

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

No. IHC/Jud. Deptt.

(REVISED FORM OF BLUE SLIP)

Case No. 1.C.A 529/14

Titled. PTCL v/s Chirman Federal Board of Revenue,


a) Judgment approved for reporting

Yes/No ✓

b) Judgment any comment upon the conduct of the
Judicial officer for quality of the impugned judgment
Is desired to be made.

Yes/No ✓

(In case the answer is affirmative separate
confidential note may be sent to the Registrar
drawing his attention to the particular aspect).

Initial of the Judge. 

NOTE.

1. If the slip is used, the Reader must attach on top of first Page of the judgment.
2. Reader may ask the Judge writing the judgment whether the judgment is to be approved for reporting of any comment is to be made about the judicial officer / quality of judgment.
3. This slip is only to be used when some action is to be taken.

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

I.C.A. No.529/2014

PAKISTAN TELECOMMUNICATION COMPANY LIMITED
VERSUS
FEDERATION OF PAKISTAN
through the Chairman Federal Board of Revenue, Islamabad & 2 others

Appellants by : **Mr. Makhdoom Ali Khan, Sr. ASC, Mr Ali Sibtain Fazli, ASC Hafiz Muhammad Idrees, ASC, and Ch. Naeem Ul Haq, Sardar Ahmed Jamal Sukhera, Malik Nasir Abbas Awan, Mr. Saad Hashmi, Mr. Salman Afridi, Advocates.**

Respondent by : **Hafiz Munawar Iqbal, Dr. Farhat Zafar, Sheikh Anwar Ul Haq and Mr. Saeed Ahmed Zaidi, Mr. Ayyaz Shaukat, Syed Anwar Ahmed Shah, Advocates**

Date of Hearing : **25-11-2015.**

ATHAR MINALLAH, J.- Through this consolidated judgment we shall decide the Intra Court Appeals listed in Annexure-A, Annexure-B and Annexure-C attached hereto. Annexure-A relates to the Intra Court Appeals wherein petitions were filed challenging notices issued under section 177 of the Income Tax Ordinance, 2001 (*hereinafter referred to as the 'Ordinance of 2001'*), while Annexure-B lists the appeals arising from petitions wherein notices under section 25 of the Sales Tax Act 1990 (*hereinafter referred to as the 'Act of 1990'*) read with section 46 of the Federal Excise Act 2005 (*hereinafter referred to as the 'Act of 2005'*) had been assailed. Annexure-C includes appeals which were heard

only to the extent of deciding the question of maintainability of the Intra Court appeals and not on merits.

MAINTAINABILITY OF THE INTRA COURT APPEALS:

2. The Intra Court Appeals in the appended Annexures have arisen from petitions wherein notices/show cause notices were challenged and pursuant thereto Orders-in-Original had not been passed.

3. The learned counsels appearing on behalf of the respondent Department had raised a preliminary objection regarding the maintainability of the Intra Court Appeals on the ground of the proviso to sub section 2 of section 3 of the Law Reforms Ordinance 1972 (hereinafter referred to as the "Ordinance of 1972"). The respective appellants had 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'*) challenging the issuance of Notices/Show Cause Notices. Admittedly, 'original orders' had not been passed. It is in this context that a question has arisen i.e whether the proviso to sub section 2 of section 3 of the Ordinance of 1972 will be attracted if the appeal arises from a constitutional petition wherein a notice/show cause notice issued prior to passing an original order, wherein the relevant law provides for a right of appeal, review or revision against such order, has been challenged. A notice issued under section 177 of the Ordinance of 2001 is not an 'original order', nor does the Ordinance of 2001 provide a right of appeal or review against the said notice. After issuance of the notice, audit is conducted. On completion of the audit, if the appropriate officer is satisfied that material exists for amending an assessment order

then under section 122(9) a show cause notice is issued, which may result in passing an amended assessment order. The amended assessment order in the proceedings is, therefore, an 'original order' in the context of the said expression used in the proviso to section 3(2) of the Ordinance of 1972. The right of appeal or review under the Ordinance of 2001 is provided against the original order and not the notice or show cause notice issued prior thereto. As already noted above, Annexure-A and Annexure-B relate to appeals wherein notices had been issued either under Section 177 of the Ordinance of 2001 or under section 25 of the Act of 1990, read with section 46 of the Act of 2005.

4. The learned counsels appearing on behalf of the appellants have strenuously argued in favour of the maintainability of the Intra Court Appeals. They have contended that similar notices had been assailed before the Lahore High Court wherein the judgment titled '*Chenone Stores Limited through Executive Director (Finance Accounts) v. Federal Board of Revenue through Chairman and 2 others*' [2012 PTD 1815] had been rendered. The judgement in the *Chenone Stores Limited supra* was assailed before the august Supreme Court in C.As. No.1032 to 1082 of 2012 and the said petitions were disposed-of by the apex Court vide judgment dated 03-01-2013. The petitions were sent back to the Lahore High Court to be heard as Intra Court Appeals. The learned counsel appearing before the august Supreme Court in the aforesaid case on behalf of the Department i.e the Federal Board of Revenue had conceded that the Intra Court Appeals were competent. The learned counsels have further brought to our attention the order dated 08-11-2013 passed by the august Supreme Court in C.P. No's.1002, 1009 etc. of 2013. In the

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latter proceedings it was argued before the august Supreme Court that when a show cause notice, and not an original order or otherwise, has been passed by the income tax authorities, the remedy of appeal, revision or review does not arise and, therefore, an Intra Court Appeal in such an eventuality would be competent. It is manifest from perusal of the order that the learned counsel appearing on behalf of the Department before the august Supreme Court had conceded to this legal proposition. In these circumstances the august Supreme Court had expunged that part of the judgment impugned before it wherein it was held that Intra Court Appeals were not competent. Some of the learned counsels appearing in the instant appeals, as well as on behalf of the Department, had also appeared before the august Supreme Court in the proceedings wherein order dated 08-11-2013 had been passed. We inquired from the learned counsels as to whether in the light of the aforementioned two orders passed by the august Supreme Court, particularly when the Intra Court Appeals preferred against the judgment in the *Chenone Stores Limited supra* are pending before a Division Bench of the Lahore High Court pursuant to having been sent back by the august Supreme Court, the instant Intra Court Appeals would also be maintainable? The learned counsels candidly conceded that on the same analogy and in the light of the orders passed by the august Supreme Court in the above referred two cases, the instant Intra Court Appeals are also to be treated as being maintainable. The august Supreme Court in "*Pakistan Oilfields Ltd, Rawalpindi versus Province of Punjab, through Secretary Finance Department, Lahore and others*" [2010 SCMR 328], while interpreting the proviso to section 3(2) of the Law Reforms Ordinance 1972, has observed and held that an Intra Court Appeal would be maintainable if at the time

of filing the constitutional petition under Article 199 of the Constitution the remedy of appeal etc was not available. It was further held that 'Another reason which makes the proviso to sub section 2 of section 3 of the Law Reforms Ordinance 1972 inapplicable to the instant matter is that there had not yet been passed any 'original order' which could be made basis for filing of departmental appeal.' Reference may also be made to "*Secretary to the Government of Punjab Revenue Department and others versus Sajjad Ahmad and another*" [2012 SCMR 114], "*Iftikhar Hussain and others versus Government of Pakistan and others*" [2001 P.Cr.L.J. 146], and "*Chief Commissioner Income Tax, Lahore and 02 others versus Waseem Yaqoob*" [2013 PTD 1114].

4. We, therefore, hold the Intra Court Appeals before us to be maintainable since they are at par with the appeals pending before the Lahore High Court, arising from the judgment in the Chenone Stores Limited supra pursuant to the order of the august Supreme Court dated 03-01-2013, and for the reason that at the time of filing the petitions no appeal etc was provided against the impugned notices nor an 'original order' had been passed.

5. The set of appeals listed in Annexure-C, however, have not been heard on merits; therefore, we direct the office to place the same before the Chief Justice for appropriate orders. These appeals arise out of petitions wherein show cause notices had been assailed and the matter has remained pending since more than four years. The Hon'ble Chief Justice may, therefore, consider placing the appeals before a Bench to be heard on merits.

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6. We would now take up the appeals listed in Annexure-A & Annexure-B attached hereto.

7. Mr. Makhdoom Ali Khan, Sr. ASC has contended that there is no factual or legal basis for the impugned audit notices; even otherwise, the provisions of the respective statutes i.e. the Ordinance of 2001, the Act of 1990 or the Act of 2005 does not empower the Commissioner to select a taxpayer for audit; the power to select a person for audit lies with the Federal Board of Revenue under section 214C of the Ordinance of 2001, section 72-B of the Act of 1990 and section 42-B of the Act of 2005; once a person is selected for audit by the Board, only then the Commissioner may conduct the audit in accordance with the procedure laid down in the respective provisions; an objective criteria is a precondition for selection for audit; if the aforementioned provisions are interpreted in a manner which empower the Commissioner to select a person for audit, the concept of self assessment will be impaired; the Commissioner cannot pick and choose persons for audit in an arbitrary manner; the audit cannot take place on the whims and caprice of the Officer of the Inland Revenue; such unfettered, unbridled and absolute powers are bound to be used to hold fishing expeditions into tax affairs of a taxpayer; reliance has been placed on the cases of *Chenone Stores Limited through Executive Director (Finance Accounts) v. Federal Board of Revenue through Chairman and 2 others* [2012 PTD 1815] and *Northern Bottling Company Limited v. Federation of Pakistan* [2013 PTD 1552]; that pursuant to the said judgments, the legislature in order to further clarify the matter, inserted an explanation in the respective provisions; a

bare reading of the respective explanations makes it obvious that the Commissioner Inland Revenue is not vested with the power to select a person for audit, and the same remains with the Federal Board of Revenue; section 25 of the Act of 1990, section 177 of the Ordinance of 2001 or section 46 of the Act of 2005 only empowers the Commissioner to conduct the audit of a person after having been selected by the Board and, therefore, the explanation cannot provide to the contrary; it is trite law that an 'Explanation' cannot invalidate the provision; the object of adding the explanation to a statutory provision is only to facilitate proper interpretation and to remove any possible confusion or misunderstanding; reliance has been placed on '*Colony Sarhad Textile Mills Ltd. v. Collector, Central Excise and Land Customs*' [PLD 1969 Lahore 228], '*Muhammad Hussain Patel v. Habib Wali Muhammad*' [PLD 1981 SC 1], '*Chief Administrator Auqaf v. Koura*' [PLD 1991 SC 596]; it is for this Court to look at the intention of the legislature; the legislature, having not used the word "select", has made it obvious that the said power is not conferred or vested on or in the Commissioner; it is not permissible to supply a *cassus omissus* in the facts and circumstances of the instant appeal; reliance has been placed on '*Muhammad Ismail v. The State*' [PLD 1969 SC 241], '*Amanullah Khan v. Chief Secretary NWFP*' [1996 PLC (C.S.) 81], '*State Cement Corporation v. Collector of Customs*' [1998 PTD 2999], '*Zain Yar Khan v. The Chief Engineer*' [1998 SCMR 2419], '*Nadeem Ahmed Advocate v. Federation of Pakistan*' [2013 SCMR 1062]; that a harmonious reading of section 25 and 72-B of the Act of 1990, section 46 and 42B of the Act of 2005 and section 177 and 214C of the Ordinance of 2001 clearly shows that the power to select for audit is with the Federal Board of Revenue, while the subsequent act of conducting it is with the

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Commissioner Inland Revenue; it is a settled principle of law that a harmonious interpretation must be given to statutory provisions; reliance has been placed on the cases of *'East and West Steamship Co. V. Queensland Insurance'* [PLD 1963 SC 664], *'Wazir Ali Industries v. ATIR'* [2012 PTD 405], *'Qazi Hussain Ahmed v. General Pervaiz Musharraf'* [PLD 2002 SC 853]; there is no doubt that the Commissioner has no power to select a person for audit, especially in the light of the judgments of the Lahore High Court in *Chenone Stores Limited supra* and the Peshawar High Court in the case of *Northern Bottling Company supra*. However, if there is any doubt, it must be resolved in favour of the assessee; reliance has been placed on the cases of *'B. P. Biscuit Factory v. Wealth Tax Officer'* [1996 SCMR 1470], *'Bisvil Spinners v. Superintendent Central Excise'* [PLD 1988 SC 370], *'Sohail Jute Mills v. Federation of Pakistan'* [PLD 1991 SC 329], *'Mehran Associates v. Commissioner of Income Tax'* [1993 SCMR 274], *'Pakistan through Secretary Finance and others v. Messrs Lucky Cement and others'* [2007 SCMR 1367], *'Collector of Customs, Lahore v. S. M. Ahmed & Company'* [1999 SCMR 138]; it is settled law that when interpreting a taxing statute the Court has to merely examine the language of the law and give it a plain meaning. There is no room for intendment; there is no equity about a tax; there is no presumption as to tax; reliance has been placed on the cases of *'Government of Pakistan v. Hashwani Hotels Limited'* [PLD 1990 SC 68], *'A & B Food Industries Limited v. Commissioner of Income Tax'* [1992 SCMR 663], *'B. P. Biscuit Factory v. Wealth Tax Officer'* [1996 SCMR 1470]; illustrating the arbitrariness of the Commissioner, the learned counsel has referred to the intimation notices dated 23-04-2013 which had been assailed by invoking the jurisdiction of this Court under Article 199 of the

Constitution, and is the matter for consideration in the Intra Court Appeal No.529/2014; it has been stressed that the Order-in-Original dated 13-04-2013, the appeal before the learned Appellate Tribunal establish that the reasons stated for conducting an audit has no basis, rather in the impugned notice is in the nature of a fishing expedition.

8. Mr Ali Sibtain Fazli, ASC, Hafiz Muhammad Idrees, ASC, Ch. Naeem Ul Haq, ASC, adopted the arguments advanced by Mr. Makhdoom Ali Khan, Sr. ASC and have urged for allowing the appeals and setting aside the impugned judgment.

9. On the other hand Hafiz Munawar Iqbal, Dr. Farhat Zafar, Sheikh Anwar Ul Haq and Saeed Ahmed Zaidi Advocates appeared on behalf of the respondent Department and have controverted the contentions advanced on behalf of the appellants and have argued that; there is no ambiguity regarding the language used in the three statutes; the provisions being considered are not in the nature of charging sections, rather they are machinery provisions and prescribing the procedure for effectuating the charging provisions; the learned counsels appearing on behalf of the appellants are reading into the statute something not provided therein; the judgments rendered by the Lahore High Court and the Peshawar High Court in the Chenone Stores Limited supra and Northern Bottling Company Limited supra respectively have not appreciated the statutory provisions in their correct perspective; the judgments relied upon in the Chenone Stores Limited supra are distinguishable.

10. The learned counsels have been heard and the record perused with their able assistance.

11. The questions raised involve the interpretation of three distinct statutes, i.e. the Ordinance of 2001, the Act of 1990 and the Act of 2005. The august Supreme Court in the case of *'Federation of Pakistan through Secretary Ministry of Finance and others v. Haji Muhammad Sadiq and others'* [PLD 2007 SC 133] has observed and held that every statute has to be examined independently, though some features may be similar. It is for this reason that we will examine the provisions of the Ordinance of 2001, the Act of 1990 and the Act of 2005 separately. It may be pointed out that the Ordinance of 2001 relates to income tax affairs, which is a direct tax. On the other hand, the Act of 1990 and the Act of 2005 are independent fiscal statutes dealing with Sales Tax and the Federal Excise respectively. Both the latter taxes fall within the ambit of indirect taxation and, therefore, each statute necessarily has to be examined independently. We will, therefore, discuss the appeals separately.

APPEALS LISTED IN 'ANNEXURE-A'

12. These appeals arise from the respective judgments of this Court passed by the learned Single Judge in Chambers, whereby the petitions assailing notices issued under Section 177 of the Ordinance of 2001 were dismissed. The learned counsels appearing on behalf of the appellants have wholly placed reliance on the judgments delivered by the Lahore High Court and the Peshawar High Court in the cases of Chenone

Stores Limited supra and Northern Bottling Company Limited supra respectively. Before we advert to the arguments advanced by the learned counsels, it would be beneficial to examine the scheme of the Ordinance of 2001 in the context of section 177 and section 214C *ibid*.

13. The Ordinance of 2001 is a self contained comprehensive fiscal statute, which was published in the Gazette of Pakistan on 13th September 2001 and the notification under sub-section (3) of section 1 was issued by the Federal Government for its enforcement on 01-07-2002. Through section 238 the Income Tax Ordinance, 1979 (*hereinafter referred to as the 'Ordinance of 1979'*) was repealed with effect from the date on which the Ordinance of 2001 was enforced. The provisions of the Ordinance of 2001 had introduced some significant changes, particularly by introducing the universal self assessment scheme. The procedure for passing assessment orders after a detailed scrutiny made by the assessing officer was done away with, and instead a return filed by a tax payer was treated as an assessment order. In the context of the questions raised by the learned counsels for the appellants it would also be pertinent to examine the various income tax authorities and their respective functions and roles attributed by the legislature within the realm of tax administration. This is crucial to appreciate the role attributed by the legislature to the Federal Board of Revenue (*hereinafter referred to as the 'Board'*) and the other authorities, particularly the Commissioner.

14. Section 207 enumerates the Income Tax authorities for the purposes of the Ordinance of 2001 and the rules made there under. The 'Board', as defined in sub-section (a) of section 2, means the Central

Board of Revenue established under the Central Board of Revenue Act 1924 (IV of 1924), and on the commencement of the Federal Board of Revenue Act 2007, the Federal Board of Revenue established under section 3 thereof. Pursuant to the notification dated 01-11-2007, the Federal Board of Revenue Act 2007 (*hereinafter referred to as the 'FBR Act'*) came into force with effect from the said date. The Board has been established under section 3, while the powers and functions thereof are enumerated in section 4 of the FBR Act. The powers of the Board relating to human resource management have been provided under section 5 *ibid*. Besides the power and functions as described in the FBR Act, the Board is vested with powers under the respective fiscal statutes. Sub-section (2) of section 207 of the Ordinance of 2001 provides that the Board shall 'examine, supervise and oversee the general administration of the Ordinance'. The remaining authorities, as enumerated in clauses (b) to (l) of sub-section (1) of section 207, have been declared to be subordinate to the Board. Sub-section **(3A)** to sub-section (5) of section 207 are in respect of the Income Tax authorities subordinate to the Board and involved in the administration of the Income Tax. The appointment of the Income Tax authorities is vested in the Board, as provided under section 208, while their respective jurisdiction and the manner in which they are assigned functions and powers are provided in section 209. Section 212 empowers the Board by a general or special order, to authorize the Regional Commissioner or the Commissioner to grant approval in any case where such approval is required from the Board under any provision of the Ordinance. Sub-section (1) of section 214 mandates that the Income Tax authorities and other persons employed in execution of the Ordinance shall observe and follow the orders, instructions and directions issued by

the Board. The exclusion has been provided in sub-section (2) to the extent that no order, instruction or direction shall be given by the Board which will interfere with the discretion of the Commissioner (Appeals) in the exercise of the appellate functions. Section 214-B inserted vide the Finance Act 2009 vests revisional powers in the Board. Section 214-C, inserted through the Finance Act 2010, relates to the power of the Board in the context of selection of persons or classes of persons for audit of Income Tax affairs. The latter provision vests the Board with the power to select persons or classes of persons for audit through computer ballot which may be random or parametric. Sub-section (1A) starts with a non-obstante clause and provides that the Board shall keep the parameters confidential. Sub-section (2) prescribes that the audit of Income Tax affairs of persons selected under sub-section (1) i.e by the Board shall be conducted as per procedure given in section 177. Through the Finance Act 2013 an Explanation was inserted, whereby it has been declared by the legislature that the powers of the Commissioner under section 177 are independent of the powers of the Board under section 214-C, and that nothing contained in the said section restricts the power of the Commissioner to call for record or documents, including the books of accounts of the taxpayer, for audit and to conduct audit under section 177. Section 214-D, inserted vide the Finance Act 2015, provides for the eventualities whereby a person shall be automatically selected for audit of its Income Tax affairs for a tax year.

15. When the provisions of the FBR Act are read in conjunction with the provisions of the Ordinance of 2001 it becomes obvious that, as declared under sub-section (2) of section 207 of the Ordinance of 2001,

the role of the Board is to examine, supervise and oversee the general administration of the Ordinance. The Board, therefore, has a supervisory role and to oversee the general administration under the Ordinance, unless some other power has been expressly specified in a particular provision of the Ordinance of 2001. It is, therefore, obvious that the functions, role and powers of the Board and other authorities, enumerated in sub section 1 of section 207, are distinct and separate, and the same have been expressly specified in the relevant provisions as shall be adverted to.

16. The other relevant provisions of the Ordinance of 2001 in the context of deciding the appeals before us are provided, *inter alia*, in Chapter X of the Ordinance of 2001. Part-I of Chapter X prescribes the procedure in respect of filing a Return and describes the categories of persons liable to furnish the Return. Part-II is in respect of assessments and amended assessments. Section 120 declares that when the Return filed by a taxpayer is a complete return of income, other than a revised Return under sub-section (6) of section 114, then the 'Commissioner shall be taken to have made an assessment of taxable income for that tax year and that the Return shall be taken for all purposes of the Ordinance to be an assessment order issued to the tax payer by the Commissioner on the day the Return is furnished'. Sub-section (1A) of section 120 starts with a non-obstante clause and provides that the Commissioner, notwithstanding the deemed assessment under sub-section (2), is empowered to conduct audit of all the Income Tax affairs of the person under section 177 and in such an eventuality all the provisions of the said section shall apply. Sub-section (2) to sub-section (6) prescribes the procedure and powers of the

Commissioner when a Return is found not to be complete. Sub-section (1) of section 121 empowers the Commissioner to make a best judgment assessment in the circumstances, which have been specified therein. The introduction of the self assessment scheme through the deemed assessment order under section 120 of the Ordinance of 2001 was a significant change from the earlier repealed provisions of the Ordinance of 1979. The concept and purpose of the self assessment scheme has been eloquently stated by the Hon'ble Justice Muhammad Afzal Zulla Chief Justice, as he was then, in the judgment titled '*Income Tax Officer and another v. M/s Chappal Builders*' [1993 SCMR 1108] as follows.-

"The matter mhas arisen out of the well-known self-assessment scheme introduced in the Income Tax Law of Pakistan so as to encourage the tax-payers to make contribution towards the State effort in running the Government and the other related State machinery more willingly than it used to be under the normal assessment scheme. One purpose was to save an honest tax-payer from unnecessary suspicion, accusation and torture of being accused and/or found guilty of deceit and falsehood. This being the main purpose, care was taken to safeguard the interest of the State also against deceit and cheating even in the self-assessment scheme. For the latter purpose the scheme a well as the provisions in the Income Tax Ordinance provided for a very limited re-opening of the self-assessment."

17. It is, therefore, obvious that in a self assessment scheme the taxpayer is expected to maintain the records prescribed under the Ordinance of 2001, and to make a true declaration of his or her income without being exposed to a detailed scrutiny by the assessing officer. The Return, as filed by the taxpayer, is treated as if it was an assessment order passed by the Commissioner. However, the legislature in its wisdom

has simultaneously ensured that the interests of the exchequer and the State are safeguarded by empowering the Income Tax authorities to verify that the declarations made by the taxpayer are true and accurate and thus has devised a statutory mechanism in this regard so as to ensure a check or deterrence. The mechanism, as will be discussed later, provides for a narrow and restricted scope for reopening the assessment treated as an assessment order under section 120. It would, therefore, be pertinent to examine the safeguards which are prescribed in this regard and the scope of reopening of the deemed assessment under the self assessment scheme.

18. In any self assessment scheme audit is the most effective and efficient tool to verify the accuracy of the declarations made in the Returns, treated as an assessment order. This is the only process for the purposes of determining that correct income has been declared and the levied tax has been paid. In simple words, audit is an examination and inspection of documents, books, accounts etc. Section 177 of the Ordinance of 2001 provides for the power of audit and so does section 214-C *ibid*. As already noted above, the normal assessment scheme entailed a detailed scrutiny by the assessing officer before passing an assessment order. During the period of transition from the normal assessment scheme, based on detailed scrutiny, to the self assessment scheme, several amendments were made from time to time in section 177. In order to appreciate the legislative intent it would be advantageous to examine these amendments so as to answer the questions raised by the learned counsels i.e whether section 177 is merely a machinery provision while the power to select a taxpayer for audit vests with the

Federal Board of Revenue under 214-C. If the answer to the question is in the negative, then whether the power of the Commissioner to select a person under section 177 is unfettered, unbridled and thus susceptible to be exercised in an arbitrary manner. Before proceeding further it would be pertinent to examine the historical perspective of section 177 since the Ordinance of 2001 was promulgated.

19. At the time of enactment of the Ordinance of 2001 section 177 was as follows.-

"177. Audit.--(1) The Commissioner may select any person for an audit of the person's income tax affairs having regard to--

- (a) the person's history of compliance or non-compliance with this ordinance;*
- (b) the amount of tax payable by the person;*
- (c) the class of business conducted by the person; and*
- (d) any other matter that the Commissioner considers relevant.*

(2) The fact that a person has been audited in a year shall not preclude the person from being audited again in the next and following years where there are reasonable grounds for such audits, particularly having regard to the factors in sub-section (1).

(3) The Central Board of Revenue may appoint a firm of Chartered Accountants as defined under the Chartered Accountants Ordinance, 1961 (X of 1961), to conduct an audit of the income tax affairs of any person and the scope of such audit shall be as determined by the Central Board of Revenue on a case to case basis.

Any person employed by a firm referred to in sub-section (3) may be authorized by the Commissioner, in writing, to

exercise the powers in section 175 and 176 for the purposes of conducting an audit under that sub-section."

20. Sub-section (1A) was inserted through the Finance Ordinance, 2002, and it provided that after selection of a person for audit under sub-section (1), the Commissioner shall conduct an audit of the Income Tax affairs, including examination of the record and accounts, inquiry into expenditure, assets and liabilities of the person. It is noted that the scope of audit was not confined to examination or inspection of documents but was extended to conducting an inquiry into expenditure , assets and liabilities as well. Sub-section (1B) was inserted vide the Finance Act 2003, which empowered the Commissioner to amend the assessment under sub-section (1) or sub-section (4) of section 122 as the case may be, after completion of the audit under sub-section (1A) or sub-section (3), and the same was made subject to obtaining the taxpayers explanation on all the issues raised in the audit. It is noted that the Board had no role in the context of the powers pertaining to audit except the power to appoint a Chartered Accountant under sub section 3, while selection as well as conducting the audit was within the exclusive power of the Commissioner. It is further noted that clauses (a) to (d) of sub-section (1) specified guidelines or laid down a broad criterion for selection of a tax payer. However, as is obvious, the said criterion was expansive. The Commissioner, therefore, could select persons on the basis of a class of business e.g all those engaged in construction or to fix a threshold of tax or select a person on the basis of any matter which was 'considered relevant'. The last expression indeed connotes wide discretionary power in selecting a taxpayer for audit. Nevertheless, the powers were neither unfettered nor unbridled because the selection had to be based on some

'relevant consideration' and not merely on presumption or conjuncture. The scope of powers vested in the Commissioner at the time of promulgation of the Ordinance of 2001 were, therefore, beyond the realm of mere audit of documents or records. Through the Finance Act 2004 section 177 was further amended and the relevant portion is as follows.-

- "177. Audit.—(1) The Central Board of Revenue, may lay down criteria for selection of any person for an audit of person's income tax affairs, by the Commissioner.*
- (2) The Commissioner shall select a person for audit in accordance with the criteria laid down by the Central Board of Revenue under sub-section (1).*
- (3) The Central Board of Revenue shall keep the criteria confidential.*
- (4) In addition to the selection referred to in sub-section (2), the Commissioner may also select a person for an audit of the person's income tax affairs having regard to:--*
- (a) the person's history of compliance or non-compliance with this ordinance;*
- (b) the amount of tax payable by the person;*
- (c) the class of business conducted by the person; and*
- (d) any other matter which in the opinion of Commissioner is material for determination of correct income.*
- (5) After selection of a person for audit under sub-section (2) or (4), the Commissioner shall conduct an audit of the income tax affairs (including examination of accounts and records, enquiry into expenditure, assets and liabilities) of that persons.*
- (6) After completion of the audit under sub-section (5) or sub-section (8), the Commissioner may, if considered necessary, after obtaining taxpayer's explanation on all the issues raised in the audit, amend the assessment under*

sub-section (1) or sub-section (4) of section 122, as the case may be.

- (7) The fact that a person has been audited in a year shall not preclude the person from being audited again in the next and following years where there are reasonable grounds for such audits, particularly having regard to the factors in sub-section (4).*
- (8) The Central Board of Revenue may appoint a firm of Chartered Accountants as defined under the Chartered Accountants Ordinance, 1961 (X of 1961), to conduct an audit of the income tax affairs of any person and the scope of such audit shall be as determined by the Central Board of Revenue on a case to case basis.*
- (9) Any person employed by a firm referred to in sub-section (8) may be authorized by the Commissioner, in writing, to exercise the powers in section 175 and 176 for the purposes of conducting an audit under that sub-section."*

21. The effect of the above amendment was to give the Board the power to cause or have an audit conducted through the Commissioner and to lay down criterion for selection of a person in this regard. The Board was to keep the criteria confidential. However, a plain reading of the section as a whole would unambiguously show that the power of the Commissioner to select remained intact and was exclusive and independent of the power of the Board. In other words, independent of the powers vested in the Commissioner to select and conduct the audit, and in addition thereto, the Board was also empowered to select and cause audit to be conducted through the Commissioner. The powers of the Board and the Commissioner were exclusive of each other. Neither the power of the Commissioner to select was diluted in any manner nor was it made subject or subservient to the power of the Board under sub section

(1). Any other interpretation to the contrary would render the expression 'In addition to the selection referred to in sub section (2),' as well as the rest of the statutory provisions *ibid* as redundant. It is settled law of interpretation that every word and expression has to be given meaning and that redundancy is to be avoided. However, there was yet another crucial amendment made in clause (d) of sub section 4. The said criterion was narrowed down from 'any other matter the Commissioner considers relevant' to 'other matter which in the opinion of the Commissioner is material for determination of correct income'. The legislature, therefore, in the context of the powers vested in the Commissioner in relation to selecting a person for audit had raised the bar of the criterion. As a corollary the Commissioner was required to form an opinion that a matter, which was being made as the basis of selection, was 'material' for determination of correct income. It would be relevant, in the context of the later discussion, to briefly advert to the pre requisites inherent in exercising a statutory power, when the provision explicitly requires an executive authority to form an opinion and to act or decide pursuant thereto. Can an executive authority form an opinion for the purposes of taking a decision on a mere guess, suspicion or conjecture, or whether the threshold is higher? The process of forming an opinion inevitably requires the existence of certain facts and circumstances, and an application of mind. It is through this process that a Commissioner forms an opinion as to whether or not the matter is material for determination of the correct income. In other words the Commissioner has to be satisfied that 'reasonable grounds' exist for his/her opinion for making a selection. The existence of reasonable grounds, therefore, is a jurisdictional pre condition to select a tax payer for an audit. The opinion as such must be based on

facts and circumstances which to an 'ordinary, cautious and prudent person' would appear to be reasonable and which would go beyond mere conjecture, suspicion, guess or being illusory in nature. If the exercise of discretion appears to be for irrelevant reasons e.g to conduct a roving enquiry or the selection made is arbitrary, it would not be sustainable as it would not be in consonance with the object of vesting such powers in the Commissioner.

22. Some amendments were made in sub-section (5) through the Finance Act 2005 and the Finance Act 2009, but the same are not relevant for deciding the appeals. Through the Finance (Amendment) Ordinance 2009, sub-sections (3), (4) and (5) , inserted vide the Finance Act 2004, were omitted. Important and significant amendments, however, were made by substituting sub-section (1) and sub-section (2) and the same are as follows.-

"(1) The Commissioner may call for any record or documents including books of accounts maintained under this ordinance or any other law for the time being in force for conducting audit of the income tax affairs of the person and where such record or documents have been kept on electronic data, the person shall allow access to the Commissioner or the officer authorized by the Commissioner for use of machine and software on which such data is kept and the Commissioner or the officer may take into possession such machine and duly attested hard copies of such information or data for the purpose of investigation and proceedings under this Ordinance in respect of such person or any other person;

Provided that the Commissioner shall not call for record or documents of the taxpayer after expiry of six years from the end of the tax year to which they relate,"

(2) After obtaining the record of a person under sub-section (1) or where necessary record is not maintained, the

Commissioner shall conduct an audit of the income tax affairs (including examination of accounts and records, enquiry into expenditure, assets and liabilities) of that person or any other person and may call for such other information and documents as he may deem appropriate."

23. Two critical aspects are obvious from a plain reading of the above provisions. Firstly, the scope of audit was narrowed down and secondly, the criterion for selection of a person for audit was not expressly mentioned. The Commissioner was empowered to 'call for any record or document including books of accounts', required to be maintained under the Ordinance or any other law. It may be pointed out that section 174 imposes a statutory duty on every taxpayer to maintain such accounts, documents and records as may be prescribed i.e prescribed by Rules made under the ordinance of 2001 as defined in clause (44) of section 2 ibid. However, it is implicit in the phrase 'call for any record or document' that such power is not unfettered or unbridled nor takes away the power to select a person for audit. This is unambiguously affirmed by the fact that at the time when the aforesaid amendment came into effect, the Board had no power to select a person or cause an audit to be conducted. A new sub section (10) was also added which empowered the Commissioner to make a best judgment assessment under section 121 of the Ordinance of 2001 in the eventualities as specified therein. The provisions of section 177 were further amended through the Finance (Amendment) Ordinance 2010, promulgated on 06-02-2010 and further amendments made through the Finance Act 2010. The latter amendments stand enforced till date. It is significant to note that section 214-C was inserted for the first time through the Finance Act 2010. An 'Explanation' was inserted in sections 177 and 214-C respectively through the Finance

Act 2013 i.e after the judgments in Chenone Stores supra and Northern Bottling Company supra had been rendered by the Lahore High Court and the Peshawar High Court respectively. The legislature, in its wisdom, declared that the powers of the Commissioner under section 177 are independent of the powers of the Board under section 214C. The provisions of section 177, as amended through the Finance Act 2010, are enforced till date and for the purposes of the instant appeals sub-section (1) of section 177 being relevant is as follows.-

"177. Audit.— [(1) *The Commissioner may call for any record or documents including books of accounts maintained under this Ordinance or any other law for the time being in force for conducting audit of the income tax affairs of the person and where such record or documents have been kept on electronic data, the person shall allow access to the Commissioner or the officer authorized by the Commissioner for use of machine and software on which such data is kept and the Commissioner or the officer may have access to the required information and data and duly attested hard copies of such information or data for the purpose of investigation and proceedings under this Ordinance in respect of such person or any other person:*

Provided that—

(a) the Commissioner may, after recording reasons in writing call for record or documents including books of accounts of the taxpayer; and

(b) the reasons shall be communicated to the taxpayer while calling record or documents including books of accounts of the taxpayer:

Provided further that the Commissioner shall not call for record or documents of the taxpayer after expiry of six years from the end of the tax year to which they relate.]”

24. The proviso to sub section (1) made it mandatory for a Commissioner to record the reasons in writing for the purposes of calling for the record, documents or books of accounts of the tax payer and to communicate the same to the latter. This statutory duty must be fulfilled before calling for the records etc. The proviso, therefore, qualified or in other words circumscribed the powers of the Commissioner. The proviso, in fact, is the basis or criterion prescribed for exercising the powers contemplated under sub section (1). It is obviously implicit in the expression 'call for records--', the power to select. When sub section (1) is read in conjunction with the proviso, it unambiguously shows the legislative intent to vest the powers exclusively in the Commissioner, not only to conduct the audit but to select a person as well, subject to the jurisdictional pre conditions prescribed in the proviso. Any other interpretation would lead to reading something not provided in the said provision and thus formulate or substitute a policy other than envisaged by the legislature. The inherent power vested in the Commissioner to select a person and to conduct the audit has consistently remained the premise of section 177 since the Ordinance of 2001 was promulgated and enforced and right till the last amendments made through the Finance Act 2010. This intent of the legislature has been unequivocally reaffirmed by inserting the 'Explanation' through the Finance Act 2013. Can we, therefore, construe sub section (1) of section 177, read with its proviso, to give unguided, unfettered or unbridled power in the hands of the Commissioner? Whether the omission of the criterion in clauses (a) to (d) of subsection (4) of section 177, through the Finance Act 2004, has left

the selection to be made for conducting the audit to the unguided whims or caprice of the Commissioner and whether the latter can exercise powers or record reasons in the absence of a criterion. Whether the proviso in any manner violates the fundamental rights guaranteed in the Constitution.

25. Sub section (1) of section 177, as enforced today and reproduced above, prescribes the jurisdictional pre conditions and the criterion is implicit therein. The power to call for records etc unequivocally includes the process of selection. Only two categories of records, documents or books of accounts can be called for audit; firstly, those maintained under the Ordinance of 2001 and secondly, maintained under any other law for the time being enforced. If the person from whom the demand has been made has fulfilled the statutory duty and has maintained the prescribed records etc then the audit conducted is restricted to such records, documents and books of accounts, and the tax payer cannot be subjected to an inquiry or made to produce documents or information as contemplated in sub section (2). Sub section (2) envisages a person who has failed to maintain the record under the Ordinance of 2001 and any other relevant law for the time being enforced, and obviously for good reasons. The proviso to sub section 1 of section 177 prescribes the jurisdictional pre requisites for exercising the power and simultaneously implicitly includes the criterion for selection of a person who is required to produce the documents or records. Before calling for records etc the legislature has made it mandatory for a Commissioner to record the reasons in writing and communicate the reasons to the taxpayer while calling for the records etc. Recording of reasons inevitably

requires an application of the mind, thereafter arriving at a conclusion or decision based on those reasons . The process is inherently premised on some definite criterion in the context of selection of a person being called to produce records or documents, otherwise recording of reasons in writing would lose its relevance. In order for a Commissioner to exercise powers under section 177 the first step is to identify or select the person whose records etc are to be audited. This necessarily involves a process of selection from amongst the taxpayers within his jurisdiction. On completion of the process of selection, there is a statutory duty to record the reasons in writing and communicate the same to the taxpayer. The reasons would be sustainable in law only if they could be justified on the basis of a criterion. The criterion for selection, or in other words in identifying a taxpayer for conducting an audit, is an integral part of the reasons required to be recorded in writing. The criterion, therefore, would not be different from what had hitherto been expressly provided in clauses (a) to (d) of sub section 4 of section 177 and which had been omitted through the Finance (Amendment) Ordinance 2009 followed by the Finance Act 2010. The aforesaid criterion, particularly clause (d) thereof, was not only expansive and exhaustive but met the minimum threshold for exercising powers in the context of section 177. The reasons required to be recorded by the Commissioner in the context of section 177 necessarily have to reflect that a criterion has been considered and acted upon, otherwise the exercise of power would definitely be arbitrary and obviously beyond the legislative intent of the proviso to section 177(1) of the Ordinance of 2001. Donaldson J in *Tramontana Annadora SA v Atlantic Shipping Co. S,A* [1978] 2 All ER 870 has aptly observed 'Having

to give reasons concentrates the mind wonderfully'. De Smith. Woolf & Jowls in the commentary titled 'Principles of Judicial Review' state;

"To have to provide an explanation of the basis for their decision is a salutary discipline for those who have to decide anything that adversely affects others. The giving of reasons is widely regarded as one of the principles of good administration in that it encourages a careful examination of the relevant issues, the elimination of extraneous consideration, and consistency in decision making."

26. The duty to record reasons and communicate the same for a decision taken in the context of section 177(1) has been expressly mandated by the legislature. Mentioning of the criterion on the basis of which a taxpayer has been selected is an integral part of the reasons required to be recorded in writing. The reasons must be sufficiently intelligible so that the taxpayer knows why he/she has been selected for conducting the audit. The reasons ought to be of a standard which unambiguously shows that the taxpayer has not been singled out, nor have the powers been exercised arbitrarily. The Commissioner, having regard to the omitted criterion, may select a class of business or fix a threshold of amount of tax payable or the history of compliance or non compliance with the Ordinance of 2001. To illustrate this point it may be mentioned that it would be a valid and lawful reason to select a person engaged in the business of rendering the services of telecommunication if the said class of business has been identified as per the criterion laid down by the Commissioner in a particular financial year. However, while selecting a person from such a class, there has to be a process or again a

criterion which would clearly reflect transparency, fairness and neutrality on the part of the Commissioner. It may be random balloting or some other basis or criterion which would conspicuously show the transparency of the process of selection. A uniform standard or threshold for the reasons cannot be laid down. In each case it would depend on the facts and circumstances and whether the reasons have a nexus with the object of the statute. Nevertheless the test for judging the validity of the reasons recorded by the Commissioner would be whether the latter has acted arbitrarily or pursuant to a reasonable criterion. A reasonable criterion would, therefore, be a jurisdictional pre requisite for the decision in the context of section 177 and an integral part of the reasons to be recorded in writing. There may be a situation when the Commissioner is of the opinion to select a particular person for conducting an audit on grounds other than those specified in the criterion laid down by him/her e.g on the basis of some information relating to the latter. It may be that in the opinion of the Commissioner some matter other than the general criterion laid down by the latter is material to determine the correct income of a particular taxpayer. In such an eventuality what should be the minimum threshold of the standard of reasons to be recorded in writing? As already explained above, it cannot be stated in definite terms as to what standard of reasoning would be required in such a situation. Obviously it would depend on the facts and circumstances in each case. Nevertheless, when it is necessary to conduct an audit of a particular taxpayer outside the already laid down criterion by the Commissioner, the test for the standard of reasoning envisaged in the proviso to section 177(1) would be whether it is based on 'reasonable grounds' or not. In other words the Commissioner has to be satisfied that 'reasonable grounds' exist for

his/her opinion for making a selection. The existence of reasonable grounds, therefore, is a jurisdictional pre condition to select a tax payer for an audit in such an eventuality. The reasoning, therefore, must be based on facts and circumstances which to an 'ordinary cautious and prudent person' would appear to be reasonable and which would go beyond mere conjecture, suspicion, guess or being illusory. In a nutshell, the reasoning cannot be sustainable if on the face of it the Commissioner appears to have exercised powers arbitrarily, by taking into consideration irrelevant matters and having disregarded the relevant. In such an event the reasoning cannot be termed as being based on 'reasonable grounds'. The reasoning recorded in writing and communicated by the Commissioner to the taxpayer must clearly reflect that the latter has acted reasonably and genuinely for the purposes of determination of correct income. Proceedings which are in the nature of roving inquiries or fishing expeditions cannot be termed as based on 'reasonable grounds'. As a corollary, the Commissioner may exercise the powers under section 177 pursuant to a pre determined criterion laid down by him/her in this regard, and if a selection is to be made of an individual taxpayer outside the ambit of the pre determined criterion then reasoning ought to conspicuously show that the decision has been taken on 'reasonable grounds'. What cannot be in consonance with the object and purpose of the powers vested in section 177 is acting on reasons devoid of criterion or based on a guess, conjecture or presumption and not supported by reasonable grounds. Reasons reflecting a roving inquiry, therefore, are obviously alien to the proviso to sub section (1) of section 177 of the Ordinance of 2001.

27. In the context of further appreciating the powers of the Commissioner under section 177, it would be relevant to examine the consequences flowing from conducting an audit. Is audit in itself an adverse action and order, or a necessary tool to safeguard the interests of the exchequer, particularly in the context of a universal self assessment scheme. The mere conducting of an audit may not even cause inconvenience if the taxpayer has fulfilled the statutory duty of maintaining the record prescribed under the Ordinance of 2001 or any other law. As already noted above, the scope of audit is restricted to two categories of records, documents etc. If a taxpayer has maintained the records, documents etc prescribed under the Ordinance 2001 or under any other law at the time being enforced, the latter is not exposed to the consequences stipulated in sub section (2) of section 177. The failure on the part of a taxpayer to fulfil the statutory obligation of maintaining the prescribed record would empower the Commissioner to exercise powers envisaged under section 177(2). The legislature has, therefore, struck a balance and has provided a mechanism to safeguard the rights of both the taxpayer as well as the exchequer. The mere conducting of an audit does not create any liability or in any manner adversely effects the return treated as an assessment order under section 120. The completion of an audit has no effect whatsoever on the assessment order deemed to have been passed under section 120, as it can only be amended in the manner prescribed under section 122. In this regard the legislature has prescribed a stringent procedure and pre conditions. Section 122 provides for the mechanism and the safeguard for amending an assessment order. Sub-section (1) of section 122 empowers the Commissioner to amend an assessment order treated as issued under section 120 or issued under

section 121, 122C, and may make such alterations or additions as the latter considers necessary. Sub-section (2) provides for the period of limitation within which the Commissioner may exercise the powers under sub-section 122. Sub-section (3) relates to a revised return furnished by the taxpayer under sub-section (6) or sub-section (6A) of section 114. Sub-section (4) provides for the power of the Commissioner to further amend as many times as may be necessary the original assessment order under sub-section (1), (3) or (5A). Sub-section (4A) is in respect of the assessment made under the repealed Ordinance of 1979. Sub-section (5) empowers the Commissioner to amend an assessment order under sub-section (1) within the parameters which have been explicitly mentioned therein. It provides that the assessment order can only be amended under sub section (1) or an amended assessment for that year can be further amended under sub-section (4) when on the basis of "definite information" acquired through an audit or otherwise, the Commissioner is satisfied that eventualities mentioned in clauses (i) to (iii) exist. The expression 'definite information' has been defined in sub-section (8) but the same is not exhaustive. In the context of section 64 of the repealed Ordinance of 1979, the august Supreme Court has interpreted the expression 'definite information'. It has been observed and held that the said expression does not mean a mere difference of opinion or further reasoning or other exercise of logic or even drawing of conclusions. Not every information can be treated as the basis for reopening of assessment. The information should be of a nature which should qualify as 'definite information'. Reliance is placed on the cases of '*Messrs Central Insurance Co. and others v. The Central Board of Revenue Islamabad and others*' [1993 SCMR 1232], '*Income Tax Officer and another v. Chappal*

Builders' [1993 SCMR 1108], '*E.F.U. General Insurance Co. Limited v. The Federation of Pakistan and others*' [PLD 1997 SC 700] and '*Inspecting Assistant Commissioner and Chairman, Panel 20 Companies and others v. Pakistan Herald Limited, through Director Finance and Corporate Affairs*' [1997 SCMR 1256].

28. The plain reading of section 177 and 122 conjunctively unambiguously shows that the Commissioner is empowered to call for the record, documents etc of any taxpayer for the purposes of audit and to amend or further amend the assessment order deemed to have been passed under section 120. However, the said powers are neither unfettered, unguided or unbridled. Before proceeding further it would be pertinent to refer to the settled principles of interpretation of a fiscal statute. It is settled law that while interpreting fiscal statutes the Court looks at what is clearly said; there is no room for any intendment; nor is there any equity about a tax; there is no presumption as to tax; nothing was to be read in or implied and one could only look fairly at the language used. These principles were stated by Rowlett J regarding the interpretation of fiscal statutes in the case of *Cape Brandy Syndicate versus Inland Revenue Commissioner*, (1921)1 KB 64. In the words of Lord Cairns in *Charles James Partington versus Attorney General* (1869) LR 4 HL 100 '--if the court seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be'. The taxing statute has to be interpreted strictly and as a corollary any defect or omission cannot be inferred. The powers vesting in taxation officers to impose penalties and initiate criminal proceedings under the Act

of 1990, e.g section 33, default surcharge under section 34 or powers of arrest under section 37-A, are akin to penal provisions and thus to be strictly construed. As a settled law the parameters provided in the taxing statute determines the chargeability and levy of a tax.

29. The aforementioned principles have been affirmed, enunciated and followed by the Supreme Court of Pakistan in cases of *M/s. Mirpurkhas Sugar Mills Limited Versus Government of Sindh through Chief Secretary, Sindh and 2 others* [1993 SCMR 920], *Muhammad Younas Versus Central Board of Revenue, Govt. of Pakistan and others* [PLD 1964 SC 113], *The Commissioner of Income-Tax, Karachi Versus Mst. Khatija Begum, partner, Shakil Impex, Karachi* [PLD 1965 SC 472], *Messrs Hirjina & Co. (Pakistan) Ltd. Versus Commissioner of Sales Tax Central, Karachi* [1971 SCMR 128], *Aslam Industries Ltd. Khanpur Versus Pakistan Edible Corporation of Pakistan and others* [1993 SCMR 683], *Collector of Customs (preventive) and two others Versus Muhammad Mehfooz* [PLD 1991 SC 630], *Commissioner of Income Tax (Central) Karachi Versus Messrs Fakir Cotton Ginning and Pressing Industries Ltd., Gambat and another* [PLD 1991 SC 280], *Government of West Pakistan and others Versus Messrs Jabees Ltd.* [PLD 1991 SC 870], *The Commissioner of Agricultural Income Tax East Bangal Versus B.W.M. Abdur Rehman, Manager , Taki Bara Taraf Wards Estate* [1973 SCMR 445], *Messrs Mehran Associates Limited Versus The Commissioner of Income-Tax, Karachi* [1993 SCMR 274], *Collector of Customs (Appraisement) Karachi and others Versus Messrs Abdul Majeed Khan and others* [1977 SCMR 371], *Messrs Star Textile Ltd. and 5 others Versus Government of Sindh and 3 others* [2002 SCMR 356], *Government of*

Pakistan and others Versus Messrs Hashwani Hotel Ltd. [PLD 1990 SC 68], *Federation of Pakistan and others Versus Haji Muhammad Sadiq and others, alongwith seven other civil appeals* [PLD 2007 SC 133], *X.E.N. Shahpur Division Versus Collector Sales Tax (Appeals) Collectorate of Customs Federal Excise and Sales Tax, Faisalabad and 2 others* [2008 PTD S.C. 1973], *Government of Pakistan and others Versus Messrs Hashwani Hotel Ltd.* [PLD 1990 S.C. 68] and *A & B Food Industries Limited Versus Commissioner of Income-Tax/Sales, Karachi* [1992 SCMR 663].

30. It is equally settled law that the principles of strict interpretation does not extend to the machinery or procedural provisions. In so far as the machinery or procedural provisions are concerned, they are to be interpreted liberally so as to effectuate the charging sections. In this regard reliance is placed on the case of '*Pearl Continent Hotel and another v. Government of N.W.F.P and others*' [2010 PTD 2018], *Commissioner of Income Tax v. Messrs Eli Lilly Pakistan (Pvt.) Ltd.*' [2009 PTD 1392].

31. Applying the said principles of interpretation, and in the light of the above discussion, we hold that by no stretch of the imagination can the powers of the Commissioner under section 177 be construed or interpreted as being subservient to the powers of the Board under section 214 C. The powers under both the provisions are exclusive and independent of each other. The scope of the power of the Commissioner under section 177 are circumscribed by the checks and limitations which have been imposed by the legislature and discussed above. The power to select a person under section 177 exclusively vests in the Commissioner

and the same has to be exercised within the scope determined therein and as highlighted above. The argument advanced by the learned counsels that the audit provisions give invasive investigation powers and thus it compromises the neutrality of the tax regulator is misconceived. The language of the statute and the legislative intent does not give rise to any doubt and, therefore, sub section (1) of section 177 and the proviso thereto cannot be construed or in any manner be interpreted as being against the scheme of the Ordinance of 2001, or that the provisions are silent regarding the guidelines or criterion. The language of section 177 and 214-C is plain, unambiguous and, therefore, nothing can be read therein, nor is it within the domain of the Court to question the policy, wisdom or intent of the legislature. The legislature, by inserting the 'Explanation' in sections 177 and 214-C, has declared and reaffirmed the intention that the powers are independent and exclusive of each other.

32. In view of the above, we hold that the power of the Commissioner to call for records and conduct an audit under section 177 does not require any pre-selection process by the Board. No case is made out for declaring the provisions of section 177 to be in violation of Article 10A, 25 or 18 of the Constitution. However, while exercising powers under section 177 of the Ordinance of 2001, the Commissioner has certain statutory obligations to comply with as have already been discussed above. We have examined the notices issued to the appellants before us. We are afraid that in most of the cases the reasons do not meet the standard of reasons envisaged in sub section (1) of section 177. Neither do the reasons recorded disclose a criterion nor that the selection of individual cases had been made on 'reasonable grounds'. As an

illustration, we may refer to the notice issued and impugned in the instant Intra Court Appeal, i.e. Intra Court Appeal No.529 of 2014. Perusal of the notice dated 23-04-2013 reveals that the reasons mentioned in paragraph 2 thereof are not of the nature as would meet the requirements of the proviso to sub-section (1). The reasons are based on mere speculation, conjecture and unsupported allegations. The learned counsel for the appellant appearing in the Intra Court Appeal No.529 of 2014 is justified in contending that the said notices do not meet the requirements of sub-section (1) of section 177 nor is the reasoning based on 'reasonable grounds'.

33. We have had the privilege of carefully going through the enlightened and well articulated judgments rendered by the Lahore High Court and the Peshawar High Court in the cases of Chenone Stores Limited supra and Northern Bottling supra respectively. Notwithstanding the enviable intellectual ingenuity, we have not been able to persuade ourselves to concur with the reasoning and conclusions of the two learned Courts.

34. Without making any observations regarding the notices issued in the case of each appellant, we allow the appeals and set aside the impugned judgments on the above grounds. We direct the relevant Commissioners to afford an opportunity of hearing to the appellants before proceeding to conduct the audit pursuant to the notices. The appellants shall be at liberty to raise any objection regarding lack of jurisdictional pre requisites in issuing the notices, and the respective Commissioners shall pass speaking orders prior to conducting the audit.

We expect that the respective Commissioners shall take into consideration the statutory duty and obligations, particularly the jurisdictional pre conditions in respect of exercising powers under section 177, as have been discussed above.

APPEALS LISTED IN 'ANNEXURE-B'
ACT OF 1990 AND ACT OF 2005

35. As already noted above, the august Supreme Court in the case of '*Federation of Pakistan through Secretary Ministry of Finance and others v. Haji Muhammad Sadiq and others*' supra has observed and held that every statute ought to be examined independently, though some features may be similar. It is for this reason that the provisions of the Act of 1990 and the Act of 2005 are being separately examined. The Ordinance of 2001 is a self contained fiscal statute relating to income tax affairs. On the other hand the Act of 1990 and the Act of 2005 are independent fiscal statutes dealing with Sales Tax and Federal Excise respectively. Income Tax falls in the category of direct tax while Sales Tax and Federal Excise are in the nature of indirect taxes. The scheme of the three statutes are also different and, therefore, they need to be separately examined. The Act of 1990 and the Act of 2005 falls in the category of taxes known as "indirect taxes". Unlike a direct tax such as income tax, the indirect tax is a tax collected by a person from another person who bears the burden of the tax. Such a person after collecting the tax has a statutory duty to deposit and account for the same in the respective returns. It is, therefore, of utmost importance that intermediary who is saddled with the duty to collect the tax accounts for the same by making

a true and correct declaration in the returns. Simultaneously, the only tool available to the tax officer to determine that the tax has been correctly collected and deposited is through conducting audit as provided in the relevant statute.

ACT OF 1990

36. The Act of 1990 was enacted with the object to consolidate and amend the law relating to the levy of tax on sales, importation, exportation, production, manufacturing or consumption of goods. It came into force with effect from 01-11-1990 vide notification dated 28-10-1990 issued by the Federal Government in exercise of powers conferred by subsection (3) of section 1. The Act of 1990 is divided into ten chapters. Section 3 is the charging section and provides for the ingredients of the charge, levy and collection of Sales Tax. Chapter IV describes the records and documents to be maintained by a person liable to be registered under section 14. Section 22 and 23 enumerates the record and documents required to be maintained while section 24 prescribes the limitation for the purposes of retention thereof. Section 25 empowers the Commissioner to require a person to produce the record or documents which are in his possession or in the possession or control of his agent for the purposes of conducting an audit. The record or documents for the purposes of section 25 have been specified i.e required to be maintained under the Act of 1990 or any other law. Likewise if such record or documents have been kept on electronic data then the person is under an obligation to allow access to the officer of the Inland Revenue authorized by the Commissioner, and also to allow the use of any machine on which such data is kept. It may be noted that the Commissioner may exercise the

powers under sub-section (1) of section 25 'as and when required'. Sub-section (2) mandates the authorized officer of the Inland Revenue, on the basis of the record obtained under sub-section (1), to conduct the audit once a year. However, exceptions to sub-section (2) are provided in the two provisos thereto. The first proviso is in respect of the powers of the Commissioner in the eventuality when he/she has information or sufficient evidence showing that the registered person is involved in 'tax fraud' or 'evasion of tax'. In such an event the Commissioner has the power to authorize an officer of the Inland Revenue not below the rank of Assistant Commissioner to conduct an inquiry or investigation under section 38. The second proviso contemplates that an earlier audit conducted by the office of the Auditor General of Pakistan shall not be a bar in conducting an audit under the Act of 1990. Sub-section (3) to sub-section (5) outlines the procedure to be followed after completion of the audit. Through the Finance Act 2013 an 'Explanation' has been inserted whereby the legislature, in order to remove any doubt, has declared that the powers of the Commissioner or officer of the Inland Revenue under sections 25, 38, 38A, 38B and 45A are independent of the powers of the Board under section 72B.

37. Section 32-A empowers the Board to appoint as many special audit panels as may be necessary, while sub-section (2) thereof, which starts with a non-obstante clause, vests power in the Board or Commissioner to direct a special audit panel to audit the records of any registered person despite the fact that the records may have been audited by the officer appointed under section 30. Sub-section (6) provides that

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the Board may prescribe rules in respect of the constitution, procedure and working of the special audit panel.

38. Chapter VII of the Act of 1990 relates to offences and penalties and, inter alia, provides for the powers in respect of investigations and inquiry. Section 38 and section 38-A provides for the access to premises, stocks, accounts and records and the power to call for information in connection with any investigation or inquiry. It may be noted that section 25 on the one hand and section 38 and 38-A on the other are distinct.

39. Perusal of the provisions of the Act of 1990 reveals that the Board is vested with specific powers which are supervisory in nature. However, the administration and procedure prescribed in the Act of 1990 envisages the role of the Commissioner as being pivotal.

40. Chapter X of the Act of 1990 provides for miscellaneous provisions. Through the Finance Act 2010 a new section i.e. 72-B was inserted, which conferred powers on the Board to select a person or persons or classes of persons for audit of tax affairs, either through computer ballot, which may be random, or parametric. Once the person or classes of persons are selected, then sub-section (2) provides that the audit shall be conducted in accordance with the procedure given in section 25 and all the provisions of the Act of 1990 shall apply accordingly.

41. A conjunctive reading of the above provisions clearly shows that sections 25, 38, 38-A and 72-B are distinct and independent of each

other. Section 25 exclusively empowers the Commissioner to direct a person 'as and when required' to produce the categories of records, documents etc for conducting an audit. Section 38 and 38-A, on the other hand, are powers vested for the purposes of carrying out investigations and inquiries. Pursuant to the proviso to sub-section (2) of section 25, the Commissioner can only authorize an officer of the Inland Revenue not below the rank of Assistant Commissioner to conduct an inquiry or investigation if he or she has information or sufficient evidence showing that a registered person is involved in tax fraud or evasion of tax. Both the expressions 'tax fraud' and 'evasion of tax' have limited and specific meanings. Likewise, the power under the said proviso can only be exercised if the Commissioner has information or sufficient evidence of tax fraud or evasion of tax. However, if there is no such information or sufficient evidence, resort cannot be made to section 38 or 38-A.

42. The Scheme of the Act of 1990, like the Ordinance of 2001, is also based on the self assessment scheme. A person liable to be registered under the Act of 1990 has to maintain the prescribed records and documents for a period specified under section 24 and file Returns giving true and correct particulars and information for the purposes of payment of tax. While the legislature has placed confidence in the taxpayer and has allowed the latter to pay tax on the basis of self assessment and without interference by the Department, simultaneously it has also created and provided tools to be used by the tax collectors for ensuring that proper records are maintained and the tax levied and collected is paid correctly and on the basis of true declarations. In case of an indirect tax such as Sales Tax or Federal Excise Duty, the obligation of

a taxpayer to make a true and correct declaration is of immense importance, because the latter has collected the tax from another person on behalf of the exchequer and has the statutory duty to deposit the same diligently and on the basis of filing correct and true Returns. Section 25, as inserted at the time of promulgation of the Act of 1990 and thereafter amended from time to time, unambiguously vests the power exclusively in the Commissioner. The Board at no point of time was assigned any role, function or power in relation to section 25 of the Act of 1990. The powers under section 25 were initially conferred on an officer of Sale Tax and later the Commissioner pursuant to the amendment made through the Finance Act 2010. The insertion of section 72-B, through the Finance Act 2010, has for the first time conferred powers on the Board for the purpose of selecting a person or classes of persons for audit. The said powers are circumscribed by the manner explicitly mentioned in the said provision. Once the selection has been made then the procedure under section 25 for conducting the audit is to follow. By no stretch of the imagination can the insertion of section 72-B be construed or read as making the powers of the Commissioner as subservient thereto.

43. Section 25 empowers the Commissioner to direct a person to produce the specified records, documents etc 'as and when required'. The expression 'as and when required' is crucial. The said expression limits the powers conferred under the provision. The Commissioner has to take a conscious decision, after application of mind, in the context of as and when the latter would require a person to produce the records etc for audit. The Commissioners powers are, therefore, neither unguided nor unfettered. The Commissioner cannot pick and choose arbitrarily or

capriciously. The language of section 25 unambiguously shows that the power to select is exclusively vested in the Commissioner and the selection is to be made as and when the latter requires such a person to produce the record etc. It is settled law that a person vested with power under a statute is obliged to exercise the same 'reasonably, fairly, justly and for the purposes of the enactment'. Moreover, a person making an order under powers conferred by any enactment shall, so far as necessary or appropriate, 'give reasons for making the order'. Reliance is placed on Mohammad Ashraf Tiwana and others versus Pakistan and others 2013 SCMR 1159. It is, therefore, implicit in the expression 'as and when required' to give reasons having regard to the object and purpose of section 25. The reasons ought to reflect the criterion determined by the Commissioner for selecting a person from amongst the taxpayers within his jurisdiction. The principles already discussed in detail in the context of section 177 of the Ordinance of 2001 would also be attracted when powers are exercised under section 25 of the Act of 1990. Section 25 itself makes a distinction between a routine audit and an audit when the Commissioner has information or sufficient evidence relating to tax fraud or tax evasion. In case of a routine audit under sub-section (1) of section 25, the provisions of section 38 or 38A are not attracted. On completion of an audit sufficient safeguards have been prescribed by the legislature to ensure that the requirements of due process are complied with.

44. We, therefore, hold that section 25 and section 72-B are independent of each other. The Commissioner is exclusively empowered to exercise powers within the scope and limits as prescribed under sub-section (1) of section 25 of the Act of 1990. If the arguments advanced

by the learned counsels for the appellants are to be accepted then one will have to read into sub-section (1) of section 25 the provisions of section 72-B and thus interfere with and substitute the legislative intent and policy. However, in exercising powers conferred under section 25, it is the statutory duty of the Commissioner to select a person for audit and give reasons based on the principles as have been discussed above in the context of reasons required to be recorded in writing by the Commissioner under the proviso to section 177 (1) of the Ordinance of 2001.

ACT OF 2005

45. The Act of 2005 was enacted with the object to consolidate and amend the law relating to the duties of Excise and it came into force on the first day of July, 2005. Section 3 is the charging section. Section 7 empowers the Board to issue a notification in the Official Gazette to the effect that the duties levied and charged under the Act of 2005 shall be payable in Sales Tax mode. Section 17 enumerates the record of excisable goods purchased, manufactured and cleared, which are to be maintained, while section 18 describes the particulars to be included in an invoice. Section 46 empowers the officer of Inland Revenue authorized by the Board or the Commissioner to conduct audit of the record and documents of any person registered under the Act of 2005 once a year after giving advance notice in writing to such person. Sub-section (2) further empowers the Commissioner, in the eventuality of having information or sufficient evidence showing that a registered person is involved in fraud or evasion of duty to authorized Officer of Inland Revenue not below the rank of Assistant Commissioner, to conduct audit at any time in a year.

Sub-section (2A) provides for the procedure to be adopted after the audit has been conducted. While sub-section 3 provides for an option to the registered person to deposit the amount without being proceeded under section 14. Sub-section (4) vests a discretion in the Board to appoint special audit panels. Section 42-B, inserted vide the Finance Act 2010, for the first time provided for the power of the Board to select a person or classes of persons for audit of the record and documents through computer ballot which may be random or parametric.

46. A plain reading of section 46 shows that the Board as well as the Commissioner are empowered to conduct audit of the record and documents of any person registered under the Act of 2005 once a year after giving advance notice in writing. The requirement of giving advance notice in writing obviously includes giving reasons for the selection of a person for audit. This power, if exercised by the Commissioner, is not dependent on a pre selection to be made by the Board under section 42-B. However, the notice in writing required to be given in advance under section 46 has to give reasons, and thus the principles already discussed in the context of section 177 of the Ordinance of 2001 or section 25 of the Act of 1990 shall apply.

47. The legislature, in its wisdom, has empowered the Commissioner independent of the power vested in the Board to conduct audit of the records and documents maintained under the Act of 2001 or any other law. Section 42-B, on the other hand, is a distinct and separate provision vesting powers in the Board for the purposes of causing an audit to be conducted. This power cannot be read in section 46 so as to

interpret the exclusive and independent power conferred on the Commissioner as being subservient thereto.

48. We have perused the notices which had been impugned in petitions relating to appeals listed in Annexure B. Either they do not disclose the reasons based on a criterion determined by the Commissioner or no reason has been mentioned. However, the relevant Commissioner shall afford an opportunity of hearing to each appellant and thereafter pass a speaking order in the light of the principles and law discussed above.

49. For what has been discussed above, the appeals listed in Annexure A and Annexure B are allowed and disposed of in the terms as directed herein. The impugned judgments passed by the learned Single Judge in Chambers are, therefore, accordingly set aside.

(ATHAR MINALLAH)
JUDGE

(NOOR-UL-HAQ N. QURESHI)
JUDGE

(AAMER FAROOQ)
JUDGE

Announced in the open Court on 25-02-2016

JUDGE

JUDGE

JUDGE

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Approved for reporting.

ANNEXURE-A

S.No	I.C.A NO		TITLE
1	I.C.A No.563/2013 W.P.No.139/2012	in	M/S OMV (Pakistan) Exploration Gmbh vs Commissioner of Inland Revenue etc
2	I.C.A No.596/2013 W.P.No.67/2012	in	M/s Nokia Siemens Networks Pakistan (Pvt) Limited vs Deputy Commissioner of Inland Revenue etc
3	I.C.A No.572/2013 W.P.No.3457/2011	in	M/s Pak Gulf Construction Co (Pvt) Ltd vs. Commissioner of Inland Revenue etc
4	I.C.A No.599/2013 W.P.No.68/2012	in	Pak Telecom Mobile Ltd vs Deputy Commissioner Inland Revenue.
5	I.C.A No.565/2013 W.P.No.128/2012	in	M/S Askari Commercial Bank Limited vs Commissioner of Inland Revenue etc
6	I.C.A No.562/2013 W.P.No.129/2012	in	M/S Askari Leasing Limited vs. Commissioner of Inland Revenue etc
7	I.C.A No.595/2013 W.P.No.137/2012	in	PTCL vs Deputy Commissioner (Inland Revenue) and other
8	I.C.A No.578/2013 W.P.No.162/2012	in	M/S Wateen Telecom Ltd vs Commissioner of Inland Revenue etc
9	I.C.A No.613/2013 W.P.No.221/2012	in	M/s Fauji Fertilizer Bin Qasim Limited vs The Federation of Pakistan etc.
10	I.C.A No.573/2013 W.P.No.485/2012	in	M/s Techaccess Pakistan (Pvt) Ltd. Vs Commissioner of Inland Revenue etc
11	I.C.A No.577/2013 W.P.No.545/2012	in	Securities and Exchange Commission of Pakistan vs Commissioner of Inland Revenue etc
12	I.C.A No.584/2013 W.P.No.550/2012	in	M/s CM Pak Limited vs Federation of Pakistan etc
13	I.C.A. No.569/2013 W.P.No.851/2012	in	M/s National Telecom Corporation vs Commissioner of Inland Revenue etc
14	I.C.A No.568/2013 W.P.No.852/2012	in	M/S Pakistan Oil Field Limited POL vs Commissioner of Inland Revenue etc
15	I.C.A No.570/2013 W.P.No.1115/2012	in	M/S MCB Bank Limited vs. Commissioner of Inland Revenue etc
16	I.C.A No.579/2013 W.P.No.1178/2012	in	M/S Shad Enterprises Executive Suites vs Commissioner of Inland Revenue etc
17	I.C.A No.582/2013 W.P.No.2576/2012	in	M/s Attock Refinery Limited vs Federation of Pakistan etc
18	I.C.A No.610/2013 W.P.No.2873/2012	in	M/s Sonya Travels (Pvt.) Limited vs Federation of Pakistan etc.
19	I.C.A No.566/2013 W.P.No.3384/2012	in	M/S Star Hydro Power Limited vs Commissioner of Inland Revenue etc

ANNEXURE-B

1	I.C.A No.629/2014 W.P.No.1172/2014	in	Pakistan Mobile Communications Limited vs Federation of Pakistan etc.
2	I.C.A No.628/2014 W.P.No.4493/2012	in	M/s Pakistan Telecommunication Company Limited vs Federation of Pakistan etc.
3	I.C.A No.615/2014 W.P.No.1142/2014	in	M/s Pakistan Telecommunication Company Limited vs Federation of Pakistan etc.
4	I.C.A No.614/2014 W.P.No.1538/2013	in	M/s Pakistan Telecommunication Company Limited vs Federation of Pakistan etc.
5	I.C.A No.567/2013 W.P.No.140/2012	in	M/S Askari Bank Limited vs Commissioner of Inland Revenue etc
6	I.C.A No.583/2013 W.P.No.552/2012	in	M/s CM Pak Limited vs Federation of Pakistan Limited etc
7	I.C.A No.574/2013 W.P.No.850/2012	in	M/s National Telecom Corporation vs Commissioner of Inland Revenue etc
8	I.C.A No.581/2013 W.P.No.1889/2012	in	M/s CM Pak Limited vs. Federation of Pakistan etc
9	I.C.A No.587/2013 W.P.No.1922/2012	in	Linkdotnet Telecom vs Federation of Pakistan etc
10	I.C.A No.609/2013 W.P.No.990/2012	in	M/s Telenor LDI Communications (Pvt) Limited vs. Federation of Pakistan etc.
11	I.C.A No.608/2013 W.P.No.1943/2012	in	M/s Telenor Pakistan (Pvt) Limited vs Federation of Pakistan etc.
12	I.C.A No.598/2013 W.P.No.2114/2012	in	Pak Telecom Mobile Limited vs. Federation of Pakistan etc
13	I.C.A No.586/2013 W.P.No.1344/2012	in	M/s Pakistan Telecommunication Company Limited vs The Commissioner Inland Revenue etc
14	I.C.A No.585/2013 W.P.No.1923/2012	in	Pakistan Mobile Telecommunication Limited vs. Federation of Pakistan etc
15	I.C.A No.576/2013 W.P.No.3042/2012	in	Bestway Cement Limited vs Deputy Commissioner Inland Revenue (Audit-IX)

ANNEXURE-C

1	I.C.A No.50/2011 W.P.No.3429/2010	in	Pak Telecom Mobile Limited vs. The Deputy Commissioner (Inland Revenue)
2	I.C.A No.51/2011 W.P.No.1717/2010	in	Pak Telecom Mobile Limited vs Additional Commissioner Inland Revenue etc
3	I.C.A No.52/2011 W.P.No.1718/2010	in	Pak Telecom Mobile Limited vs Additional Commissioner Inland Revenue etc
4	I.C.A No.53/2011 W.P.No.1715/2010	in	Pak Telecom Mobile Limited vs Additional Commissioner Inland Revenue etc
5	I.C.A No.54/2011 W.P.No.1716/2010	in	Pak Telecom Mobile Limited vs Additional Commissioner Inland Revenue etc
6	I.C.A No.55/2011 W.P.No.1714/2010	in	Pak Telecom Mobile Limited vs Additional Commissioner Inland Revenue etc
7	I.C.A No.56/2011 W.P.No.1710/2010	in	Pak Telecom Mobile Limited vs Additional Commissioner Inland Revenue etc
8	I.C.A No.876/2012 W.P.No.3736/2010	in	Pak Telecom Mobile Limited vs Deputy Commissioner etc
9	I.C.A No.761/2013 W.P.No.590/2011	in	Pakistan Telecommunications Company Limited vs The Deputy Commissioner (Inland Revenue etc.

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