

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

W.P. No.1951/2017

M/s Pakistan Oilfields Limited

Versus

Federation of Pakistan, etc.

Petitioner By : Abad-ur-Rehman, Advocate.
Respondents By : Syed Ishfaq Hussain Naqvi and Ms. Arooj Zeb Abbasi, Advocates.
Date of Decision : 22.09.2022.

AAMER FAROOQ, J. – M/s Pakistan Oilfields Limited (“**the petitioner**”) is engaged in the business of exploration and production of petroleum and allied products. It filed its income tax return for the year 2016 which was deemed to be an assessment order in terms of section 120 of the Income Tax Ordinance 2001, (“**the Ordinance**”). On 17.05.2017, a show cause notice was issued to the petitioner under section 122(9) read with section 122 (5A) of the Ordinance to show cause as to why its assessment for the referred period may not be amended as the original one being erroneous and prejudicial to the interest of the revenue. The reasons for issuance of said notice were mentioned in the referred notice and are as follows:-

- i. Incorrect Tax Rate
- ii. Excess claim of depletion allowance of Rs.1,133,429,550/-
- iii. De-Commissioning cost of Rs.1,452,118,000/-
- iv. Exploration and development costs and evaluation assets
- v. Tax credit u/s 65B of the Ordinance

The petitioner is aggrieved of notice dated 17.05.2017.

2. Learned counsel for the petitioner, *inter alia*, contended that it is *sine qua non* for issuance of an amended assessment under sub-section 5A of section

122 of the Ordinance that assessment order is erroneous and is prejudicial to the interest of the revenue. He submitted that where there are two interpretations possible, the matter cannot be termed as erroneous so as to be prejudicial to the interest of the revenue. It was contended that the term 'erroneous' and 'prejudicial' to the interest of revenue was elaborated by the Hon'ble Sindh High Court in case reported as Messrs S.N.H. Industries (Pvt) Ltd. versus Income-Tax Department and another **(2004 PTD 330)**. It was submitted that on the touchstone of the interpretation handed down in the said judgment, the assessment order in case of petitioner cannot be termed as erroneous so as to be prejudicial to the interest of the revenue. Learned counsel further placed reliance on case reported as Glaxo Laboratories Limited versus Inspecting Assistant Commissioner of Income-Tax and others **(1992 PTD 932)** to argue that mere erroneous order without causing any prejudice to the interest of the revenue does not attract sub-section 5A of section 122 of the Ordinance. Reliance was also placed on an unreported decision of this Court in case titled "Pakistan Oilfields Limited versus Federation of Pakistan, etc." **(W.P. No.1693/2011)**. It was contended that before issuance of notice, the relevant officer was required to apply mind and decide that assessment order is erroneous, hence prejudicial to the interest of revenue, which is not borne out from the show cause notice.

3. Learned counsel for the respondents, *inter alia*, contended that the instant petition is not maintainable inasmuch as it impugns a show cause notice, which is nothing but merely a notice to explain the position. It was submitted that no prejudice has been caused to the petitioner by issuance of the notice, hence petition be accordingly dismissed. In support of his contentions, learned counsel placed reliance on Commissioner Inland Revenue and others versus Jahangir Khan Tareen and others **(2022 SCMR 92)**.

4. Learned counsel for the parties were confronted that whether the competent authority i.e. Income-tax Officer, issuing the notice under section 122(9) *ibid*, has power or jurisdiction to go into the jurisdictional facts i.e. the facts which confer jurisdiction upon him which in the instant case would be erroneous assessment so as to be prejudicial to the interest of revenue, the reply of the learned counsel for the respondents was that it can be done, however, learned counsel for the petitioner answered in negative.

5. Arguments advanced by learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

6. The petitioner is aggrieved of notice under section 122(9) of the Ordinance, whereby assessment order with respect to Tax Year 2016 is sought to be amended under sub-section 5A of section 122 *ibid*. The plain reading of section 122(5A) of the Ordinance shows that assessment order can be amended if the same is erroneous so as to cause prejudice to the revenue. Insofar as the terms erroneous and prejudicial to the interest of revenue are concerned, they were interpreted by the Division Bench of the Hon'ble Sindh High Court in case reported as Messrs S.N.H. Industries (Pvt) Ltd. versus Income-Tax Department and another (2004 PTD 330) wherein it was observed as follows:-

"Section 66-A of the repealed Ordinance had conferred powers on the Inspecting Assistant Commissioner/Additional Inspecting Assistant Commissioner to revise the order of Assessing Officer/Deputy Commissioner of Income Tax, after calling for and examining the record of any proceedings under the repealed Ordinance, if he considered and was of the view an order passed by the Assessing Officer/Deputy Commissioner of Income Tax was erroneous inasmuch as it was prejudicial to the interests of the Revenue. It further empowered the Assessing Officer/Deputy Commissioner of Income Tax to pass such order as the circumstances of the case would justify including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment to be made subject to the condition that appropriate and effective opportunity of being heard was provided to the assessee/aggrieved party. From a bare perusal of section 66-A of the repealed Ordinance, it is to be noted that the Inspecting Assistant Commissioner, respondent No.3 was required to minutely examine the record of any proceedings which included the assessment finalized by the Assessing Officer/Deputy Commissioner of Income Tax

to conclude that the assessment was erroneous and prejudicial to the interests of the Revenue to attract the provisions of this section. As to what orders could be said to be erroneous and prejudicial to the interest of the Revenue was considered at great length by the Supreme Court of India in the case of Malabar Industrial Co. Ltd. v. Commissioner of Income tax, reported in 2001 PTD 1106 and following observation was made in this regard:--

"A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the Revenue. The Commissioner has to be, satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent i.e. if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue, recourse cannot be had to section 263(1) of the Act.

There can be no doubt that the provisions cannot be invoked to correct, each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category falls orders passed without applying the principles of natural justice or without application of mind."

"The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudice to the interests of the Revenue. For example, When an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law."

Likewise, in Glaxo Laboratories Limited versus Inspecting Assistant Commissioner of Income-Tax and others (1992 PTD 932), it was observed that mere erroneous order would not attract section 122 (5A) of the Ordinance unless the same is prejudicial to the interest of revenue. In light of the above judgments, it is abundantly clear that section 122 (5A) *ibid*, can only be invoked if the assessment order is erroneous so as to be prejudicial to the interest of the

revenue and the referred terms have been explained in **2004 PTD 330** *supra*. An objection was raised as to the maintainability of the instant petition in light of the recent judgment of the Hon'ble Supreme Court of Pakistan in case reported as Commissioner Inland Revenue and others versus Jahangir Khan Tareen and others **(2022 SCMR 92)**. The Hon'ble Supreme Court of Pakistan after discussing the case law on the subject *viz.* maintainability of the writ petition against a show cause notice, observed that a show cause notice is delivered to a person by an authority in order to get the reply back with a reasonable cause as to why a particular action should not be taken against him with regard to defaulting act. It was observed that the Court may take up writs to challenge the show cause notice if it is found to be barred by law or abuse of process of the Court or is *coram non judice*. In this behalf, abuse of process was explained as the use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive. It was observed that in its broadest sense, abuse of process may be defined as misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process. It was further observed that the word '*coram non judice*' meant for '*not before a judge*' is a legal term typically used to indicate a legal proceeding that is outside the presence of a judge or with improper venue or without jurisdiction.

7. In light of the above judgment, petitions under Article 199 of the Constitution against a show cause notice is maintainable in limited circumstances as mentioned hereinabove. Notice under section 122(9) of the Ordinance would not lie if an assessment order is not erroneous so as to be prejudicial to the interest of the revenue; it is only these two factors which attract section 122 (9) *ibid* and would be maintainable otherwise it is not valid and hence barred by law. On the touchstone of the interpretation of erroneous so as to be prejudicial to the interest of revenue in **2004 PTD 330** *supra*,

which in turn based its interpretation on the basis of an Indian Judgment, the Indian Supreme Court in case reported as Malabar Industrial Co. Ltd. versus Commissioner of Income-tax (20001 PTD 1106) explained the said terms. In this behalf, erroneous means an incorrect assumption of facts or an incorrect application of law; likewise, prejudicial to the interest of revenue is to be read in conjunction with an erroneous order and every loss of revenue in consequence of an order of the Assessing Officer could not be treated as prejudicial to the interests of revenue. As was stated in the referred Indian judgment that when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of revenue. The reading of the impugned notice does not show that the respondents/Additional Commissioner issuing the show cause notice has elaborated the erroneous elements in the assessment order and a resultant prejudice caused to the Revenue. Both the terms cannot be segregated and apply independently. It had to be mentioned by the Additional Commissioner pointing out the erroneous assessment and the resultant prejudice which does not find mentioned in the impugned show cause notice.

8. Respondent No.5 could not have issued the impugned notice unless the ingredients of section 122 (5A) were attracted. The question before the Court is whether non-applicability of elements of section 122 (5A) of the Ordinance can be considered by the above respondent, to see if he has jurisdiction in the matter; in other words can he examine the jurisdictional facts. In Chairman, Lahore Gymkhana Club and others versus Basharat Ali and others (2019 PLC 162), the Hon'ble Lahore High Court while relying upon its earlier judgment [Akhtar Ali versus Altafur Rehman (PLD 1963 Lahore 390)] observed as follows:

"Guidance is solicited from celebrated judgment of this Court reported as Akhtar Ali versus Altafur Rehman (PLD 1963 Lahore 390). Relevant portion whereof is reproduced hereunder:

"15. An objection to the jurisdiction of a Tribunal may take one of the following general forms-

- (i) That the law under which the Tribunal is created is defective or invalid;*
- (ii) That the Tribunal is not constituted or appointed validly under the law;*
- (iii) That a party or the parties is or are not amenable to the jurisdiction of the Tribunal; and*
- (iv) That the subject-matter is outside the filed in which the particular Court is competent to act."*

"If a plea falling in the first or the second category is raised before a Special Tribunal, the answer of the Special Tribunal, which is a creature of the special law and is constituted or appointed under that law, must be simply and shortly that these matters are not for the Special Tribunals to decide. If a party needs a decision on those points, it will have to apply to the Courts of general jurisdiction in appropriate proceedings for that purpose-----.

On the other hand, if objections are raised which fall under the third or the fourth general categories, the Rent Controller should immediately ascertain the grounds on which those objections are based, and if those grounds can be settled one way or the other, either on the admission of the parties or on the materials before the Court or with reference to matters that are verifiable from official record, he should proceed to settle those grounds and give his decisions there and then."

Similarly in Rasheed Ahmed versus Chief Settlement Commissioner and others (2020 MLD 108), it was observed by Hon'ble Lahore High Court that it is settled rule that where an objection to the jurisdiction of the forum/authority or a Court is raised, the forum/authority or Court is under a legal obligation to decide the question of jurisdiction before embarking upon merits of the issue. On the basis of foregoing judgments, respondent no.5 can examine the issue whether the subject matter is beyond its parameters. In this behalf, respondent no.5 can inquire into the fact whether the assessment of petitioner is erroneous and due to that prejudice is caused to the revenue. Only if two elements are attracted on the touchstone of above judgments especially **2004 PTD 330** *supra*, respondent no.5 shall have jurisdiction to issue notice of section 122(9) of the

Ordinance under section 122 (5A) *supra*. Petitioner in its reply can take objection regarding the said fact (assessment being erroneous and causing prejudice to revenue) if not already done.

9. Since respondent no.5 can examine the question whether the matter falls within its domain, the show cause notice cannot be termed as without jurisdiction *per se*. It would be appropriate if the matter is agitated before respondent no.5 and decided accordingly in light of the afore-noted law.

10. The matter in hand will not attract the exceptions listed in **2022 SCMR 92** *supra* to make the instant petition maintainable on the basis of reasoning noted hereinabove, hence no interference is warranted in facts and circumstances.

11. For above reasons, instant petition is **disposed of** with direction to respondent no.5 to consider the issue of assessment being erroneous so as to cause prejudice to revenue initially and proceed to decide on merits only after he has reached the conclusion that above elements of section 122(5A) *supra* are attracted.

(AAMER FAROOQ)
JUDGE

M.Shah/.

Approved for Reporting