

Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

Case No: **W. P. 3515/2012.**

DG Khan Cement Company **Versus** The Federation of Pakistan etc.
Limited.

JUDGMENT

Date of hearing:	22.11.2012.
Petitioner by:	M/s Imtiaz Rasheed Siddique and Barrister Shehryar Kasuri, Advocates. M/s M. M. Akram, Muhammad Ajmal Khan, Muhammad Farooq Sheikh and Amir Umer Khan, Advocates for the petitioners in connected petitions.
Respondents by:	Mr. Nasir Javed Ghuman, Standing Counsel for Government of Pakistan. Mr. Muhammad Yahya Johar, Advocate for the respondents. M/s Ehsan-ur-Rehman Sheikh, Sajjad Haider Rizvi, Mian Qamar-ud-Din Ahmed and Sh. Nadeem Ahmad, Advocates for the respondents in connected petitions. Mr. Abdul Latif Tariq, Advocate on behalf of Ch. Muhammad Zafar Iqbal, Advocate for respondents in W.P. No.9575/2012. Dr. Muhammad Iqbal, Chief Tax Policy, FBR. Muhammad Muzaffar Khan Lashari, Commissioner, Inland Revenue, LTU, Zone-I, Lahore. Dr. Ishtiaq Ahmad, Additional Commissioner, Inland Revenue, Lahore.
Research Assistance:	Sher Hassan Parvez, Research Associate/Civil Judge, LHCRC.

Syed Mansoor Ali Shah, J:- Petitioner company has challenged the constitutionality of section 8 (1) (ca) of the Sales Tax Act, 1990 (“Act”) being offensive to the fundamental rights of the petitioner, its directors and shareholders.

FACTS.

2. Petitioner was served with Show Cause Notice dated 20.10.2011 issued by the Assistant Commissioner, Inland Revenue, Audit-02, Zone-I, Large Taxpayers Unit, Lahore under sections 6, 7, 8 (1) (ca) & 26 of the Act alleging that an amount of Rs.9,616,053/- is recoverable from the petitioner as input tax claimed by the petitioner has been denied under section 8 (1) (ca) of the Act. The denial of input tax was because the “supplier” (the person who has supplied goods to the petitioner) has failed to deposit the tax (paid by the petitioner) in the government treasury. Pursuant to the said Show Cause Notice, Order-in-Original has been issued by the Deputy Commissioner Inland Revenue, Audit-02, Zone-I dated 05.01.2012 against the Petitioner, on the same ground. As the constitutionality of section 8 (1) (ca) of the Act is under challenge, the petitioner has invoked the constitutional jurisdiction of this Court rather than pursuing his departmental remedies under the Act. Notice was issued to the Attorney General for Pakistan under Order 27A of the CPC as vires of law is under challenge besides substantial question of interpretation of the Constitution is involved in this case.

ARGUMENTS.

3. Explaining the transaction learned counsel for the petitioner submits that the petitioner company purchases raw materials from various suppliers and makes payments to these suppliers through proper banking channel in terms of section 73 of the Act. In the present case the payments to the suppliers listed in the Show Cause Notice were duly made through the banking channel. He has also pointed out that the suppliers in this case are reputable companies, including M/s. Karachi Port Trust and Rafhan Maize Products Co. Ltd. It is submitted that the petitioner is being denied input tax under section 8 (1) (ca) of the Act just because the suppliers, having received the payment from the petitioner through banking channel, has failed to deposit the same in the government treasury.

4. Learned counsel for the petitioner has vehemently urged that the petitioner has no control over the supplier and once the transaction has been completed at arms-length and the payment made through the banking channel, the petitioner cannot be burdened for the default of the supplier in failing to deposit the amount of sales tax in the government treasury. He submitted that the petitioner is being penalized for the default and failure of another person i.e., the supplier, which is a separate entity under the law. He submitted that by denying the input tax to the petitioner due to the default of the supplier amounts to an unreasonable restriction placed on the right of the petitioner to use his property i.e., the amount of input tax, under article 23 of the Constitution of the Islamic Republic of Pakistan, 1973 (“Constitution”), therefore, section 8 (1) (ca) of the Act is in violation of the said article, hence unconstitutional. In support of his contention learned counsel placed reliance on *Messrs Elahi Cotton Mills Limited and others v. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others*, (PLD 1997 S.C. 582), *M/s Chenone Stores Limited v. The Federal Board of Revenue etc.*, (2012) 106 Tax 109) and *In the matter of Reference No.02 of 2005 by the President of Pakistan* (PLD 2005 S.C. 873).

5. On behalf of the FBR, the Chief Tax Policy, Federal Board of Revenue (“FBR”) alongwith Commissioner and Additional Commissioner, Inland Revenue submitted that Value Added Tax (“VAT”) envisages a chain of transactions and if there is a default at any stage of the chain, all the registered persons involved in the chain are responsible. He emphasized that in case of fraud and collusion, both the parties i.e., supplier, as well as, the buyer are responsible and the benefit of input tax cannot be claimed by the buyer unless the issue is resolved. He also placed reliance on section 8-A of the Act to submit that the responsibility of the buyer and supplier in case of non-deposit of tax by the supplier, subject to the conditions mentioned in the said section, are joint and several. He finally placed reliance on *Shiekhoo Sugar Mills Ltd. v. Government of Pakistan and others*, (PTCL 2001 C.L. 331) in support of his argument.

6. Learned Standing Counsel representing the Attorney General for Pakistan, as well as, the Federation submitted that the impugned provision has been introduced in the law to address the issue of “tax fraud” and placed reliance on an unreported judgment of Punjab and Haryana High Court (India) dated 23.09.2011 passed in Civil Writ Petition No.6573/2007. He also placed reliance on a judgment of the European Court of Justice titled *Optigen Ltd., Fulcrum Electronics Ltd and Bond House Systems Ltd. v. Commissioners of Customs & Excise*, (Joined Cases C-354/03, C-355/03 and C-484/03). He has also placed reliance on section 8 (3) of the Haryana Value Added Tax Act, 2003. He submitted that the impugned provision is necessary for the policing of “tax fraud” and any interference by this Court will allow tax fraud to go unchecked. Chief Tax Policy concluding on behalf of the respondents frankly submitted that section 8 (1) (ca) of the Act is attracted only when there is a collusive transaction based on tax fraud and does not cover arms-length transactions.

7. The arguments of the parties have been considered, the concept of VAT and the main theme of Act were revisited and analyzed. The relationship between constitutional fundamental rights and the sub-constitutional limit under section 8 (1) (ca) have been discussed in detail.

OPINION OF THE COURT.

8. Facts of this case are simple and have been succinctly narrated above. The question that concerns this Court is the constitutionality of section 8 (1) (ca) of the Act. Whether the sub-constitutional limitation [i.e., section 8 (1) (ca)] on the property (i.e., input tax) of the petitioner passes the test of “reasonable restriction” or “law” under articles 23 and 24 of the Constitution. Does section 8 (1) (ca) of the Act sufficiently and proportionally advance public interest or the harm to the constitutional fundamental right of the petitioner is proportional to the benefit gained from the said limitation by the society or community at large?

9. In order to examine the constitutionality of the impugned sub-constitutional limitation, its context under the scheme of Sales Tax Act, 1990 needs to be understood. Sales Tax Act, 1990 is a “value added tax.” The incidence of tax is on the incremental *value addition* made by a buyer-turned-supplier at every stage of the supply chain. The differential of sales tax paid at the time of sales (output tax) and the sales tax paid at the time of purchase (input tax) is the amount of sales tax chargeable on the incremental value addition at any stage of the supply chain. Both these taxes are sales tax and are paid at different ends of the sale-purchase transaction. Every person in the supply chain pays sales tax on purchase (input tax) and by deducting the same from the sales tax on supply (output tax) passes on the sales tax, on the value addition made by the buyer, to the next buyer. The sales tax paid by the next buyer (on purchase) automatically becomes *input tax* in the hands of the said buyer. Therefore, sales tax paid by a person is restricted to the incremental *value addition* only and is worked out by deducting input tax from output tax. Taxability under the Act, therefore, rests on value addition, calculated through the equation of output tax minus input tax.

10. The above determination of tax liability is codified in section 7 of the Act which provides as follows:

“7. Determination of tax liability.---(1) Subject to the provisions of section 8B, for the purpose of determining his tax liability in respect of taxable supplies made during a tax period, a registered person shall, subject to the provisions of section 73, be entitled to deduct input tax paid or payable during the tax period for the purpose of taxable supplies made, or to be made, by him from the output tax that is due from him in respect of that tax period and to make such other adjustments as are specified in Section 9:

Provided that where a registered person did not deduct input tax within the relevant period, he may claim such tax in the return for any of the six succeeding tax periods.

(2) A registered person shall not be entitled to deduct input tax from output tax unless,--

(i) in case of a claim for input tax in respect of a taxable supply made, he holds a tax invoice in his name and bearing his registration number, in respect of such supply for which a return is furnished;

- (ii) **in case of goods imported into Pakistan, he holds bill of entry or goods declaration in his name and showing his sales tax registration number, duly cleared by the customs under section 79 or section 104 of the Customs Act, 1969 (IV of 1969);**
- (iii) **in case of goods purchased in auction, he holds a treasury challan, in his name and bearing his registration number, showing payment of sales tax;**
- (3)
- (4)

(emphasis supplied)

11. Section 7 (2) provides mandatory requirements for deducting input tax from output tax. This is coupled with the requirement of section 73 which mandates that the payment has to be made through a banking channel.¹ While section 7 provides the mode and manner for a taxpayer to seek entitlement of input tax against output tax, section 8 disallows tax credit or the right to deduct input tax from output tax in certain cases. Section 8 (1) is reproduced hereunder for ready reference:

“8. Tax credit not allowed.---(1) Notwithstanding anything contained in this Act, a registered person shall not be entitled to reclaim or deduct input tax paid on---

- (a) the goods or services used or to be used for any purpose other than for taxable supplies made or to be made by him;
- (b) any other goods or services which the Federal Government may, by a notification in the official Gazette, specify;
- (c) the goods under sub-section (5) of section 3;
- (ca) **the goods or services in respect of which sales tax has not been deposited in the Government treasury by the respective supplier;**
- (d) fake invoices; and
- (e) purchases made by such registered person, in case he fails to furnish the information required by the Board through a notification issued under sub-section (5) of section 26.

(emphasis supplied)

¹ Section 73(1):

12. The above provision shows that deduction of input tax is primarily disallowed where there has been no *value addition* either because the goods are used for any purpose other than the taxable supplies or where the sale-purchase transaction is fraudulent and a sham. Section 8 is an exception to the scheme of the Act because it does not recognize input tax paid by the taxpayer (in certain situations) and disallows deduction of the same. As a result, the burden of input tax is either absorbed by the buyer or subject to the elasticity of demand passed on the next buyer at a higher price. Both these limitations are irritants and act a clog on the right of the taxpayer to do business or trade.

13. Section 8 (1) (a) to (e) mentions incidents, which under the law, do not constitute *value addition*, hence deduction of input tax is disallowed. One of such incidents is mentioned in section 8 (1) (ca), which disallows deduction of input tax to a **buyer** if the **supplier** fails to deposit Sales Tax in the Government treasury. The violation is the non-deposit of tax in the government treasury by the supplier for no fault of the buyer and in the absence of any allegation of collusion between the buyer and the seller.

14. It is assumed, unless proven otherwise, that there is free competition in the market. Buyers and sellers in a market are separate, unrelated and independent players, transacting with each other at arms-length. The buyer has no control over the supplier. Once payment is made to the supplier² through proper banking channel, as provided under the Act, the buyer has no control over the supplier. Buyer has no means to police the supplier to ensure that the payment made is also duly deposited in the government exchequer. Supplier is not a puppet of the buyer and does not dance to his tune. Any such expectation or obligation cast upon the buyer in a market where there is free and fair competition defies reasonability and logic.

15. Under the scheme of the Act, a taxpayer enjoys *proprietary interest* in deduction of input tax from output tax. Input tax is the property of the buyer which is paid to the supplier so that the same

² Corrected vide subsequent order dated 22.08.2013.

can be deducted at the time of supply of goods by the buyer. Any sub-constitutional limitation restricting a buyer from deducting input tax from output tax impinges on the right to property (input tax) guaranteed to a taxpayer under the Constitution (articles 23 & 24) and must successfully filter through the test of constitutionality.

16. Before examining whether section 8 (1) (ca) validly limits the constitutional fundamental rights of the petitioner under articles 23 and 24 of the Constitution, I would like to examine the constitutional fundamental rights and their limitations imposed through sub-constitutional legislation.

17. Fundamental rights and their protection is essential to a modern democracy. “Take human rights out of democracy, and democracy has lost its soul. Human rights are the crown jewels of democracy. A democracy without human rights is like an empty vessel.³” However, even in a democracy fundamental rights have limitations, this is because “in a democratic society, a human right may be limited to ensure the very existence of the state; to ensure its continued existence as a democracy; to ensure public health; to ensure public education; as well as several other national causes. These are the purposes for which a democratic society may limit the rights of its members...This demonstrates the special nature of democracy, which is based on the idea that the state protects the rights of the individual, and the individual protects the state - its safety and peaceful existence.⁴”

18. In the context of this case, constitutional limitations are embedded in articles 23 and 24 of the Constitution. The right to acquire, hold and dispose of property under article 23 of the Constitution is subject to “**reasonable restrictions**”. While the right to property under article 24 states that no person shall be deprived of his property **save in accordance with law**. It is essential to understand the meaning and scope of “law” and “reasonable restrictions” under the Constitution.

³ A. Barak, *Proportionality* (Cambridge) p.161.

⁴ Ibid p.162

19. “Laws could restrict human rights, but only in order to make conflicting rights compatible or to protect the rights of other persons or important community interests. Any restriction of human rights not only needs a constitutionally valid reason but also to be proportional to the rank and importance of the right at stake.⁵” “Reasonable restriction” or any sub constitutional limitation (“law”) on a constitutional fundamental right must also flow from the Constitution to protect lawful rights and interests of the others or the society at large. The “law” or “reasonable restrictions” in pith and substance must promote and advance fundamental rights of the community at large in order to qualify as a limitation to override the fundamental rights guaranteed to an individual under the Constitution. The “law” or the “reasonable restrictions” must be fashioned to uphold the constitutional themes of democracy, freedom, equality, tolerance, social justice and advance the principles of policy under the Constitution. The roots of sub-constitutional limitation (“law” or “reasonable restrictions”) must be grounded in the Constitution itself, only then can they possess the constitutional character and strength to take away the fundamental rights of an individual.

20. What then is the scope and nature of sub-constitutional limitation which is grounded in the Constitution? Examination of comparative constitutional literature provides an answer. Article 29 (2) of the Universal Declaration of Human Rights 1948 determines a list of human rights but does not contain specific limitation clauses, however, it carries a general limitation clause which provides that:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”
(emphasis supplied)

Similarly Canadian Charter of Rights and Freedom carries a general limitation clause:

“The Canadian Charter of Rights and Freedoms guarantees the

⁵ D.Grimm “Human Rights and Judicial review in Germany” in D.M.Beatty (ed.) P 139/140 barak. Emphasis supplied.

rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” (*emphasis supplied*)

21. Comparative international jurisprudence has moved on from the generic public interest argument to a more structured approach in assessing the impact of sub-constitutional limitation on the constitutional right by applying the *principle of proportionality* to balance and weigh the competing interests of an individual and the society, in order to maintain constitutional equilibrium. Article 36 of the Constitution of the Republic of South Africa states:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
- (a) The nature of the right;
 - (b) The importance of the purpose of the limitation;
 - (c) The nature and extent of the limitation;
 - (d) The relation between the limitation and its purpose; and
 - (e) Less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

(*emphasis supplied*)

The new Federal Constitution of Switzerland, 1999, specifically includes the *principle of proportionality* in its general limitation clause:

- “1. Restriction on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.
- 2. Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.
- 3. **Any restrictions on fundamental rights must be proportionate.**
- 4. The essence of fundamental rights is sacrosanct.”

(*emphasis supplied*)

As observed by the Constitutional Court of South Africa⁶: “The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.” Professor Barak in his book *PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS*⁷ writes that “Proportionality is a legal construction. It is a methodological tool. It is made up of four components; proper purpose, rational connection, necessary means, and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right (the last component is also called “*proportionality stricto sensu*” (balancing)).”⁸ (emphasis supplied)

22. “The element of proper purpose reflects a value-laden component. It reflects that the notion that not every purpose can justify a limitation on a constitutional right.... The purposes that justify limitation” on human rights are derived from the values on which the society is founded. In a constitutional democracy, these values are democratic values. Indeed, a proper purpose is one that suits the values of the society in a constitutional democracy⁹.” Our Constitution with its preamble, fundamental rights and principles of policy hold out our democratic values. The proper purpose behind sub-constitutional legislations is to upload these constitutional values.

23. “What is required by the “rational connection” ...test? The requirement is that the means used by the limiting law fit (or are rationally connected to) the purpose the limiting law was designed to fulfill. The requirement is that the means used by the limiting law can realize or advance the underlying purpose of that.. Accordingly, if the realization of the means does not contribute to the realization of the “laws” purpose, the use of such means would be disproportional¹⁰.”

⁶ S. v. Makwanyane, 1995 (3) SA 391.

⁷ Aharon Barak (Cambridge), 2012.

⁸ p/131

⁹ p/245

¹⁰ p/303

There must be a rational connection between proper purpose and the sub-constitutional limitation.

24. “The next component of proportionality is the “**necessity test**.” It is also referred to as the requirement of “the less restrictive means.” According to this test, the legislator has to choose - of all those means that may advance the purpose of the limiting law - that which would least limit the human right in question¹¹.”

25. The last test of proportionality is the “**proportional result**” or “**proportionality stricto sensu**.” “This test requires a balancing of the benefits gained by the public and the harm caused to the constitutional right brought the use of the means selected by law to obtain the proper purpose. Accordingly, this is a test balancing benefits and harm. It requires an adequate congruence between the benefits gained by the law’s policy and the harm it may cause to the constitutional right¹².”

26. The above principle has echoed in our jurisprudence even though not with the same exactness as argued by Professor Barak above. August Supreme Court of Pakistan deliberating on the limits imposed by ‘Law’ on fundamental rights in Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others v. Federation of Pakistan through Secretary Ministry of Interior and others, (PLD 2007 S.C. 642) has held as under:-

“31. It is worth mentioning that no fundamental right can be surrendered or waived by means of any agreement or an undertakingbecause “*the idea behind the concept of Fundamental Rights is that the preservation of certain basic human rights against State interference is an indispensable condition of free society. The paramountcy to State-made laws is the hallmark of a Fundamental Right. It follows that the aim of having a declaration of Fundamental Rights is that certain elementary rights of the individual such as his right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majorities in the Legislatures of the country should not be able to tamper with them. Absolute and unrestricted individual rights do not exist in any modern State and there is no such thing as absolute and uncontrolled liberty. The collective interests of the society, peace and security of the State and the maintenance of public order are of vital importance in any organized society.*”

¹¹ p/317

¹² p/340

Fundamental Rights have no real meaning if the State itself is in danger and disorganized. If the State is in danger, the liberties of the subjects are themselves in danger. It is for these reasons of State that an equilibrium has to be maintained between the two contending interest at stake; one, the individual liberties and the positive rights of the citizen which are declared by the Constitution to be Fundamental, and the other, the need to impose social control and reasonable limitations on the enjoyment of those rights in the interest of the collective good of the society.” (emphasis supplied)

And this Court in *Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others*, (PLD 2010 Lahore 230) has held:

“33. The right to life and liberty of a citizen can only be restricted or abridged if it is in “accordance with law.” ‘Law’ here means Law that caters to larger collective public interest. Therefore, the fundamental right of an individual guaranteed under the constitution can only surrender and succumb to a lawful collective interest of the community or the society. Public Interest or collective community interest is a basket of various public interests including public morality, public order, public health, national security and foreign policy of the country besides fundamental rights of the others. Public interest is an essential ingredient of any law that proposes to take away, abridge or interfere with the fundamental rights of an individual....”

27. The term “**reasonable restrictions**” has also come up before our courts and have advanced the principle discussed above. A. R. Cornelius, J. speaking for the Supreme Court in *M/s East and West Steamship Company v. Pakistan and others* (PLD 1958 S.C. (Pak) 41) held:-

“A “reasonable restriction” in the sense of Article 11 is one which is imposed with due regard to the public requirement which it is designed to meet. Anything which is arbitrary or excessive will of course be outside the bounds of reasons in the relevant regard, but in considering the disadvantage imposed upon the subject in relation to the advantage which the public derives, it is necessary that the Court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the individual, the Court should consider whether it is a reasonable restraint, in the sense of not bearing excessively on the subject and at the same time being the minimum that is required to preserve the public interest.”

28. In *Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others v. Federation of Pakistan through Secretary Ministry of Interior and others*, (PLD 2007 S.C. 642) the august Supreme Court held:-

“34. It is, however, to be noted that right conferred upon a citizen is neither absolute nor unlimited but subject to “reasonable restriction” imposed by law in the public interest which means that

this right can be restricted by imposing “reasonable restriction of law” in the public interest. In other words “*the State has power to impose reasonable restrictions on the right of freedom of movement of a free citizen where such restriction is necessary in the interests of the general public. Thus the law restricting the movement of prostitutes in a part of the town, or restricting movements of a person under Goonda Act are reasonable restrictions. A restriction is unreasonable if it is for an indefinite or an unlimited period or a disproportionate to the mischief sought to be prevented or if the law imposing the restrictions has not provided any safeguard at all against arbitrary exercise of power.*”

29. Reliance with advantage is also placed on *The State of Madras, v. V. G. Row*, (AIR 1952 S.C. 196):-

“15.It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable.”

30. In this background, does section 8 (1) (ca) qualify as a valid “law” or provides ‘reasonable restriction’ to abridge the fundamental rights guaranteed to the petitioner under articles 23 and 24 of the Constitution? Is there any benefit arising out of section 8 (1) (ca) in the public interest and is it proportionate to the harm suffered by the petitioner? Section 8 (1) (ca) imposes the liability of person A on person B in the absence of any relationship between the two. Every person has a separate legal character enjoying distinct rights and liabilities under the law. To impose the liability of one over the other is opposed to basic fundamentals of law and offends due process, logic and rationality. Section 8 (1) (ca) axes an innocent person for the wrong of the other. It diminishes the legal character of a person under the law as if implying that every person is the agent of the other. This

assumption also negates free and fair competition in a market economy. Section 8 (1) (ca), therefore, does not advance any public interest or passes the test of proportionality as discussed above. Infact the said provision is illogical, absurd and unreasonable. The situation would have been different, had there been a causal link between the buyer and the seller either by being a part of a collusive stratagem or by being *brothers-in-arms* in a tax fraud? Section 8 (1) (ca) does not envisage such a situation and no such allegation exists in the impugned Show Cause Notice served on the petitioner.

31. Chief Tax Policy, FBR categorically stated before the Court that section 8 (1) (ca) is attracted in case of collusion and tax fraud and does not cover an arms-length transaction, as in the present case. The learned Standing Counsel for the Federal Government supported this position. The frank submissions of the respondents even though absolve the petitioner of its liability under the impugned Show Cause Notice, it amounts to reading “collusion” and “tax fraud” into section 8 (1) (ca) which was not the intention of the legislature. Hence constitutionality of section 8 (1) (ca) requires to be considered.

32. Infact, in case of “collusion” or “tax fraud” section 8 (1) (d) of the Act is attracted. The said provision disentitles a registered person from deducting or claiming input tax if there is a “fake invoice.” The term “Fake Invoice” has not been defined in the Act but has the potential of covering a wide range of irregular and fraudulent transactions. Any taxable supply that is sham, collusive, based on tax fraud will necessarily render the invoice i.e., the material evidence documenting the transaction, to be false, collusive, and fraudulent. Fake invoice as a legal term includes the popular market terminology of ‘flying invoice’. Hence any invoice that evidences a fake, fraudulent or sham transaction is known as a “fake invoice”. Any distortion in taxable supply tainted with “tax fraud” or “collision” between buyer and seller renders the tax invoice defective and fake. The concern of the FBR and the Federal Government, urged before the Court above, is fully addressed by section 8 (1) (d) of the Act.

Hence, the contention of the respondents urging this Court to read collusion and fraud into section 8 (1) (ca) is not convincing.

33. It is also important to refer to section 8-A of the Act which deals with a complete new specie of violation of law i.e., non-deposit of tax in the government treasury by the supplier. This does not cast any allegation of collusion on the part of the buyer or supplier but simply requires that the buyer should have had “knowledge” that the supplier will not (eventually) deposit the sales tax in the exchequer. The department has to establish that the taxpayer had ‘knowledge’ and then proceed against the taxpayer. The impugned Show Cause Notice does not, however, set up a case against the petitioner under this provision of law. Section 8-A is different from section 8 (1) (ca) and is triggered by the requirement of “knowledge” of the past practice of the supplier. It appears that the respondent-department has mistakenly tried to read section 8-A into section 8 (1) (ca).

34. I have gone through the case law relied upon by the learned Standing Counsel from the Indian and foreign jurisdictions. They have little relevance with the case in hand and, therefore, require no further consideration.

35. For the reasons elaborated above, section 8 (1) (ca) of the Sales Tax Act, 1990 besides being illogical and absurd, offends articles 23 and 24 of the Constitution and is hereby declared to be unconstitutional and, therefore, struck down. As a consequence, impugned Show Cause Notice dated 20.10.2011 and Order-in-Original dated 06.01.2012 arising out of section 8 (1) (ca) of the Act are also set aside. For the above reasons, this petition is allowed with no order as to costs.

36. This judgment also decides petitions mentioned in Schedule “A” to this petition, as common questions of law and facts arise in these petitions.

(Syed Mansoor Ali Shah)
Judge

A.W.

APPROVED FOR REPORTING

SCHEDULE "A".

1.	W. P. No. 20869/2012.
2.	W. P. No. 26213/2012.
3.	W. P. No. 9574/2012.
4.	W. P. No. 9575/2012.
5.	W. P. No. 17358/2012.
6.	W. P. No. 15094/2012.
7.	W. P. No. 6820/2012.
8.	W. P. No. 24121/2012.
9.	W. P. No. 8578/2012.

(Syed Mansoor Ali Shah)
Judge

A.W.