, this appeal must fail. It is hereby dismissed.

JUDGE

JUDGE

JUDGE

Karachi, the
14th of June, 2018
Approved For Reporting
Saeed Aslam/*