

JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P No.39468 of 2016

M/s Imran Ali Lubricants

Versus

Federation of Pakistan and others

J U D G M E N T

Date of Hearing.	08-03-2018
PETITIONERS BY:	M/s Khubaib Ahmad and Mohsin Virk, Advocates.
RESPONDENTS BY:	Mr. Sarfraz Ahmad Cheema, Advocate. Mr. Tahir Mehmood Ahmad Khokhar, DAG.

Shahid Karim, J:- This petition challenges the constitutionality of rule 12 of the Sales Tax Rules, 2006 (**Rules, 2006**). Rule 12 has been enacted in pursuance of the provisions of section 21(2) of the Sales Tax Act, 1990 (**Act, 1990**). The first challenge is on the basis of the rule vouched by the respectable authority that rules cannot travel beyond the mandate of the primary enactment. The second limb of the challenge is that rule 12 offends the provisions of Article 10A and 18 of the Constitution of Islamic Republic of Pakistan, 1973 (**the Constitution**) and impinges upon the right of the petitioners to be treated in accordance with law and by due process of law as well as affects the right of the petitioners to conduct trade and business as enshrined in Article 18 of the Constitution.

2. This judgment shall also decide connected petition W.P No.22691 of 2017 which involves a

common question of law and fact and challenges the same show cause notice.

3. Rule 12 of the Rules, 2006 is at the heart of the controversy raised in these petitions and it would be appropriate to reproduce the said rule *in extenso*:-

“12. Blacklisting and suspension of registration.— *Where the Commissioner or Board has reasons to believe that the registered person is to be suspended or blacklisted, in order to ensure that the LTUs and RTOs follow a uniform policy for suspension and blacklisting of sales tax registered persons under section 21(2) of the Act and for subsequent proceedings in such cases, the following procedure shall be followed, namely:-*

(a) SUSPENSION

(i) Where a Commissioner, having jurisdiction, is satisfied that a registered person has issued fake invoices, evaded tax or committed tax fraud, registration of such person may be suspended by the Commissioner through the system, without prior notice, pending further inquiry. The basis for such satisfaction may inter alia include the following, namely:—

(A) non-availability of the registered person at the given address;

(B) refusal to allow access to business premises or refusal to furnish records to an authorized Inland Revenue Officer;

(C) abnormal tax profile, such as taking excessive input tax adjustments, continuous carry-forwards, or sudden increase in turnover;

(D) making substantial purchases from or making supplies to other blacklisted or suspended person;

(E) non-filing of sales tax returns;

(F) on recommendation of a commissioner of any other jurisdiction;

(G) any other reason to be specified by the Commissioner;

(ii) the suspension of registration shall take place through a written order of the Commissioner concerned, giving reasons for suspension. This order shall be endorsed to the registered person concerned, all other LTUs/RTOs, the FBR's computer system, the

STARR computer system and the Customs Wing computer system for information and necessary action as per law;

(iii) a registered person who does not file sales tax return for six consecutive months shall be caused to be suspended through the system without any notice;

(iv) in cases, where the buyers and suppliers of any such person, whose registration is being suspended, belongs to another LTU/ RTO, and these buyers / suppliers are also required to be suspended, the Commissioner shall intimate the Chief Commissioner of the concerned LTU/RTO in whose jurisdiction such buyers/suppliers fall, in writing explaining the complete facts of the case and the reasons on the basis of which these buyers/suppliers are to be suspended, to initiate proceedings for suspension/blacklisting of the buyers/suppliers;

(v) no input tax adjustment/refund shall be admissible to the registered person during the currency of suspension. Similarly, no input tax adjustment/refund shall be allowed to any other registered persons on the strength of invoices issued by such suspended person (whether issued prior to or after such suspension), during the currency of suspension;

(vi) the Commissioner shall, within seven days of issuance of order of suspension, issue a show cause notice (through registered post or courier service) to the registered person to afford an opportunity of hearing with fifteen days of the issuance of such notice clearly indicating that he will be blacklisted, in case—

(A) there is no response to the notice;

(B) he has not provided the required record;

(C) he has not allowed access to his business record or premises; and

(D) any other reason specified by the Commissioner;

(vii) in case show cause notice is not issued within seven days of the order of suspension, the order of suspension shall become void ab-initio;

(viii) in case of non-availability of the suspended person at the given address, the notice may be affixed on the main notice Board of the LTU/RTO;

(ix) on receipt of the reply to the notice and after giving an opportunity of hearing to the registered person, if the Commissioner is satisfied, he may order for revoking of suspension of the registered person;

(b) BLACKLISTING

(i) in case, after giving an opportunity of hearing, the offence is confirmed, the Commissioner shall issue an

appealable self-speaking order for blacklisting of the registered person, and shall proceed to take legal and penal action under the relevant provisions of the Act;

(ii) the order of blacklisting shall contain the reasons for blacklisting, the time period for which any refund or input tax claimed by such person or by any other registered person on the strength of invoices issued by him from the date of his registration shall be inadmissible, any recovery to be paid or penalties to be imposed;

(iii) the order of blacklisting shall be issued within ninety days of the issuance of the notice of hearing. In case, the order of blacklisting is not issued within this time period the suspension of registered person shall become void ab-initio;

(iv) copies of the order shall be endorsed to the registered person concerned, all other LTUs/RTOs, the FBR/PRAL computer system, the STARR computer system and the Customs Wing computer system. Each LTU/RTO shall circulate all such lists to their refund sections, audit sections and other concerned staff to ensure that the order is implemented in letter and spirit by all concerned;

(v) all LTUs / RTOs shall further circulate the copies of the order along with a computer system-generated list of invoices issued by the blacklisted persons as referred to in the preceding clause, to all officers of Inland Revenue having jurisdiction over the registered persons who have claimed credit of input tax or refund on the strength of the invoices issued by the said blacklisted persons; and

(vi) the officer of Inland Revenue receiving the aforesaid list under clause (v) shall issue show-cause notice under section 11 and sub-section (3) of section 21 of the Act to a registered person for rejecting the input tax or refund claimed against the invoices so circulated and further proceed to decide the matter as per law through a self-speaking appealable order and after affording a reasonable opportunity of being heard to such person, in the manner as provided in the said sub-section (3).”

4. As can be seen from the rule, reproduced above, that it relates to blacklisting and suspension of registration of a registered person. It lays down the procedure to be followed as a uniform policy for the purpose of suspension and blacklisting of sales tax registration under Section 21(2) of the Act, 1990 and for subsequent proceedings in such cases. The structure of

rule 12 is such that the proceedings of blacklisting follow an order of suspension by the Commissioner having jurisdiction in the matter. As a prefatory, it can be seen that the Commissioner has the power to suspend the registration of a registered person without prior notice and pending further inquiry. This can only be done by the Commissioner if he is satisfied that a registered person has issued fake invoices, evaded tax or committed tax fraud. The precise challenge of the petitioners is to the enumeration in rule 12 which empowers the Commissioner to suspend the registration of a registered person without prior notice. This power to suspend without prior notice, according to the petitioners, is ultra vires the Constitution and also resides in the Commissioner concerned an unfettered and unbridled power.

5. The learned counsel for the respondents led by Mr. Sarfraz Ahmad Cheema, Advocate, on the other hand, defended the said rule on the ground that the petitioners and other registered persons who are proceeded against by suspension of their registration are afforded an opportunity of hearing by service of show cause notice on them within seven days of the suspension of the registration and a right of hearing is conferred on such persons which takes care of their constitutional and other statutory rights.

6. At first blush, the power of the Commissioner to suspend the registration of a registered person without

prior notice is an unstructured power and clearly seems expropriatory in nature. Although, rule 12 envisages that the Commissioner prior to exercising the power has to be satisfied that the registered person has issued fake invoices, evaded tax or committed tax fraud, it does not enumerate a notice to be given to the registered person and for an opportunity of hearing to be provided. The concept of being satisfied on the part of a Commissioner clearly entails an inquiry to be undertaken as the Commissioner cannot, without recourse to scrutiny of the relevant record and making an inquiry be satisfied that a registered person has either issued fake invoices or has committed tax fraud. These are serious allegations and raise a presumption that there has to be necessarily cogent and material evidence before the Commissioner to come to a satisfaction that a drastic measure such as suspension of registration is called for. Therefore, it is clear that the Commissioner is obliged to make some sort of inquiry before proceeding to form an opinion to suspend the registration. It cannot therefore be said that the Commissioner does not have ample time to engage the registered person in that inquiry and in some of the instances, the Commissioner in order to be satisfied will require certain documents to be furnished by the registered person himself and, therefore, it can safely be said that the engagement of the registered person in the entire procedure would be inevitable in most of the cases. For example, rule 12(a) spells out the basis for such satisfaction and which will include *inter alia* the

refusal by the registered person to allow access to business premises or to furnish record. Some of the other factors which have been mentioned in the said rule would also lend credence to the view that the Commissioner will have to have material evidence before him in order to be satisfied and thus to proceed to suspend the registration of a registered person. It is incredulous and iniquitous, therefore, on the part of the rule making authority to have provided for the suspension of the registration without prior notice to the registered person.

7. Although Mr. Sarfraz Cheema, Advocate argued that the registered person will have sufficient opportunity to rebut the allegations in response to a show cause notice to be served within seven days, the service of notice and subsequent proceedings are nothing but the continuation of the proceedings that have been set in motion by an *ex-parte* suspension order. It goes without saying that a suspension order entails serious and debilitating consequences for the registered persons. Some of them have been listed in the rule 12 itself. For example, no input tax adjustment/refund shall be admissible to the registered person during the currency of suspension. Similarly, no input tax adjustment/refund shall be allowed to any other registered persons on the strength of invoices issued by such suspended person. However, the Commissioner is under a duty to issue a show cause notice within seven

days of the issuance of order of suspension and that notice will mention that the registered person will be blacklisted in case he does not respond to the notice on any of the grounds mentioned in rule 12(vi). If the proceedings are initiated by the Commissioner within seven days of the order of suspension, then the proceedings may continue for a period of ninety days and for which time the suspension order shall remain in force.

8. This begs the question: what if at the end of the ninety days either the proceedings are not concluded and the suspension order becomes *void ab initio* or that the proceedings end in favour of the registered person. In both these cases, the petitioners shall have by then suffered an irreparable loss and injury which cannot be compensated and for which the registered person does not seem to have a remedy. He will not be able to file proceedings for the restitution of the losses occasioned to him on account of an order which had no basis in law or which may have been issued *mala fide* or under a misapprehension of fact. Therefore, plainly although a registered person has ostensibly been afforded due process of law, yet the initial order of suspension of his registration without notice has rendered illusory the due process which is subsequently sought to be afforded to that registered person.

9. Section 21(2) of the Act, 1990 which requires a procedure to be prescribed by the Board is to the following effect:-

“21(2) Notwithstanding anything contained in this Act, in cases where the Commissioner is satisfied that a registered person is found to have issued fake invoices or has otherwise committed tax fraud, he may blacklist such person or suspend his registration in accordance with such procedure as the Board may by notification in the official Gazette, prescribe.”

10. Therefore, the procedure is required to be prescribed by the Board on the basis of the powers conferred by section 21(2). However, it is vouched by respectable authority that the rules made and the procedure prescribed under the delegated powers conferred by the primary registration have to conform to the main enactment and cannot be in contravention thereof. The Board has been empowered to prescribe a procedure but the power conferred on the Board does not envisage a procedure which takes away the rights of a registered person or offends the principles of due process of law. What is being contemplated by section 21(2) is that a Commissioner may have an ultimate power to either suspend a registration or blacklist a person but it cannot be culled out from section 21(2) that an unbridled and unfettered power can be conferred on the Commissioner concerned to suspend a registration for a period of ninety days without notice and without affording an opportunity of hearing. Thus, in my opinion, rule 12 to that extent travels beyond the mandate of the main enactment and cannot be sustained.

11. It will be noticed upon reading of section 21 that the satisfaction of the Commissioner is relatable both to the suspension of registration as well as to blacklisting. In the rule 12, however, the satisfaction of the Commissioner is only relevant for the purposes of suspension and the basis of the satisfaction has also been spelt out in rule 12(a)(i). It is really a contradiction in terms to say that a Commissioner is satisfied that a person has issued fake invoices, evaded tax or committed fraud, yet a further inquiry is required to confirm the offence. The term 'satisfaction' is a term of art and connotes that there is enough material to form a definite opinion. A Commissioner can only be satisfied if he has conducted a deep and invasive inquiry prying into the records of a person. The words "is satisfied that a registered person has issued fake invoices..." do not leave anything to imagination that a conclusive opinion has been formed and the show-cause notice is a mere eye-wash. The show cause notice is merely for the purpose of enabling the person to upend the satisfaction already arrived at by the Commissioner. The rules have carved out a two-tier adjudicative process treating suspension of registration as an interim step while section 21 does not lend itself to any such intention on the part of the legislature. Therefore it cannot be deemed that the Board can, by the rules, empower a Commissioner to suspend without notice and to blacklist, with notice. This is an unreasonable and confiscatory restraint on the right of a registered person

and cannot be sustained. To reiterate, the effect of suspension is as unfair and financially burdensome as an order of blacklisting and it would be iniquitous to draw a distinction and to create a dichotomy.

12. Rule 12 is irrational and unreasonable on the basis of the further ground that once a suspension order has been passed *ex-parte*, the Commissioner concerned is not required to review that order till the proceedings of blacklisting are concluded nor has a registered person been conferred a right to have that order reviewed pending those proceedings. Article 10A of the Constitution provides:-

“10A. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.”

13. In *Shabbir Ahmed v. Kiran Khursheed and 8 others* (2012 CLC 1236), learned Single Judge of this Court had the occasion to dilate upon and elaborate the extent and sweep of Article 10A in the following words:-

“The impugned auction also offends the newly incorporated fundamental right under Article 10-A of the Constitution, which mandates that civil rights and obligations of the petitioners can only be determined through fair trial and due process. Article 10-A, morphs Article 4 into a more robust fundamental right, covering both substantive and procedural due process. While substantive due process provides a check on legislation and ensures the protection of freedoms guaranteed to a person under the Constitution, procedural due process, which concerns me here, provides that "each person shall be accorded certain "process" if they are deprived of life, liberty or property....The question then focuses on the nature of the "process" that is "due."... The government always has the obligation of providing a neutral decision maker one who is not inherently biased against the individual or who has personal interest in the outcome.”¹⁴ Due process is now

available to every person as a fundamental right and underscores procedural fairness and propriety in determining his civil or criminal rights. The procedure adopted in determining the rights of the parties must at every step pass the test of fairness and procedural propriety and at all times must honour the law and the settled legal principles.¹⁵ Article 10-A is not limited to a judicial trial in its strict sense but requires fairness from any forum which determines the rights of a person. In this case the haughty indifference of TMA to ignore the petitioners and their existing tenancy and to smugly proceed directly with auction of the lease hold right does not pass the test of fairness or due process under Article 10-A. In addition, Articles 18, 23 and 24 of the Constitution are also offended as right to do business and right to enjoy property have also been impaired.”

14. Here we are concerned with the procedural due process. Its importance lies in this that it established the essential relationship between the constitutional right to be heard and the right to be heard by a counsel. In *Walker v Sauvinet 92 US 90 (1875)*, Justice Pitney, writing for the Court, thought in well-settled that:

“a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice and hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is ‘due process’ in the constitutional sense.”

15. Although suspension of registration can be argued to constitute impermissible punishment before trial, but this in itself does not violate substantive due process. However it does offend procedural due process in that it must still be implemented in a fair manner. And a suspension without notice is certainly a clog on the petitioner’s right to be treated fairly and with reasonableness. Lord Denning, a great English Judge and jurist, writing in his book “The Due Process of Law”, describes “Due Process of Law”, as follows:

“By ‘Due Process’ I do not mean rules of procedure. They are far too dull. I mean much the same as Parliament meant when it first used the phrase. It was in 1352 in the statute of 28 Edw, III, Ch. 3:

‘That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by Due Process of Law’.

I mean also much the same as Madison meant when he proposed an amendment to the Constitution of the United States. It was accepted in 1791 in the Fifth amendment: No person...shall be deprived of life, liberty, or property, without Due Process of law.

So, by ‘Due Process of Law’ I mean the measures authorized by the law so as to keep the streams of justice pure: to see that trials and inquiries are fairly conducted; that arrests and searches are properly made, that lawful remedies are readily available, and that unnecessary delays are eliminated. It is in these matters that the common law has shown its undoubtful genius.”

16. We must bear in mind the difference that the right of hearing being part of ‘fair trial’ and “due process” having acquired a constitutional status has made. An ordinary right of hearing could be taken away by an express statutory provision. But now, the right cannot be excluded by ordinary legislation (except in cases in which the right of hearing is not treated as an absolute right). In this case, the overwhelming view is that right of hearing is part of due process of law and thus an absolute right at least in cases which impact a person to his utter detriment by affecting his right of property, life, livelihood or liberty. The language of rule 12(b)(i) starkly brings forth the criminal nature of the charge against a registered person. It says that:

“i) in case, after giving an opportunity of hearing, the offence is confirmed....”.

17. Doubtless, the registered person is being charged with a criminal offence and the clear intent is to proceed against him as such. Even before the stage of blacklisting arrives, the satisfaction of the Commissioner while considering suspension, relates to seriously egregious allegations such as fake invoices, evasion of tax and commission of fraud. All of these are charges of a criminal nature and thus the registered person is, *a fortiori*, entitled to the protection of Article 10-A and to a fair trial and due process. Indubitably therefore, he is also entitled to a right of hearing at both stages of determination.

18. Also Article 18 of the Constitution confers the right on a person to enter upon any lawful profession or occupation and to conduct any lawful trade or business and this is only subject to such qualifications as may be prescribed by law. However, the conferring of power on the Commissioner under rule 12 is a clear impairment of the right under Article 18 conferred on all citizens as clearly, the registered person against whom a suspension order has been passed is barred from conducting all kind of business for a period of ninety days at least.

19. Besides, it is an immutable principle that in all proceedings whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned. Therefore, where a person is empowered to

take decisions after factual investigation into the facts which would result in consequences affecting the person, property or other right of any other person, then the courts have inclined generally to imply that the power so given is coupled with a duty to act in accordance with the principles of natural justice and fairness. [The University of Dacca through its Vice-Chancellor and the Registrar, University of Dacca v. Zakir Ahmed (PLD 1965 Supreme Court 90)].

20. Undoubtedly the power of suspension of registration without prior notice is unlawful and impinges upon the rights of the petitioners to be treated in accordance with law and to be afforded due process of law.

21. In view of the above, these petitions are allowed. The rule 12 to the extent that it provides for suspension of registration of a registered person without prior notice is held to be *ultra vires* the Constitution as well as the main enactment and is struck down. As a consequence thereof, the Commissioner concerned can only proceed to suspend the registration of a registered person with prior notice and upon affording an opportunity of hearing.

(**SHAHID KARIM**)
JUDGE

Announced in open Court on 02.04.2018

Approved for reporting

JUDGE

★

Rafaqat Ali