

(Judgment Sheet)

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ petition No.3484 of 2016

Administrator Islamabad Club, Islamabad
Versus
Federal Board of Revenue, Islamabad and another

Petitioner by: Mr. Waseem Abid, Advocate.
Respondents by: Mr. Saeed Ahmed Zaidi, Advocate.
Date of hearing: 08.03.2021

GHULAM AZAM QAMBRANI, J.:- The petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "**Constitution**"), with the following prayer:-

1. *That the Writ petition be allowed.*
2. *It be declared that Show Cause Notice No.48 dated 29.08.2016 (Annex A) issued by respondent No.1 is without jurisdiction, without lawful authority and be struck down.*
3. *It be declared that the proceedings initiated vide show cause notice No.48 dated 29th August 2016 of Respondent No.2 initiated by Respondent No.2 are without jurisdiction and without lawful authority and not sustainable.*
4. *Any other relief.*
5. *Costs. "*

2. Brief facts giving rise to filing of this petition are that the Islamabad Club was established in 1967 to provide recreational and sports facilities to the government servants, diplomats and other residents of Islamabad. That the Islamabad Club is not funded by federal government and its income is generated from entrance fees received from elected members, monthly subscription received from members which does not entail providing of any services. Such of the services which are availed by a member and are provided by the Club on payment such as dining, laundry, confectionaries, renting of halls etc. and which do constitute "Taxable serves", applicable sales tax is duly paid. Entrance fees and monthly subscription received from members neither are nor never been treated as taxable services by

the Federal Board of Revenue; that Sports activities are otherwise also exempted from sales tax; that the Taxation Directorate or Federal Board of Revenue have never claimed recovery of tax on entrance fee and monthly subscription as taxable services.

3. On 15.08.2016, the petitioner received a letter calling for record for audit purposes for the year 2011-2012 and record was submitted to the respondent vide letter dated 19.08.2016, thereafter respondent No.2 issued show cause notice No. 48 dated 29.08.2016 alleging that the club has to charge, levy and pay sales tax on their services as per Section 3 of Islamabad Capital Territory (Tax on service) Ordinance, 2001 read with Section 3 of Sales Tax Act, 1990 and Chapter VI of Sales Tax Special Procedure Rule, 2007 with the observation that during audit for the year 2011-2012, the club has received consideration for services provided and there is a short payment of Rs.36,646,038/- on account of subscription fee, entrance fee and other sport and non-sport revenue from services provided. After receiving the show cause notice, petitioner submitted reply No.IC-ACC/2016/1.1/172, dated 02.09.2016 with the contention that monthly subscription is not subject to sales tax, as it is a fixed amount, which is charged to the members irrespective of their usage of club services; that the matter was also decided by the CIR (Appeals-I) in order No.59/2014 dated 23.01.2014 wherein it was held that receipt on account of entrance fee, monthly sports subscription and subscription were not part of value of supply and, therefore, such receipts were not liable to sales tax; that the entry fee is included an amount of Rs.43,952,500/- on account of advance entrance fee received during the year and is not a part of general fund as it remains outstanding as a liability towards applicants until they become members of the club and the remaining amount of Rs.89,134,495/- on account of entrance fee which was transferred to the general fund during 2011-2012 is not subject to sales tax and the matter has already been decided by the CIR (Appeals-I) in its order No. 59/2014 dated 23.01.2014, wherein it has been held that receipt on account of entrance fee and subscription were not part of value of supply, therefore, such receipts are not liable to sales tax; that the revenue from non-sports sections includes an amount of Rs.945,170/- and Rs. 8,545,700/- on account of library and gym subscriptions. The matter was also decided by CIR (Appeals-I) in its order No.59/2014 dated 23.01.2014, wherein it was held that receipt on account of entrance fee and subscriptions were not part of

value of supply and, therefore, such receipts were not liable to sales tax. The sales tax on remaining amount of revenue from non-sports sections i.e. Rs.274,414,414/- was duly charged and deposited into government exchequer.

4. Learned counsel for the petitioner has contended that proviso to Rule 2 (xxvii) of the Sales Tax Special Procedure Rules, 2007 excludes membership fee and monthly subscription from the ambit of value of taxable services and the expression value of supply does not include entrance fee and monthly subscription. It is further submitted that all the sports activities provided by the petitioner are exempted from tax, as such, respondents cannot levy any tax on these activities; that the petitioner has never charged entrance fees and monthly subscription from its members whereas respondent No.2 has acted on the basis of surmises through the impugned Show Cause Notice. Lastly prayed for acceptance of petition and setting aside of the impugned show cause notice.

5. On the other, learned counsel for the respondent has opposed the contentions of petitioner and has contended that case of the petitioner has been selected for audit and various discrepancies with regard to the payment of sales tax on various services were observed and the same were communicated to the petitioner through Show Cause Notice dated 29.08.2016; that the monthly subscription and entrance fees are charged from the members in cash flow statement to retain or gain the rights to be a member of the club. It is further submitted that in case any member fails to pay the monthly subscription and entrance fees, the club ceases rights of the said member; that these fees are non-refundable and becomes integral part of consideration received from the members against the services provided to them. Lastly, prayed for dismissal of the instant petition.

6. I have heard arguments of learned counsel for the parties and have perused the material available on record with their able assistance.

7. It is settled principle of law that writ petition is not maintainable against a show cause notice and writ petition can only be entertained if this Court finds that the show cause notice is suffering from want of jurisdiction of the issuing authority or the same has been issued with malafide intention and in violation of the statute. Perusal of the record reveals that the impugned Show Cause Notice has been issued against the petitioner by respondent No.2, ignoring the proviso at the end of

definition of value of taxable services in Clause 2 (xxvii) of Sales Tax Special Procedures Rules, 2007. For ready reference, the said Rule is reproduced hereunder:-

“Rule 2 (xxv), “Taxable services” means the services chargeable to sales tax under the respective Provincial law, and include all such services, utilities or facilities, by whatever name called, which are provided or rendered by a service provider to his clients or customers or members.”

“Rule 2 (xxvii), Value of Taxable services”, in relation to hotels and courier services, means the gross amount charged or the consideration in money including all Federal and Provincial levies, if any, , which a service provider receives from the clients or customers or members for providing or rendering taxable services, , but excluding the amount of sales tax:

Provided that in case the consideration for providing a taxable services is in kind or is partly in kind partly in money or the service provider and recipient or client are associated persons and the service is provided for non-consideration or for a consideration, which is lower than the open market value, the value of taxable service shall mean the open market value for providing the taxable service, excluding the amount of tax.

Provided further that value of taxable service in relation to clubs for the purpose of levy of sales tax shall not include consideration received on account of membership fees, refundable deposit or security unless the same is deducted or adjusted in full or in part as settlement or recovery of dues for services.”

8. Perusal of the above definition reveals that imposition of sales tax demanded by respondent No.2 through Show Cause Notice No.48, dated 29.08.2016 is unjustified, illegal and has been issued in violation of a statute i.e. Rule 2 (xxvii) of the Sales Tax Special Procedure Rules, 2007. An identical matter, regarding membership fee, received by clubs has earlier been decided by the Karachi High Court in the case reported as “Defence Authority Club Karachi & five others Vs. Federation of Pakistan through Secretary, Revenue, Division & two others” [2007 PTD 398], wherein it has been held as under:-

“The term “ services provided” used in the schedule cannot in any manner include membership fee or monthly subscription as the same has no nexus with the services , which a club provided to its members like providing boarding, lodging, arranging parties, supplying foods and other stuffs.”

9. In view of the above, it is crystal clear that membership fee, monthly subscription and such other subscriptions are not against the consideration of providing of services and that sales tax is leviable only on sale at shop and supply of food to the members. As such, receipt on

account of membership fee, entrance fee and sports subscription are not part of value of supply, therefore, such receipts are not liable to sales tax. In spite of the remedy of appeal before the Commissioner Inland Revenue (Appeals), Islamabad, this petition is maintainable against issuance of a show cause notice, which has been issued in violation of the Statute. In this regard, I am also fortified by the law laid down by the Hon'ble Supreme Court in the case reported as "Town Committee, Gakhar Mandi Vs. Authority under the Payment of Wages Act Gujranwala and 57 others" [PLD 2002 SC 452], wherein it has been held as under:-

"Writ of certiorari for instance, could be granted, despite availability of an alternate remedy, where, for example, the impugned order was ex facie without lawful authority or where it was a case of lack or absence of or even excess of jurisdiction."

10. In the case reported as "Saira Rubab Nasir and 25 others Vs. President of Pakistan through Secretary, Islamabad and 12 others" [PLD 2020 Islamabad 130], it has been held that this Court has the jurisdiction to examine whether pre-requisites provided for in the relevant provision of the Statute for exercise of the power thereunder existed when the impugned order is passed, if the answer to the said question is in negative, the exercise of power is held to be without jurisdiction calling for interference by this Court. The Hon'ble Division Bench of this Court in the case reported as "Mari Petroleum Company Limited through General Manager Finance, Islamabad Vs. Federation of Pakistan through Secretary Revenue, Islamabad & three others" [2019 PTD 1774], has held as under:-

"It is well settled that mere issuance of a show-cause notice does not amount to an adverse action. Reference in this regard may be made to the cases of Mir Nabi Bakhsh Khan v. Branch Manager, National Bank of Pakistan Jhatpat and others (2000 SCMR 1017) and Zaver Petroleum Corporation Limited v. Federal Board of Revenue (2016 PTD 2332). It is also well settled that a writ petition against the mere issuance of a show-cause notice is not maintainable unless the same is wholly without jurisdiction and in violation of a statute. Reference in this regard may be made to the cases of Al-Ahram Builders (Pvt.) Ltd. v. Income Tax Appellate Tribunal (1993 SCMR 29), Pakistan Tobacco Company Limited v. Government of Pakistan (1993 SCMR 493) Deputy Commissioner of Income Tax/Wealth Tax, Faisalabad v. Punjab Beverage Company (Pvt.) Ltd. (2007 PTD 1347), Irum Shah Shahadi v. Principal School of Nursinci, Mayo Hospital, Lahore (2017 PLC (C.S.) 943) and Apna T.V. Channel (Private) Limited v. Pakistan Electronic Media Regulatory Authority (2017 CLC 199)."

Record further reveals that earlier, the petitioner approached the Commissioner Inland Revenue (Appeals-I), Islamabad, against the Order-in-Original No.29/2006 dated 09.09.2013 passed by the Deputy Commissioner Inland Revenue, LTU, Islamabad, whereby demand of sales tax in respect of amount paid by persons for becoming members of the Club as well as fixed monthly subscription made by the Deputy Commissioner Inland Revenue was challenged, it was held vide order dated 23.01.2014 that receipt on account of membership fee, entrance fee and sports subscription are not part of value of supply and, therefore, such receipts are not liable to sales tax and the impugned order dated 09.09.2013 was vacated.

11. In view of what has been discussed above, this writ petition is **accepted** by setting aside the impugned Show Cause Notice No.48, dated 29.08.2016, as the same has been issued in violation of the Statute.

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court on this 31st day of March, 2021.

JUDGE

S.Akhtar