

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.63 of 2022

Mobilink Microfinance Bank Ltd.

Versus

**Additional Commissioner (Audit-I) Inland Revenue, Islamabad and
others**

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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**04. 26.01.2022. Hafiz Mohammad Idrees, Syed Farid
Bokhari and Malik Nasir Abbas Awan,
Advocates for petitioner.**

The petitioner is aggrieved by show cause notices issued under Section 122(9) of the Income Tax Ordinance, 2001 ("Ordinance"), read together with Section 122(5A) of the Ordinance.

2. Learned counsel for the petitioner states that respondent No.1 while issuing the said show cause notices exceeded his jurisdiction as he gave no reasoning for disallowing the provisions made by the petitioner in the Tax returns and further did not explain how the deemed assessment order is erroneous and prejudicial to the interest of revenue as required by Section 122(5A). And that the Additional Commissioner Income Tax has essentially exercised his powers to undertake an audit under Section 177 of the Income Tax Ordinance. Learned counsel for the petitioner also states that in W.P. No.4598/2021 this

Court had issued notices whereby similar subject matter was brought before the Court.

3. I have perused the notice which has been impugned. Pursuant to the said notice the Additional Commissioner Income Tax has granted the petitioner an opportunity to explain as to why the deemed assessment may not be amended in exercise of powers under Section 122(9) read together with Section 122(5A) of the Ordinance. In exercising such authority, the Additional Commissioner has provided reasons for forming a preliminary opinion that the provisions made by the petitioner in its tax return are to be disallowed and granted the petitioner an opportunity to convince the tax authorities that the tax return as filed, which constitutes deemed assessment, may not be revised.

4. Section 122(5A) of the Ordinance states the following:

"Subject to sub-section (9), the Commissioner may amend, or further amend, an assessment order, if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue."

Once the Income Tax Commissioner is satisfied on a *prima-facing* basis that a deemed assessment order is erroneous and prejudicial to the interest of revenue, he is required to provide the taxpayer an opportunity of hearing prior to ordering amendment of the

assessment. Such inquiry for purposes of Section 122(5A) of the Ordinance, in which the taxpayer is provided an opportunity to convince the tax authority that a case for amendment of assessment under Section 122(5A) of the Ordinance not made out, doesn't tantamount to exercise of audit powers under Section 177 of the Ordinance. If the contention of the petitioner were accepted every show cause notice issued in exercise of powers under Section 122(5A) providing the taxpayer an opportunity to establish through record that the tax return is not erroneous and prejudicial to the interest of revenue, and should thus not be amended, would amount to exercise of audit powers. It is in the final order to be passed by the Commissioner at the culmination of proceedings in exercise of authority under Section 122(5A) read with Section 122(9) of the Ordinance that the Commissioner would record detailed reasons as to why the return has been found to be erroneous and prejudicial to the interest of revenue requiring amendment. And such order would then be appealable under provisions of the Ordinance.

5. Merely because a taxpayer disagrees with the *prima-facie* view formed by the Commissioner that there has arisen the need

to exercise jurisdiction under Section 122(5A) of the Ordinance, the order affording the taxpayer an opportunity to establish that the grounds for exercise of such jurisdiction are not made out doesn't get tainted by a jurisdictional defect. This Court in its constitutional jurisdiction can only take cognizance of a show cause notice when it is palpably and wholly without jurisdiction. After discussion of the law as laid down by the august Supreme Court in relation to bringing a challenge against a show cause notice the circumstances in which a challenge could be brought were detailed in **PKP Exploration Limited Vs. FBR (2021 PTD 1644)** as follows:

"1. Where the impugned notice is without jurisdiction for being coram non judice or being issued by a person not vested with the authority under law to issue such notice.

2. Where the impugned notice is non-est for purporting to exercise power and jurisdiction for 31. W.P Nos. 886 and 1077 of 2015 purposes alien to the empowering statute, thereby rendering it palpably or wholly without jurisdiction.

3. Where the impugned notice suffers from malafide for having been issued (i) for a collateral purpose that can be easily inferred from the facts and circumstances of the matter or (ii) in clear breach of procedural preconditions and pre-requisites prescribed by statute, that is tantamount to colourable exercise of jurisdiction or abuse of authority.

4. Where the alternative remedy is inadequate and illusory, because it lies before an adjudicatory forum that is conflicted or otherwise incapable of

deciding the matter with an open mind in accordance with law as the authority or discretion vested in it stand fettered.

5. Where the impugned order violates the fundamental rights of the aggrieved person to due process guaranteed by the Constitution.

6. Where the controversy involves the interpretation of a statutory instrument, which makes it a case of first impression, provided that the High Court is not the repository of ultimate appellate, revisional or reference powers within the adjudicatory scheme prescribed by statute for remedying such grievance."

6. This Court is not convinced that the impugned notice has been issued for the collateral purpose of exercising powers vested in tax authority under Section 177 of the Ordinance. It has not been argued that the impugned show cause notice is without jurisdiction for being *corum non judice* or is nonest for being issued for a purpose alien to the Ordinance. The matter requires no interpretation of any statutory provision afresh. The impugned show cause notice affords the petitioner an opportunity to be heard instead of undermining its fundamental rights. The learned counsel for the petitioner has therefore failed to satisfy this Court that this case qualifies the test under which the Court can be called upon to exercise its judicial review powers in relation to a show cause notice.

7. In view of the above, the petitions are ***dismissed*** for not being maintainable.

(BĀBAR SATTAR)
JUDGE

M.A. Raza

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