

*Form No: HCJD/C-121.*

**JUDGEMENT SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**

**JUDICIAL DEPARTMENT**

W.P. No. 4001 of 2012

Pakistan Tobacco Company Limited

***vs***

Federation of Pakistan, etc.

**DATES OF HEARING:** 26-6-2015 and 03-12-2015.

**PETITIONERS BY:** M/s Sardar Ahmed Jamal Sukhera, Ali  
Sibtain Fazli, Hafiz Muhammad Idrees  
and Muzammal Hussain Advocates, for  
the petitioners, in their respective  
petitions.

**RESPONDENTS BY:** M/s Hafiz Munawar Iqbal, Saeed Ahmed  
Zaidi, Babar Bilal, Shazia Bilal, Sheikh  
Anwar-ul-Haq and Dr Mrs Farhat  
Zafar Advocates, for the respondents, in  
their respective petitions.  
  
Mr Fazal-ur-Rehman Khan Niazi, Deputy  
Attorney General.

**ATHAR MINALLAH, J.-** Through this  
consolidated judgment I shall decide the instant petition as well  
as the following writ petitions:

- i) *W.P. No. 991 of 2013, re: Pakistan Telecommunication Company Limited, Headquarters, Islamabad Versus Federation of Pakistan, etc.*
- ii) *W.P. No. 583 of 2014, re: Attock Refinery Limited Versus Federation of Pakistan, etc.*
- iii) *W.P. No. 4000 of 2012, re: Pakistan Tobacco Company Limited Versus Federation of Pakistan, etc.*
- iv) *W.P. No. 3999 of 2012, re: Pakistan Tobacco Company Limited Versus Federation of Pakistan, etc.*
- v) *W.P. No.1818 of 2011, re: Pakistan Oilfields Limited Versus Federation of Pakistan, etc.*

2. The facts, in brief, are that the petitioners are juridical persons and were served with respective notices under sections 122 (5-A) read with 122 (9) of the Income Tax Ordinance 2001 (hereinafter referred to as the "Ordinance"). The petitioners have assailed the respective notices served on them and have simultaneously challenged the vires of section 122(5-A) and sub section (1), (1-A) of section 210 of the Ordinance.

3. *Sardar Ahmed Jamal Sukhera ASC* has contended that; the provision of the Ordinance i.e. sections 122 (5 A) and 210 give sweeping and unfettered powers to the Commissioner, and that the same are in violation of the fundamental rights guaranteed under the Constitution; there are no guidelines prescribed for exercising the powers; reliance was placed on 2013 SCMR 1158, particularly page 1195 thereof, to draw a distinction between functions and powers, and thus build an argument that giving unbridled powers offends the Constitutional guarantees; reliance was also placed on PLD 2002 SC 460; sections 210 and 122 are ultra vires on the ground of excessive delegation of legislative power; the notices have been issued by officers, who are not in BS-19 and were appointed Additional Commissioners on officiating basis; the post of Additional Commissioner is of BS-19; the power to issue a Show Cause Notice under Sections 122 (5-A) is vested in an officer of the rank of a Commissioner; any person holding the post of a Commissioner has to be in BS-20; though the Commissioner is allowed to delegate powers to amend an assessment under Section 122(5-A) to an Officer not below the rank of an Additional Commissioner, however, the officer posted as Commissioner in BS-19 is not empowered to exercise the said powers, nor can a Commissioner in BS-20 delegate the powers to an Additional Commissioner who is not in BS-19; the notices have been issued by officers who were not in BS-19, therefore, the powers could not be delegated to them nor were they competent to exercise the powers; Section 210(1) has

empowered the Commissioner to delegate to any subordinate officer any or all of his powers; through an amendment, sub Section (1-A) was inserted and it provides that the power of amendment cannot be delegated to a person lower in rank than an Additional Commissioner; through the said amendment the legislature had intended that an officer junior in rank to an Additional Commissioner could not be delegated the power of amendment under Section 122(1-A); the Federal Board of Revenue (hereinafter referred to as the "Board") has been flouting the legislative intent by posting officers in BS-18 on officiating basis as Additional Commissioners; the Federal Budget Document establishes that an Additional Commissioner must be in BS-19; the posting of BS-18 officers on officiating basis on the posts of Additional Commissioners is in violation of the Civil Servant Act 1973, read with the Civil Servant Rules, 1973; such practice is in violation of the law laid down by the august Supreme Court of Pakistan in the case of *Province of Sindh and others Versus Ghulam Fareed and others* [2014 SCMR 1189]; there is no provision in the Ordinance which empowers the Board to post an officer of a lower grade to a higher grade post on officiating basis; it is for the respondents to explain as to under what legal authority are officers in Bs-18 posted as officers to posts designated for a higher grade; notices issued under Section 122 (5-A) read with Section 122 (9) by officers who are in BS-18, posted as Additional Commissioners, are without lawful authority and jurisdiction and, therefore, null and void; Reliance is placed on the case of

*Captain Muhammad Azhar Versus (1) Commissioner of Karachi and (2) Province of West Pakistan* [PLD 1966 S.C. 253] in support of the contention that incompetently issued notices renders the proceedings without lawful authority; reliance is placed on the case of *Izhar Alam Farooqi, Advocate Versus Sheikh Abdul Sattar Lasi and others* [2008 SCMR 240] contending that if a mandatory condition for the exercise of jurisdiction is not fulfilled, it renders the entire proceedings as illegal, and thus suffers from want of jurisdiction; the posting of an officer of BS-19 as Commissioner on officiating basis also renders the proceedings as null and void; a constitutional petition is maintainable against a notice even when an alternate remedy is available, and the same does not suffer for want of jurisdiction; reliance has been placed on the case of *Commissioner of Income Tax, Companies-II and another Versus Hamdard Dawakhana (Waqf) Karachi* [PLD 1992 S.C. 847] and *Khalid Mehmood Versus Collector of Customs, Customs House, Lahore* [1999 SCMR 1881]; Provisions of Order 7 Rule 7 of the Civil Procedure Code, 1908 (hereinafter referred to as the "Code") empowers the Court to grant an effective ancillary relief even if not prayed for; it is the mandate of Section 122(6) of the Ordinance that the Commissioner, in addition to delegating to the Additional Commissioner the powers to amend an assessment, also has to delegate the power to pass an amended assessment order; there is nothing on record to show that the power of amending the assessment has been delegated to an officer of the rank of Additional Commissioner;

PTCL versus FOP, etc.

the delegation of power under one section will not automatically delegate the ancillary power under a different section which has to be specifically delegated; reliance is placed on the case of *Mian Jamal Shah Versus The Member Collection Commissioner, Government of Pakistan, Lahore and others* [PLD 1966 S.C. 1]; in the case of W.P. No. 583/2014 the Additional Commissioner was not vested with the jurisdiction of amending the assessment order; the earlier petitions i.e. 660 and 138 filed by the PTCL related to notices issued for different years and, therefore, shall not attract the principle of resjudicata; reliance has been placed on the case of *Mst. Bibi Alam Taj and others Versus Mst. Inayat Begum* [PLD 1963 Peshawar 199]; the power of delegation vested under Section 122 is in violation of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "Constitution") as it allows the Commissioner to revise his own order.

4. *M/s Ali Sibtain Fazli ASC and Hafiz Muhammad Idrees ASC* reiterated the above arguments advanced by Sardar Ahmed Jamal Sukhera ASC and further contended that the notices are without jurisdiction and that this Court has the power to proceed in the matter as the impugned notices suffer from jurisdictional error.

5. On the other hand, the learned counsels for the respondents have argued that; the notices impugned in the instant petitions are not adverse orders and, therefore, the petitioners cannot be treated as aggrieved persons under Article 199 of the Constitution; the petitions are not maintainable as the petitioners have bypassed the statutory remedies available under the Ordinance; the petitioners have raised disputed questions of fact, and the same can not be resolved by exercising jurisdiction under Article 199 of the Constitution; in the case of W.P. No. 583/2014 the petitioner has availed the alternate remedy and, therefore, the petition has become infructuous and is liable to be dismissed; in support of the contention reliance is placed on the cases of *Commissioner of Income Tax, Companies-II and another Versus Hamdard Dawakhana (Waqf), Karachi* [PLD 1992 S.C. 847] and *Khalid Mehmood Versus Collector of Customs, Customs House, Lahore* [1999 SCMR 1881]; the question of vires relating to Section 210 of the Ordinance was earlier raised through W.P. No. 2413/2009 and the same was dismissed and ICA No. 183-W/2012 was also dismissed vide CPLA No. 1002/2013, as not pressed.

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

7. The petitioners have assailed the respective notices issued under Section 122(5-A) read with Section 122(9) of the Ordinance. They have also questioned the vires of Section 122(5-A) and Section 210.

8. Before adverting to the arguments advanced by the learned counsels, it would be beneficial to examine the scheme of the Ordinance. The Ordinance has been promulgated with the object to consolidate and amend the law relating to income tax, and to provide for matters ancillary thereto or connected therewith. Chapter XI relates to the administration i.e. describing various Income Tax authorities, how they are appointed and vested with powers under the provisions of the Ordinance. Section 207 enumerates the hierarchy of the Income Tax authorities, starting with the Board at the highest level to an Auditor Inland Revenue. It, *inter alia*, includes the Commissioner Inland Revenue and several officers lower in rank. The supervision and overseeing of the general administration is vested in the Board. The latter is defined in clause (8) of section 2 of the Ordinance as meaning the 'Federal Board of Revenue' established under the Federal Board of Revenue Act 2007. Section 208 empowers the Board to appoint as many Chief Commissioners, Commissioners, Additional Commissioners, Deputy Commissioners, Assistant Commissioners of Inland Revenue etc. Sub-section (2) of section 208 empowers any Income Tax authority to appoint any other income tax authority subordinate to it and such other



executive or ministerial officers and staff as may be necessary, subject to orders or directions as may be issued by the Board. Section 209 provides that, subject to the Ordinance, the Chief Commissioners, the Commissioners and the Commissioners (Appeals) shall perform all or such functions and exercise all or such powers under the Ordinance as may be assigned to them in respect of such persons or classes of persons or such areas as the Board may direct. However, the Board or the Chief Commissioner have been vested with the power to transfer jurisdiction in respect of cases or persons from one Commissioner to another. Likewise, they may also confer upon or assign to any officer of the Inland Revenue all or any of the powers and functions conferred upon or assigned to the Commissioner. The provision further provides for other terms and conditions in the context of jurisdiction and powers vested in various Income Tax authorities. Section 210 of the Ordinance vests in the Commissioner the power to delegate powers. It provides that the Commissioner may, by an order in writing, delegate to any Officer of the Inland Revenue, subordinate to the Commissioner, all or any of the powers or functions conferred upon or assigned to the latter under the Ordinance, other than the power of delegation. The exception or restriction is provided in sub-section (1A) and the same is to the effect that the powers of amendment of assessment contained in sub-section (5A) of section 122 cannot be delegated to an officer of the Inland Revenue below the rank of an Additional Commissioner Inland Revenue. The Commissioner is also

empowered to delegate the powers to a firm of Chartered Accountants or a firm of Cost and Management Accountants appointed by the Board for the purposes of conducting an audit under section 177. The Commissioner is also vested with the power to cancel, modify, alter or amend an order under sub-section (1) of section 210.

9. Section 211 declares and further clarifies that an officer delegated with powers under section 210 shall be treated for the purposes of exercising the powers or functions as if the same have been exercised or performed by the Commissioner. The Commissioner, even after delegating his powers, is not precluded or prevented from exercising the powers or to perform the functions as may have been delegated. Under section 212 the Board has been authorized to issue a general or special order, authorizing 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.

10. It is, therefore, obvious, from a combined reading of sections 207 to 214, that the Ordinance has described the various designations of authorities of the Income Tax administration and their powers and jurisdictions under the Ordinance. The manner in which they are appointed, as to who is to exercise the power and jurisdiction under the Ordinance,

particularly the powers vested in the Commissioner to delegated his functions and powers under the Ordinance to other officers have been elaborately laid down and described. The power of delegation vested in the Commissioner under section 210 is expansive in nature as is manifested from the language of sub-section (1) *ibid.* The only exception or restriction has been provided in sub-section (1A) i.e that the power to amend an assessment under sub-section (5A) of section 122 cannot be delegated to an officer below the rank of an Additional Commissioner Inland Revenue. The provisions are clear, unambiguous and manifest the legislative intent.

11. Section 122 of the Ordinance empowers the Commissioner to amend an assessment made under section 120 or 121 of the Ordinance. Sub-section (1) of section 122 vests in the Commissioner the power to amend an assessment order treated to have been issued under sections 120, 121 or 122C by making such alteration or additions as he or she may consider necessary. The limitation prescribed for exercising the said power has been prescribed i.e a period of five years from the end of the financial year in which the Commissioner has issued the assessment order to the tax payer. Sub-section (5A) of section 122 vests power in the Commissioner to amend or further amend an assessment order after making or causing to be made such inquiries as he deems necessary, and if in his or her opinion the assessment order is erroneous in as much as it is prejudicial to the interest of revenue. Sub-section (5A) has

expressly been made subject to sub-section (9) which provides that no assessment shall be amended or further amended unless the tax payer has been provided with an opportunity of being heard. Sub-section (6) of section 122 imposes a duty on the Commissioner to issue an amended assessment order to the tax payer after making an amended assessment under sub-section (1), sub-section (4) or sub-section (5A) and such amended assessment order is declared to be treated in all respects as an assessment order for the purposes of the Ordinance.

12. As already noted, the Commissioner Inland Revenue has been empowered to delegate the powers vested under section 122. However, in the case of sub-section (5A), the powers cannot be delegated to an officer of the Inland Revenue below the rank of an Additional Commissioner.

13. There is yet another crucial question i.e. whether a notice issued under sub-section (5A) of section 122 of the Ordinance can be treated as an adverse order so as to give a cause of grievance and thus bring a person who invokes the jurisdiction of a High Court under Article 199 of the Constitution within the fold of the expression 'aggrieved person'. Sub-section (5A) of section 122 has been expressly made subject to sub-section (9) *ibid*. The Commissioner cannot amend or further amend an assessment order unless the

taxpayer has been given an opportunity of hearing. The Commissioner, therefore, is required to issue a show cause notice to the taxpayer so that the latter may respond to the grounds for the proposed amendment of the assessment order. It is then mandatory for the Commissioner or the Additional Commissioner, as the case may be, to give an effective, meaningful and proper opportunity of hearing as expressly mandated under sub-section (9) of section 122 of the Ordinance. A show cause notice issued under sub-section (5A) of section 122 thus cannot be treated as an adverse order unless the taxpayer is able to show that the same suffers from want of jurisdiction i.e. person who has issued the same had no power or jurisdiction or the proceedings were manifestly malafide.

14. In the context of challenging the *vires* of a law, the august Supreme Court in the case of '*Lahore Development Authority through D.G. and others Versus Ms. Imrana Tiwana and others*' [2015 SCMR 1739] after elaborately examining the precedent law has encapsulated and summarized the principles as follows.-

- i) There was a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute was placed next to the Constitution and no way

could be found in reconciling the two;

- ii) Where more than one interpretation was possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favoured validity;
- iii) A statute must never be declared unconstitutional unless its invalidity was beyond reasonable doubt. A reasonable doubt must be resolved in favour of the status being valid;
- iv) Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds;
- v) Court should not decide a larger Constitutional question than was necessary for the determination of the case;
- vi) Court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution;
- vii) Court was not concerned with the wisdom or prudence of the

legislation but only with its  
Constitutionality;

viii) Court should not strike down  
statutes on principles of republican  
or democratic government unless  
those principles were placed  
beyond legislative encroachment by  
the Constitution; and

ix) Mala fides should not be attributed  
to the Legislature.

15. The Ordinance is 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. The taxing statute has to be interpreted strictly, and as a corollary any defect or omission cannot be inferred. Moreover, it is settled law that the parameters provided in a taxing statute determines chargeability and levying of a tax. Moreover, the law ought to be interpreted in the case of fiscal statutes by looking at the language in its literal and ordinary meaning. A fiscal statute cannot be declared *ultra vires* on the touchstone of

reasonableness or otherwise, as the same has been declared by the august Supreme Court to be a matter of legislative policy and not for the Court to adjudicate upon. Reliance is placed on the cases of *'Federation of Pakistan through Secretary Ministry of Finance and others v. Haji Muhammad Sadiq and others'* [PLD 2007 SC 133], *'Aslam Industries Ltd., Khanpur v. Pakistan Edible Corporation of Pakistan and others'* [1993 SCMR 683], *'Collector of Customs (Appraisal), Karachi and others v. Messrs Abdul Majeed Khan and others'* [1977 SCMR 371], and *'Messrs Hirjina & Co. (Pakistan) Ltd., Karachi v. Commissioner of Sales Tax Central Karachi'* [1971 SCMR 128].

16. Having discussed the relevant provisions of the Ordinance and the principles and law expounded by the august Supreme Court in the context of a challenge to the *vires* of a fiscal statute, I now take up the arguments of the learned counsels for the petitioners. They have laid great stress on the point that sections 122 and 210 amount to excessive delegation and thus renders the said provisions as unconstitutional. The test for examining a law in the context of the doctrine of excessive delegation is by now well settled by the august Supreme Court in a chain of judgments. It would be pertinent to quote the relevant portion from the judgment in the case of *'Mrs. Sh. Abdul Rahim, Allah Ditta v. Federation of Pakistan and others'* [PLD 1988 SC 670] and the same is as follows;



"In this view of the matter, what has to be seen is the nature of the power delegated which determines whether the delegation is proper or invalid. If the legislature delegates its power to make the law, that is, its own legislative function then it would be invalid but if what is delegated is the authority to exercise the discretion in respect of matters which had been finally determined by the legislature itself, the delegated authority does not exercise a legislative function. In this context, the law provided the framework and left it to the Federal Government to exercise the discretion in the manner laid down within the framework. It cannot, therefore, be regarded as an abdication of its function by the Legislature but by law a valid delegation of a discretion to achieve the purpose of the law".

It was further held:

"The crux of the matter is that in determining whether there has been an unconstitutional delegation of legislative power, the field in which the powers are granted is an important element of consideration, and in the final analysis the question is one of kind and degree and each case of questioned delegation of authority must depend upon the facts of that particular case."

“What is prohibited by the Legislature is the delegation of its function to make the law but not the authority exercised under and in pursuance of the law itself to another agency in regard to the provision of details when by the very nature these are incapable of being laid down by the Legislature itself.”

17. The earliest judgment wherein the august Supreme Court had applied the doctrine of excessive delegation was in the case of *'Sobho Gyanchandani v. Crown'* [PLD 1952 FC 29]. The apex Court had held the proviso to section 1(3) of the Pakistan Public Safety Ordinance 1949 as ultra vires on the ground that it had conferred legislative power on the Central Government. Reference may also be made to *Mrs. Sh. Abdul Rahim, Allah Ditta v. Federation of Pakistan and others'* [PLD 1988 SC 670].

18. In the authoritative commentary on the Constitution titled 'Judicial Review of Public Actions' Justice (R) Fazal Karim after examining the precedent law has noted that 'In Pakistan, the recent trend is to reiterate that legislative power cannot be delegated, and if it is, the legislation will be invalid.'

19. It is, therefore, settled law that legislative power cannot be delegated, as this would tantamount to violation of the letter of the Constitution. The doctrine of excessive delegation and its extent has been settled as discussed above. By no stretch of the imagination can sections 122 and 210 of the Ordinance be construed as conferring any legislative powers or functions to the Commissioner. The argument advanced by the learned counsels for the petitioners in this regard is misconceived and fallacious.

20. Sections 122 and 210 of the Ordinance are in the nature of machinery provisions. They provide for the machinery and procedure for assessment and collecting tax. It is settled law that unlike the principle of strict construction in the case of charging sections, the machinery provisions are construed liberally so as to effectuate the charging provisions. The august Supreme Court has observed and held in the case of *'Pearl Continental Hotel and another v. Government of N.-W.F.P. and others'* [2010 PTD 2018] that 'We are in no doubt that the machinery provisions, where provided, have to be construed liberally and in a manner aiding the realization of proper tax and to prevent avoidance of the tax'. Section 122 neither confers unstructured or unbridled powers, nor in any manner contravenes Article 10-A of the Constitution. Likewise, section 210 also prescribes guidelines in the context of delegation of powers under section 5 A of section 122. There is, therefore, no force in the argument of the learned counsel that

no guidelines have been provided for exercising the powers under section 210 of the Ordinance. It is settled law that the wisdom of the legislature cannot be questioned. The learned counsel has not been able to make out a case so as to bring the challenge to the vires of sections 122 or 210 within the principles and law laid down for striking down a statutory provision, as highlighted in the case of *Lahore Development Authority* supra.

21. The next argument of the learned counsels related to the grades of various officers. The learned counsel has emphasized that an officer other than one who is in BPS-20 cannot be given the charge of the post of Commissioner. According to their understanding, a Commissioner has to be a civil servant who is in BPS-20 otherwise the exercise of powers vested in a Commissioner would suffer from want of jurisdiction. Likewise, they have argued that an Additional Commissioner has to be an officer in BPS 19 so as to be delegated with the powers of a Commissioner, or for such an officer to exercise the powers of a Commissioner. As noted above, it is a settled principle of interpretation of a fiscal statute that nothing can be read into, nor can anything be presumed in a taxing statute; nor can there be any equity. I am afraid that the learned counsels are reading into section 122 or section 210 something not provided therein. Nothing can be read into a taxing statute which has not provided therein, and reliance in this regard is placed on the case of *'Pearl Continental Hotel and*

*another v. Government of N.-W.F.P. and others'* [2010 PTD 2018]. The Income Tax authorities have been described in section 207 of the Ordinance and no reference has been made regarding entitlement to hold the post on the basis of the grades of an officer. 'BPS' is an abbreviation for Basic Pay Scale Structure and relates to the pay scales of various grades of civil servants. It is for the purpose of determining the salaries and allowances of the civil servants and is alien to the scheme of the Ordinance. A person, regardless of his basic pay scale i.e. his grading, may be appointed as a Commissioner or an officer of the Inland Revenue with any other designation enumerated in section 209. There is, therefore, no force in the argument of the learned counsels that the impugned notices suffer from want of jurisdiction because either the Commissioner was not in BPS-20 or the Additional Commissioner in BPS-19. The notices have been issued by officers who were vested with jurisdiction and are, therefore, valid and effective.

22. This Court is also not impressed with the argument advanced by the learned counsel for the petitioner that a separate order in respect of delegation of power is required to be issued for the purposes of sub-section (6) of section 122 of the Ordinance. It is sufficient if the Commissioner has delegated his powers and functions to an officer not lower in rank than an Additional Commissioner for the purposes of section 122. The delegation of powers vested in the Commissioner under section 122 would essentially

include and cover the powers under all of its sub-sections i.e. from (1) to (9) thereof.

23. Lastly is the argument regarding Writ Petition No.583/2014 [*Attock Refinery Limited versus Federation of Pakistan, etc.*]. Admittedly the petitioner, after filing the said petition, resorted to the remedies available under the Ordinance against the order passed by the competent authority. It is settled law that when an adequate remedy is provided under the law then a petition under Article 199 of the Constitution is not competent. It is also settled law that once the petitioner has made resort to the alternate remedy available under the law, then the constitutional petition is liable to be dismissed. In this regard it would be pertinent to refer to the principles enunciated by the august Supreme Court in the case of '*Commissioner of Income Tax, Companies-II and another v. Hamdard Dawakhana (Qaaf), Karachi*' [PLD 1992 SC 847] and the relevant portion is as follows.-

*"Before parting with the judgment we may observe that in cases where any party resorts to a statutory remedy against an order he cannot abandon or bypass it without any valid and reasonable cause and file Constitution petition challenging the same order. Such practice, in cases where statute provides alternate and efficacious remedy upto High Court, cannot be approved or encouraged. In a recent judgment of this Court in C.A. No.79-K of 1991, one of us*

*(Ajmal Mian, J.) in similar situation observed as follows:*

*"We may now revert to the question whether the appellant was justified to file above Constitution petition against the order of the Tribunal instead of invoking section 136 of the Ordinance for making a reference to the High Court. According to Mr. Rehan Naqvi, a reference under the above provision would not have been adequate and efficacious remedy as it would have taken years before it could have been heard. The same could be true for a Constitution Petition. The tendency to bypass the remedy provided under the relevant statute and to press into service Constitutional jurisdiction of the High Court has developed lately, which is to be discouraged. However, in certain cases invoking of Constitutional jurisdiction of the High Court instead of availing of remedy provided for under the relevant statute may be justified, for example when the impugned order/action is palpably without jurisdiction and/or mala fide. To force an aggrieved person in such a case to approach the forum provided under the relevant statute may not be just and proper.*

*In the present case, the appellant had opted to avail of the hierarchy of forums provided for under the Ordinance upto the stage of filing of appeal before the Tribunal and, therefore, it would have been proper on the part of the appellant to have invoked section 136 of the Ordinance for making a reference to the High Court instead of filing a Constitutional petition. In our view, once a party opts to invoke the remedies provided for*

*under the relevant statute, he cannot at his sweet will switch over to Constitutional jurisdiction of the High Court in the mind of the proceeding in the absence of any compelling and justifiable reasons."*

24. In view of the above discussion, no case is made out for declaring section 210 or section 122 of the Ordinance as invalid or *ultra vires*. Moreover, the petitioners have not been able to persuade this Court that the impugned notices in any manner suffer from want of jurisdiction. The notices impugned in the petitions have been issued by officers vested with power and jurisdiction under the Ordinance and, therefore, do not suffer from any legal infirmity or jurisdictional error. The notices are also not adverse orders so as to bring the petitioners within the fold of 'aggrieved persons'. The petitions are, therefore, without merit nor maintainable and are accordingly ***dismissed***.

**(ATHAR MINALLAH)  
JUDGE**

Announced in open Court on 28-12-2015

**JUDGE**

**Approved for reporting.**