Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

(1) WRIT PETITION NO. 886 OF 2015

PKP Exploration Limited

Vs.

Federal Board of Revenue through its Chairman, etc.

(2) WRIT PETITION NO. 1077 OF 2015

BHP Petroleum (Pakistan) Pty. Limited

Vs.

Federal Board of Revenue through the Secretary, etc.

PETITIONERS BY:	Mr. Raheel Kamran Sheikh, ASC in W.P No. 886/2015. Mr. Saad M. Hashmi, Advocate High Court in W.P No. 1077/2015
RESPONDENTS BY:	Syed Ishfaq Hussain Naqvi, Advocate High Court. Raja Saad Sultan, Assistant Attorney General. Mr. Kashif Ali Malik, Mr. Qaiser Abbas Gondal and Sardar M. Yaqoob Mastoie, Advocates for respondent No.6 in W.P No. 886/2015.
DATE OF HEARING**:**	01.03.2021.

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BABAR SATTAR, J.- Through this consolidated judgment, the petitions titled above are being decided as common questions of law are involved.

2. Through these petitions the petitioners have assailed show-cause notices (i.e. notice dated 18.03.2015 in W.P No. 886/2015 and notice dated 17.03.2015 in W.P No. 1077/2015) **("impugned notices")**. Through the impugned notices an Officer Inland Revenue

has asked the petitioners to show cause as to why demand may not be generated against the petitioners in relation to returns for tax years 2010 to 2014, wherein supply on account of locally produced crude oil/condensate had been claimed as zero rated as per Item No. (XVII) of Serial No.4 of S.R.O No. 549(1)/2008 dated 11.06.2008.

3. The relevant part of the impugned notices stated the following:

> *"Perusal of Serial No.4(Item No. XVII) clearly shows that the tax facility of zero percent has been given on Import and Supplies thereof. There is no ambiguity on this scope that the word "and" used between import and supplies is conjunctive and demands that both the conditions should be simultaneously met as has also been held by the learned ATIR at Para-13 of its recent judgment in STA No. 314/L13/2014 dated 16.10.2014. Moreover, at Para-23 of the aforesaid judgment it has been held by the learned ATIR that locally produced products are not covered under SRO-549(1)/2008 dated 11.06.2008."*

4. Mr. Raheel Kamran Sheikh Advocate, who has appeared on behalf of the petitioner in W.P No. 886/2015, explained the history of the Sales Tax regime applicable to import and supply of crude oil. His basic contention was that the show cause notice is rooted in a decision rendered by the learned Appellant Tribunal Inland Revenue **("Tribunal")** in STA No. 314/LB/2014 dated 16.10.2014 and the decision in such appeal has been retrospectively applied by the Officer Inland Revenue who has issued the impugned notice. The learned counsel relied on National Security Company (Pvt.) Ltd. Vs. Income Tax Appellate Tribunal, Lahore and 2 others (2005 PTD 2340) and Messrs Oxford University Press Vs. Commissioner of Income Tax (2007 PTD 1533).

5. Mr. Saad M. Hashmi, Advocate appeared on behalf of the petitioner in W.P No. 1077/2015 and argued that the impugned notice suffered from jurisdictional defect as it was issued on the basis of decision rendered by the learned Tribunal in STA No 314/LB/2014 which misconstrued the effect of SRO No 549(1)/2008 dated 11.06.2008. Mr. Hashmi contended that the relevant item i.e. petroleum crude oil was listed at Sr. No.4 and in the column that referred to conditions and restrictions the language mentioned was "import and supply thereof". He contended that the word "and" in the said column ought to have been read as "or" as a consequence of which both the import of crude oil and supply of the crude oil would be zero rated. However, the learned Tribunal erred in not reading the "and" as "or" and in relying on such decision of the Tribunal, the Officer Inland Revenue issued the impugned notice which consequently suffered from the jurisdictional defect of misconstruing SRO No. 549(1)/2008. Mr. Hashmi stated that as the matter involved interpretation of a statutory instrument, his challenge to the impugned notice in writ jurisdiction was maintainable. He relied on Messrs S.A Haroon and others Vs. Collector of Customs Karachi and the Federation of Pakistan (PLD 1959 SC 177), Lt. Col. Nawabzada Muhammad Amir Khan Vs. The Controller of Estate Duty (PLD 1961 SC 119), Nagina Silk Mill, Layallpur Vs. The Income Tax Officer (PLD 1963 SC 322), Anjuman-e-Ahmadiya Sargodha Vs. The Deputy Commissioner, Sargodha (PLD 1966 SC 639), The Murree Brewery Co. Ltd. Vs. Pakistan, through the Secretary to Pakistan, Works Division, etc. (PLD 1972 SC 279), Watan Party through President Vs. Federation of Pakistan and others (PLD 2006 SC 697), Commissioner Income Tax Vs.

Messrs Eli Lilly Pakistan (Pvt.) Ltd. through Director (2009 SCMR 1279), Pakistan Tobacco Co. Ltd. Vs. Pakistan through the Secretary, Ministry of Finance, Islamabad and four others (1991 PTD 359) and Shahnawaz (Pvt.) Ltd. Vs. Pakistan through the Secretary, Ministry of Finance, Islamabad, etc. (2011 PTD 1558). Mr. Hashmi further submitted that the Officer Inland Revenue, who is to decide the fate of show cause notice, is bound by the decision of the learned Tribunal rendered in STA No. 314/LB/2014 and the statutory remedies provided against any adverse decision rendered by the Officer Inland Revenue would be illusory all the way up to the Tribunal and consequently the petition against the impugned notice was maintainable. He relied on M/s Julian Hoshang Dinshaw Trust and others Vs. Income Tax officer, Circle XVIII, South Zone, karachi and others (PTCL 1992 CL 181), Attock Cement Pakistan Ltd. Vs. Collector of Customs, etc. (1999 PTD 1892), Collector of Customs, etc. Vs. M/s Ahmad & Company (1999 SCMR 138), M/s Usmania Glass Sheet Factory v. Sales Tax Officer (PLD 1971 SC 205), Oxford University Press Vs. Commissioner of Income Tax (2019 PTD 523), Sky Rooms Ltd. Vs. Assistant Collector of Central Excise and Land Customs, Karachi (PLD 1982 Karachi 244), Baluchistan Textile Mills Ltd. V. Central Excise Board of Revenue and others (1984 CLC 2192), Pakistan Metal Industries v. Assistant Collector, Central Excise and Land Customs and another (1990 CLC 1022), M/s S.A Abdullah & Co. Vs. Collector of Customs (Appraisement) Karachi (PLD 1992 Karachi 258), Messrs Khyber Electric Lamps Vs. Assistant Collector Customs and others (1996 CLC 1365), Pirani Engineering Vs. Federal Board of Revenue (2009 PTD 809), EFU General

Insurance Ltd. Vs. Federation of Pakistan (2010 PTD 1159) and Engro Vopak Vs. Pakistan (2012 PTD 130).

6. Syed Ishfaq Hussain Naqvi, Advocate appeared on behalf of the respondents and raised objections to the maintainability of these petitions. He submitted that any order passed against the petitioners in pursuance of show cause notices was appealable under the Sales Tax Act, 1990 and in presence of such adequate statutory remedy, writ petitions were not maintainable. For this he relied on Collector of Customs v. Universal Gateway Trading Corporation (2005 PTD 123), Islamabad Wi-Tribe Pakistan Ltd. v. Deputy Commissioner Inland Revenue and others (2018 PTD 654) and Lahore Flour Mills Association v. Province of Punjab (1994 MLD 2094). He further submitted that writ petition against show cause notice was not maintainable, given that no adverse order had thus far been passed. He relied on Messrs Zorlu Enerji Pakistan Limited v. Sindh Revenue Board and others (2020 PTD 1288). He also submitted that a show cause notice cannot be challenged on statutory grounds where the question of law involved interpretation of a statutory provision and the challenge was rooted in the argument that the authority issuing the show cause notice must give a certain interpretation to the statutory provisions in question preferred by the petitioner. For this he relied on Northern Power Generation Company Limited v. Federation of Pakistan and others (2015 PTD 2052). Mr. Naqvi while also citing principles of statutory interpretation contended that in the instant case the word "and" as used in SRO No. 549(1)/2008 is conjunctive and it could not be read as "or".

7. This Court by order dated 13.02.2015 had issued pre-admission notices to the respondents to assist the Court on the question of maintainability. As these petitions are being decided on grounds of maintainability, detailed arguments of the learned counsel for the parties on the merit of how the language used in SRO 549(1)/2008 is to be interpreted, as not being addressed at all.

8. Let us begin by considering the meaning of precedent and the rule on *"stare decisis"* as explained in Corpus juris Secundum:

Section 139, Corpus Juris Secundum volume 21.	*A "precedent" has been defined as a decision considered as authority for a similar case afterward arising on a similar question of law; but a precedent, sufficient to protect rights and which must be followed in similar cases, usually requires a series of decisions declaratory of common-law or equitable principles.*
Section 140, Corpus Juris Secundum, volume 21.	*Under the stare decisis rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the courts, it is not universally applicable.*
Section 151, Corpus Juris Secundum, volume 21.	*Decisions of courts of last resort should be followed by inferior courts until reversed or overruled.*
Section 153, Corpus Juris Secundum, volume 21.	*Decisions of coordinate courts, while not binding, will ordinarily be followed unless clearly erroneous.*

9. Johan Hanna in "The Role of Precedent in Judicial Decision" (Villanoa Law Review, 2 Vill.L.Rev. 367, 1957) states that *"the English doctrine of precedents is that the House of Lords is absolutely bound by its own decisions, and every court is absolutely bound by decisions of all superior courts. The Court of Appeal is probably bound by its own decisions. A decision of one court of first*

instance is only of persuasive force on another similar court. A decision of an inferior court does not bind a higher court, although a course of decisions may have considerable influence. The Judicial Committee of the Privy Council may overrule its own decisions."

10. John W. Salmond in Jurisprudence (4th Edition) explains authoritative and persuasive precedents as follows:

> *"Decisions are further divisible into two classes, which may be distinguished as authoritative and persuasive. These two differ in respect of the kind of influence which they exercise upon the future course of the administration of justice. An authoritative precedent is one which judges must follow whether they approve of it or not. It is binding upon them and excludes their judicial discretion for the future. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight as it seems to them to deserve. It depends for its influence upon its own merits, not upon any legal claim which it has to recognition. In other words, authoritative precedents are legal sources of law, while persuasive precedents are merely historical. The former establish law in pursuance of a definite rule of law which confers upon them that effect, while the latter, if they succeed in establishing law at all, do so indirectly, through serving as the historical ground of some later authoritative precedent. In themselves they have no legal force or effect.*

Explaining the English Law on precedents, Salmond notes the following:

> *"Absolute authority exists to the following cases:- (1) Every court is absolutely bound by the decisions of all courts superior to itself. A court of first instance cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow the judgments of the House of Lords.*
>
> *(2) The House of Lords is absolutely bound by its own decisions. A decision of this House once given upon a point of law is conclusive upon this House afterwards, and it is impossible to raise that question again as if it was res integra and could be re-argued, and so the House be asked to reverse its own decision.*

> *(3) The Court of Appeal is, it would seem, absolutely bound by its own decisions and by those of older courts of co-ordinate authority, for example, the Court of Exchequer Chamber.*
>
> *In all other cases save these three, it would seem that the authority of precedents is merely conditional."*

The rationale for respecting precedent is the need for certainty in the realm of law. Salmond argues that:

> *"The operation of precedents is based on the legal presumption of the correctness of judicial decisions. It is an application of the maxim, Res judicata pro veritate accipitur. A matter once formally decided is decided once for all."*
>
> *"A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large."*

11. Let us now produce Articles 189, 203 GG and 201 of the Constitution of the Islamic Republic of Pakistan, 1973 that declare which precedents are binding:

> ***189. Decisions of Supreme Court binding on other Courts.*** *Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan.*
>
> ***203-GG. Decision of Court binding on High Court and Courts subordinate to it****. Subject to Article 203-D and 203-F, any decision of the Court in the exercise of its jurisdiction under this Chapter shall be binding on a High Court and on all courts subordinate to a High Court.*
>
> ***201. Decision of High Court binding on Subordinate Courts.*** *Subject to Article 189, any decision of a High Court shall; to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all courts subordinate to it.*

12. Article 212 contemplates the creation of Administrative Courts and Tribunals, but does not state that their decisions constitute binding precedents. Likewise, civil courts decide questions of law, but the judgments of civil courts do not constitute binding precedents. They might be persuasive precedents to the extent that they decide a question of law upon which a decision can be based in a subsequent case, but in the reasoning forms part of a binding precedent in terms of Articles 203 or 189, only when adopted by a superior court.

13. The same analogy applies to the decision of the Appellate Tribunal Inland Revenue. The learned Tribunal exercises such authority as vested in it by law. Given that it is an adjudicatory forum of a quasi-judicial nature established by statue, it is vested with no inherent power. Neither any of the taxing statutes that provide for an appeal before the learned Tribunal nor the Appellate Tribunal Inland Revenue Rules, 2010, contain language akin to that in Articles 189, 203-GG and 201, stating that to the extent that the learned Tribunal decides a question of law or enunciates a principle of law, such decision is binding on all authorities passing assessment orders under the relevant tax statutes or exercising adjudicatory powers in relation to assessment orders, the appeals against which lie to the learned Tribunal. The language in section 132 of the Income Tax Ordinance 2001, establishes that the Tribunal's authority relates to the case in hand. The consequences of the decision of the Tribunal are limited to the case that it decides and do not travel beyond the four corners of the subject-matter before it in appeal. In other words, neither the Constitution nor any statute

envisages a law-declaring function for the Tribunal. Its decisions do not become binding precedents. The reasoning of the Tribunal in one case could be treated by tax authorities as a persuasive precedent in a subsequent case where the subject-matter is the same or similar. But the persuasive quality or cogent reasoning of a decision of the Tribunal does not transform it into a legally binding precedent for officials exercising executive or adjudicatory authority under tax statutes, just as the most compelling and potent decisions of District Courts do not make such decisions binding precedents. In this regard the ratio of the judgments of the learned Lahore High Court and Sindh High Court reported as National Security Company (Pvt.) Ltd. v. Income Tax Appellate Tribunal, Lahore and 2 others (2005 PTD 2340) and Messrs Oxford University Press v. Commissioner of Income Tax (2007 PTD 1533), respectively ought not be misconstrued. In the said judgments, it was held that in face of divergent views taken by different benches of the Tribunal on the same issue, the correct course of action would be to constitute a larger bench of the Tribunal to remove such conflict. The ratio of the judgments is not that decisions of the Tribunal form binding precedents in terms of the principles of law they enumerate, but that in the interest of certainty of law the outcome of cases on the same issue must not be contingent on the composition of benches. And in face of conflicting opinions of various benches of the Tribunal, such conflict must be resolved by settling the issue through the constitution of a larger bench. The principle of law enunciated in the aforesaid precedents is that the adjudicating authority of the Tribunal should not be exercised in a manner that is arbitrary or nurtures uncertainty. This principle relates to the manner of exercise

of authority and not to the effect of the decisions on those exercising executive or adjudicatory powers within the tax hierarchy. The decision of one High Court is not binding on another High Court, even though a precedent laid down by one High Court has persuasive value for another. But the decision of a bench of the High Court is binding on another equal sized bench of the same court as held in Multiline Associates v. Ardeshir Cowasjee and 2 others (PLD 1995 SC 423). And if a bench disagrees with an earlier precedent, the prescribed course of action is to seek the constitution of a larger bench to resolve the difference of opinion. This principle of law has been enumerated by the august Supreme Court in the interest of legal certainty and consistency to ensure that a court, which comprising individual judges and is not a monolith, still speaks with one voice and its decisions do not rest on the vagaries or preferences of individual judges. And the same logic has been extended to the functioning of benches of the Tribunal to avoid conflicting decisions in National Security Company (Pvt.) Ltd. and Messrs Oxford University Press.

14. It has been held by the learned Tribunal in a decision cited as 1996 PTD (Trib) 388 that, "a judgment of the Income Tax Appellate Tribunal interpreting or enunciating any point of law has the force of precedent and is binding on absolute terms on the C.I.T(As)/A.A.Cs and has a binding force on the other functionaries in the tax collection hierarchy established under the Income Tax Ordinance, 1999…The judgment of the Income Tax Appellate Tribunal has the force of precedent which can be inferred from the fact that the judgments of those Courts and Tribunals only are

reported in the law journals under the Law Report Act, 1875 which have the force of precedent." With utmost respect, this order and other subsequent orders of the learned Tribunal declaring that the Tribunal's orders form binding precedents on questions of law in view of provisions of the Law Reports Act, 1875, are misconceived. Let us reproduce sections 3, 4 and 5 of the said Act.

> ***3. Authority given only to authorized reports****. No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided on or after the said day by any High Court, other than a report published under the authority of a Provincial Government.*
>
> ***4. Authority of judicial decisions****. Nothing herein contained shall be construed to give to any judicial decision any further or other authority than it would have had if this Act had not been passed.*
>
> ***5. Certification by the courts, etc****. A court or tribunal deciding a matter shall at the end of the judgment or order, as the case may be, certify in the form specified in the Schedule that it is based upon or enunciates a principle of law or decides a question of law which is of first impression or distinguishes, over-rules, reverses or explains a previous decision.*

Section 4 above clarifies that provisions of the Law Reports Act, 1875, would not endow any judicial decision with the quality of being a binding precedent that is otherwise not a binding precedent. The intent of section 5 is to achieve the object of certainty and consistency in the decisions rendered by a Tribunal, as highlighted above. The factum of publication of a decision does not bestow on the decision any binding force in terms of becoming a precedent to be followed in subsequent cases by income tax authorities, even though such decisions no doubt have persuasive value for all subordinate adjudicatory forums and any exercise of authority by a

subordinate forum in patent disregard of a decision of a Tribunal on a question of law could open itself to the charge of being arbitrary if it such authority to give reasons, within the terms of section 24 of the General Clauses Act, 1897, as to why it has not been persuaded by a decision of the Tribunal on a question decided by the Tribunal.

15. Let us reiterate the guidance provided by the Constitution in Article 175(2) which states the following

> *(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.*

To the extent that neither the Constitution nor any other statute declares the decisions of the Tribunal to have binding force on subsequent decisions reached by executive and adjudicatory authorities exercising powers under taxing statutes, such binding legal authority cannot be claimed by the learned Tribunal for its decisions in which it interprets or enunciates any point of law. The decision of the learned Tribunal has binding force, but only in relation to the case-in-hand.

16. Once it is concluded that the decisions of the Tribunal do not constitute binding precedents, it cannot be argued that the remedy afforded to an assessee before the adjudicatory hierarchy provided under tax statutes is illusory merely because the authorities exercising executive or adjudicatory jurisdiction under the tax statutes would be influenced by the reasoning of the Tribunal in another case that it has already decided and such decision militates against the assessee’s argument. In such case it remains for the assessee to convince the authorities vested with jurisdiction under the tax statutes that the decision of the Tribunal being relied

upon by the authority to decide the assessee's case a certain way is distinguishable, or is against the law or reason. And in the event that the assessee is unable to persuade the adjudicatory forums provided under the statute, the relevant question of law will ultimately come before the High Court for determination in its reference jurisdiction.

17. There are at least three reasons why this Court ought not exercise its extra-ordinary constitutional jurisdiction to adjudicate a matter that will eventually come before it in appellate, revisional or reference jurisdiction:

1. The remedy of appeal, revision or reference is provided by statute. The High Court must not exercise its constitutional jurisdiction in a manner that circumvents the adjudicatory scheme provided by statue, as doing so could undermine legislative intent and also the scheme of separation of powers upon which our Constitution rests, wherein the foremost purpose of the judicature is to give effect to the laws as promulgated by the legislature.

2. By assuming the jurisdiction to adjudicate a matter in exercise of its jurisdiction under Article 199 of the Constitution, the Court would render redundant the provisions of tax statues that provide the remedy of filing a reference before the High Court in relation to questions of law that emanate from a decision of the Tribunal. Such reference is heard by a division bench of this Court, while a writ petition is heard by a single bench. One of the principles guiding the exercise of constitutional jurisdiction by the Court must be that it ought not exercise its constitutional jurisdiction in a manner that usurps the statutory jurisdiction vested

by the legislature in its wisdom in a division bench of the same Court.

3. When a question of law in relation to exercise of jurisdiction under a tax statute culminates in a tax reference, the High Court has the benefit of the reasoning of adjudicatory forums provided by the statute that have already applied their mind to the question. As a functional matter, the High Court is devoid of the benefit of such reasoning if it allows a petition to circumvent statutory remedies.

18. In this regard this Court is guided by the dicta of superior courts, especially in situations where exercise of writ jurisdiction would result in circumventing statutory provisions that include an ultimate remedy before the High Court:

(i) Al Ahram Builders (Pvt.) Ltd. v. Income Tax Appellate Tribunal (1993 SCMR 29)

"The tendency to by-pass the remedy provided under the relevant statute 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."

(ii) H.M Abdullah v. The Income Tax Officer (1993 SCMR 1195)

"Income Tax Ordinance is a complete code in itself which creates rights in favour of an assessee, and in certain circumstances in favour of the Revenue as well, and also provides remedy for redress of the grievances of the aggrieved party. In the circumstances of the case, the appellant was not entitled to invoke the Constitutional

jurisdiction of the High Court and bypass the remedy available under the Income Tax Ordinance".

(iii) Roche Pakistan Ltd. Vs. Deputy Commissioner of Income TAx (2001 PTD 3090).

" In the case of Shagufta Begum v. I.T.O. PLD 1989 SC 360, a notice issued by the Income-tax Officer under section 65 of the Ordinance was challenged. The Honourable Supreme Court held that although a person can come directly to the High Court in a case where the Tribunal lacks jurisdiction which is discoverable on the face of record, it was in the interest of litigants to pursue the remedy with the departmental authorities."

(iv) Sitara Chemical Industries Ltd. and another Vs. Deputy Commissioner of Income Tax (2003 PTD 1285)

"15. The High Court under Article 199 of the Constitution of Islamic Republic of Pakistan on the application of an aggrieved party, if it is satisfied that no other adequate remedy is provided by law, is authorized to make an order directing the person performing within the territorial jurisdiction of the Court functions in connection with the affairs of the Federation to refrain from doing anything he is not permitted by law to do or to do anything he is required by law to do. Thus jurisdiction can be exercised only if there is no other adequate remedy provided by law. Under the Income Tax Ordinance, if a person is aggrieved by an order passed by an Assessing Officer, the Ordinance provides an appeal against such an order to the Commissioner of Income Tax and a second appeal to the Income Tax Appellate Tribunal and if the person is still dissatisfied with the order of the Tribunal, he can request the Tribunal to refer the question of law arising from the order of the Tribunal for an opinion of the High Court under section. 136(1) of the Ordinance; and if the Tribunal refuses to do so, he can file an application to the High Court under section 136(2) for an opinion by the High Court: It is well established that a party cannot be allowed to bypass an ordinary remedy provided by the statute in favour of a Constitutional petition under Article 199 of the

Constitution. The Hon'ble Supreme Court of Pakistan has in several cases expressed its disapproval of the practice of approaching the High Court directly without resorting to the remedies available under the specific statutes and has declined to interfere in matters where the High Court has refused to exercise its discretionary jurisdiction for the aforesaid reason (see Shagufta Begum v. I.T.O. PLD 1989 SC 360, Khalid Mehmood v. Collector of Customs 1999 SCMR 1881, AI-Ahram Builders (Pvt.) Limited v: I.T.A.T. 1993 SCMR 29 and Ameen Textile Mills (Pvt.) Limited v.. CIT and others (2000 SCMR 201)"

(v) Mughal-E-Azam Banquet Complex v. Federation of Pakistan (2011 PTD 2260).

"6. Interference at the stage of issuance of Show-Cause Notice stultifies and retards the adjudicatory process provided under the relevant law, in this case Ordinance, 2000 read with Sales Tax Act, 1990. This unduly stalls the investigative machinery of the quasi judicial authorities and hampers discharge of their statutory duties which are to be done with a free hand independent from outside control. The petitioner has an opportunity to place its case before the concerned authority who is competent to look into the factual receipts besides there are elaborate procedures by way of appeal or revision against order passed in such proceedings. The petitioner has already filed its replies to the Show-Cause Notice and the matter is pending adjudication before the concerned authority.

7. Petitioner, however, can invoke the constitutional jurisdiction of this Court, if the Show-Cause Notice is not issued by a competent authority or the liability in the Show Cause Notice is palpably unlawful and without jurisdiction. This is not so in the present case. Show-Cause Notice is admittedly issued by a competent authority and its contents do not prima facie reveal that the liability is ultra vices the law. In fact the allegations raised in the Show-Cause Notices requires factual inquiry in order to determine whether the petitioner renders services as Caterers."

(vi) M/s Pakistan Mobile Communications Ltd. v. Sindh Revenue Board and others (2014 PTD 2048)

"5…There is no objection or dispute with regard to jurisdiction of the respondent department over the case of the petitioners nor there seems any error or legal bar to issue such Show-Cause Notice to the petitioners. The petitioners have expressed their grievance only to the extent of proposed treatment by the respondents to the claim of input adjustment by the petitioners in terms of Rule 22(1) of Sindh Sales Tax Rules, 2011, whereas, the respondents have not finally decided the legal issue nor passed any final order in this regard, hence the petitioners are still at liberty to make their submissions, which shall be decided by the respondents strictly in accordance with law and applying the relevant Rules. Since the impugned Show-Cause Notices do not suffer from any jurisdictional error nor the petitioners have been able to point out any patent illegality in the impugned Show-Cause Notices, whereby, an opportunity of being heard has been provided to the petitioners, therefore, the petitions filed by the petitioners appear to be pre-mature and tantamount to preempting the decision on the subject controversy."

(vii) Messrs Zorlu Enerji Pakistan Limited V. Sindh Revenue Board and others (2020 PTD 1288).

"3…This Court in number of cases has already deprecated such practice and the tendency to challenge a show-cause notice in the Constitutional Petition under Article 199 of the Constitution. Reference in this regard can be made to judgment of this Court in the case of Messrs Maritime Agencies (Pvt.) Ltd. v. Assistant Commissioner-II of SRB and 2 others (2015 PTD 160), wherein, it has been held as under:-

6. The tendency to impugn the show-cause notices issued by the Public Functionaries under taxing statutes, before this Court under Article 199 of the Constitution, and to casually bye-pass the remedy as may be provided under a Special Statute is to be

discouraged as it tends to render the statutory forums as nugatory. Moreover, if the proceedings initiated under Special Taxing Statutes do not suffer from jurisdictional error or gross illegality the same are required to be responded and resolved before the authority and the forums, provided under the Statute for such purpose, whereas, any departure from such legal procedure will amount to frustrate the proceedings which may be initiated by the public functionaries under the law and will further preempt the decision on merits by the authorities and the forums which may be provided under the statute for such purpose. In the instant case a show-cause notice has been issued by the respondent who admittedly has the jurisdiction over the case of the petitioner, wherein, certain queries have been made and the petitioner has been provided an opportunity to respond to such show-cause. Petitioner is at liberty to file detailed reply and to raise all such legal objection, as raised through instant petition…"

(viii) Omer Flour Mills v. Government of Punjab and others (2021 PTD 275)

"8. The Petitioners have also challenged a show-cause notice dated 02.08.2017 issued in the name of the Petitioners wherein the Deputy Director (B&A), Directorate of Food, Punjab only required them to appear before the Director Food Punjab for defending their stance. However, they instead of replying to the show cause notice or appearing before the aforesaid Respondents, filed this petition. It is an established principle that show cause notice is mere initiation of proceedings and not the proceedings in itself and no Constitutional petition is maintainable against it unless the same is without jurisdiction or suffers from patent legal defect. In "Khalid Mahmood Ch. and others v. Government of the Punjab through Secretary, Livestock and Dairy Development" (2002 SCMR 805) the Hon'ble Supreme Court of Pakistan held that "where disputed show-cause notice was still at preliminary stage as after considering the replies if the competent authority comes

to the conclusion that it was a case of taking further proceedings only then the proceedings shall commence, therefore, Constitutional petition was pre-mature and ought to be dismissed". Furthermore, a show-cause notice can only be impugned where the same is without jurisdiction and lawful authority, however, no challenge to the show-cause notice can be made in Constitutional petition on merits."

19. There is without doubt another series of authorities that explain the exception to the rule and circumstances in which a direct remedy before the High Court in its constitutional jurisdiction may be afforded despite availability of an alternate remedy that a petitioner chooses not to avail. Let us reproduce dicta from several cases in this regard:

(i) M/s Usmania Glass Sheet Factory Limited, Chittagong v. Sales Tax Officer, Chittagong (PLD 1971 SC 205).

"It has been held by this Court that in a case where the dispute arises between the parties in respect of a fiscal right based upon a statutory instrument the same can be easily determined in writ jurisdiction. In the case of Burma Oil Company (Pakistan Trading) v. The Trustees of the Port of Chittagong (P L D 1962 S C 113), it was held as under:

"We consider that since the question which arose was one of fiscal right based upon a statutory instrument, it was as easily and conveniently determined in a writ petition as by means of a suit. By the exempting notification, a duty was cast upon the taxing authority viz., the Port Trustees to relieve the subject against certain imposition and thereby a corresponding right to such relief was created in favour of the subject. Mandamus is in every way an appropriate remedy for the assertion of such a right by enforcement of the corresponding duty."

(ii) The Murree Brewery Co. Ltd. v. Pakistan through the Secretary to Government of Pakistan, Works Division and 2 others (PLD 1972 SC 279).

"It was held by the Supreme Court in Lt.-Col. Nawabzada Muhammad Amir Khan v. Controller of Estate Duty and others (PLD 1961 SC 119), that the rule that the High Court will not entertain a writ petition when other appropriate remedy is yet available is not a rule of law barring jurisdiction but a rule by which the Court regulates its jurisdiction. It was further observed that one of the well recognised exceptions to the general rule is a case where an order is attacked on the ground that it was wholly, without authority."

(iii) Chairman Central Board of Revenue, Islamabad Vs. Pak-Saudi Fertilizer Limited and another (2001 SCMR 777).

"*7. The next contention of the learned counsel for the petitioners is that petition under Article 199 of the Constitution was not maintainable as alternate adequate remedy of filing an appeal under section 129 of the Ordinance, 1979 against the impugned order was available to the respondent. Admittedly; the impugned order of demand was without jurisdiction and unlawful, consequently there would be no bar to the filing of Constitutional a petition under Article 199 of the Constitution of Islamic Republic of Pakistan considering also that section 53 of said Ordinance is not mentioned in section 129 of the said Ordinance as appeal would lie only against the order passed under the provision of law mentioned in section 129 of Ordinance, 1979."*

(iv) EFU General Insurance Limited Vs. Federation of Pakistan, etc. (2010 PTD 1159).

"*9. In the instant petitions also the learned counsel for the petitioner has challenged the very authority of the Respondent No.4 in mis interpreting the provisions of the law which as per the learned counsel is not only mala fide but also contrary to law and is also a misapplication of the law. We, therefore in the light of the decisions noted supra have come to the conclusion that the matter does require an authoritative pronouncement in view of the allegations made by the learned counsel. At this junction*

we also would like to refer a decision given by a D.B. of this court in Pirani Engineering v. Federal Board of Revenue (2000 PLD 809) wherein it was held that "a reviewing authority had already expressed his opinion in the form of an administrative order, therefore, filing of an appeal or revision/review before such authority was mere illusory in nature and was not efficacious remedy and it was held that the petition was maintainable." In the instant petitions also it was explained by the learned counsel for the petitioners that in certain petitions the CIT has already refused to issue nil withholding certificate to the petitioners and again going to the department for revision etc. would be an exercise in futility and mere illusory in nature. We, therefore, overrule the objection raised by the learned counsel appearing for the respondent that these constitution petitions are not maintainable."

(v) J.K Brothers Pakistan (Pvt.) Ltd. Vs. Additional Commissioner Inland Revenue (2016 PTD 461).

"*8. The objection of the learned counsel for the respondents that the writ petition against impugned show cause notice was not maintainable, is not of much substance. If an act is illegal and facts of the case confirm the said illegality, there is no bar in exercising writ jurisdiction. Superior courts of the country have already held that if the show cause notice is ultra vires, without jurisdiction or with mala fide intent, such action is to be nipped in the bud. Reference, in this regard, can be made to the case of Mughal-E-Azam Banquet Complex 2011 PTD 2260 and Northern Power Generation Company Ltd. v. Federation of Pakistan and others (2015 PTD 2052)."*

(vi) Pepsi-Cola International (Pvt.) Ltd. Vs. Federation of Pakistan, etc. (2017 PTD 636).

"The precise contention was that if proceedings for adjudication of assessment and recovery of taxes and duties have been set in motion by the officer empowered to undertake such adjudication under the relevant statutes, it has been vouched by respectable authority that constitutional petition will not be entertained by this

Court unless the assumption of jurisdiction by the authority or the forum is ultra vires and suffers from patent illegality. I need not advert to the entire body of case law on the subject. The proposition stands crystallized over the years and the precedents circumscribe the conditions under which a collateral challenge can be maintained to proceedings for the assessment and recovery commenced under the relevant statutes. In Murree Brewery Co. Ltd. v. Pakistan and others (PLD 1972 SC 279), it was held that "in order to maintain a challenge the order has to be wholly without authority". Chairman, Central Board of Revenue v. Pak-Saudi Fertilizer Ltd. (2001 SCMR 777) laid down the proposition that the proceedings have to be without jurisdiction and against which no appeal lies for it to be liable to challenge in the Constitutional jurisdiction of this Court."

(vii) Reliance Commodities (Pvt.) Ltd. Vs. Federation of Pakistan and another (PLD 2020 Lahore 632).

"*41. Now coming to the point whether writ petition is maintainable against show-cause notice, it will be in the fitness of things to take guidance from the dictum of the case precedents developed on this particular issue. It will emerge that the consistent view of the Courts has been that a mere show-cause notice is not an adverse order. However, the Court in exercise of its Constitutional jurisdiction could take up writs to challenge the show-cause notice if it is found that the show-cause notice is totally non est i.e. want of jurisdiction of the issuing authority or has been issued malafidely i.e. merely to harass the subject.*

…However, the only two exception which may give a cause of grievance and thus make a person an aggrieved person in the context of Article 199 of the Constitution are, firstly, when it is issued by a person who is not authorised under the law or conferred with the power or jurisdiction and, secondly, when the powers and jurisdiction have been exercised by an authorised person for purposes alien to the empowering statute i.e.

exercised for mala fide reasons. These are the only two exceptions ordinarily recognised in the precedent law which would make a person an 'aggrieved party' for the purposes of Article 199 of the Constitution, and thus invoke the jurisdiction thereunder.

(viii) Unilever Pakistan Limited Vs. Pakistan through Secretary Law and Justice and others (2020 PTD 2052)

"6. It is settled law that a show-cause notice may not ordinarily be justiciable in writ jurisdiction; unless it is manifest that the same suffers from want of jurisdiction; amounts to an abuse of process; and/or is mala fide, unjust and/or prejudicial towards the recipient."

20. This Court, after detailed discussion of the case law on the subject of constitutional challenge to show cause notices, has summarized the principles that emanate from the law laid down by the august Supreme Court in two cases:

(i) In Eastern Testing Service (Pvt.) Limited Vs. Securities and Exchange Commission of Pakistan and others (2016 CLD 581) it was held that:

"The above precedent law has settled the principles and law relating to the scope of jurisdiction of the High Court, while exercising powers under Article 199 of the Constitution when an adequate remedy is provided under the law. The principles and law may, therefore, be summarised as follows:-

(i) The rule that the Court will not entertain a petition under Article 199 when other appropriate remedy is available is not a rule of law barring the jurisdiction of the Court.

(ii) When the law provides an adequate remedy, constitutional jurisdiction under Article 199 of the Constitution will be exercised in exceptional circumstances.

(iii) The exceptional circumstances which may justify invoking jurisdiction under Article 199 of the Constitution when adequate remedy is available are when the order or action impugned is palpably without jurisdiction, malafide, void or coram-non-judice.

(iv) The tendency to bypass the remedy provided under the relevant statute by resorting to the Constitutional jurisdiction of a High Court is to be discouraged so that the legislative intent is not defeated.

(v) Constitutional jurisdiction under Article 199 cannot be readily resorted to when the matters amenable to the jurisdiction of an exclusive forum is mandated by the Constitution itself or when hierarchy provided under a statute ends up in appeal, revision or reference before a High Court or directly the apex Court.

(vi) The High Court in exercising its discretion will take into consideration whether the remedy provided under the statute is illusory or not.

(ii) In Pakistan Oil Field Limited Vs. Federation of Pakistan (2020 PTD 110) it was held that:

"9. The upshot of the above case law is that the exceptions under which writ petition against a show-cause notice is maintainable are as follows:

(A) Where the impugned notice is without jurisdiction/lawful authority;

(B) Where the impugned notice is non est in the eye of law;

(C) Where the impugned notice is patiently illegal;

(D) Where the impugned notice is issued with premeditation or without application of mind for extraneous reasons;

(E) Where the aggrieved person does not have adequate and efficacious remedy;

(F) Where the issues of show-cause notice violate any fundamental rights of the aggrieved person;
(G) Where there is an important question of law requires interpretation of any fiscal law or any other substantive law.

21. The jurisdictional defect that may be amenable to challenge before the High Court in constitutional jurisdiction is not every jurisdictional defect, but one that renders the action or order "palpably" or "wholly" without jurisdiction. In Ch. Muhammad Ismail Vs. Fazal Zada (PLD 1996 SC 246), the august Supreme Court drew a distinction between "want of jurisdiction", "excess of jurisdiction" and "wrong exercise of jurisdiction", while highlighting that a decision cannot be impugned before a High Court in its constitutional jurisdiction on the basis of wrongful exercise of jurisdiction.

22. It has been held by superior courts that an order that is palpably without jurisdiction is amenable to writ jurisdiction:

(i) Messrs Phoenix Mills Ltd., Karachi Vs. City District Government Karachi and others (PLD 2003 Karachi 83).
"If an order is palpably without jurisdiction the aggrieved person shall not be asked to have recourse to the forums available in the statute for the simple reason that an act without jurisdiction is void ab initio and consequently the aggrieved person shall be within his right to invoke the Constitutional jurisdiction of High Court."

(ii) *Platinum Commercial Bank. Government of Sindh through the Secretary and another (2003 MLD 279)*

"Constitutional petition would always be maintainable to assail initiation of proceedings palpably without jurisdiction, for simple reason that when foundation itself was not available, there was no question of erecting any edifice on the same."

(iii) Commissioner of Income Tax v. Messrs Eli Lilly Pakistan (Pvt.) Ltd. (2009 SCMR 1279).

"In Commissioner of Income Tax v. Hamdard Dawakhana (Waqf) (PLD 1992 SC 847) this Court quoted with approval the observation in an earlier case that the tendency to bypass the remedy provided in the relevant statute and to press into service constitutional jurisdiction of the High Court was to be discouraged, though in certain cases invoking of such jurisdiction instead of availing the statutory remedy was justified, e.g. when the impugned order/action was palpably without jurisdiction and/or mala fide…"

23. The term "palpably" is defined in various dictionaries as follows:

Advance Law Lexicon	*Easily perceived; plain; obvious…*
The Chambers Dictionary	*…pal'able adj that can be touched or felt; perceptible; (of e.g. lies, etc) easily found out; obvious, gross. Palp' ableness n. pal'ably adv. Palp'atevt to examine by touching or pressing (esp med). Palpation the act of examining by means of touch.*
Burton's Legal thesaurus	***PALPABLE, adjective** able to be felt, able to be handled, able to be touched, apparent, bold, certain, clear, clear-cut, conspicuous, crystal clear, definite, detectable, discernible, disclosed, discoverable, distinct, easily perceived, easily seen, evidens, evident, exhibited, explicit, glaring, identifiable, in evidence, indisputable, indubitable, lucid, manifest, manifestus, marked, notable, noticeable, observable, obvious, overt, patent, perceivable, perceptible, perspicuous, plain, prominent, pronounced, readily perceived, readily seen, recognizable, revealed, salient, seeable,, self-evident, stark, striking, tactile, tangible, touchable, tractabilis, unconcealed, uncontestable, uncovered, uncurtained, undisguised, undoubtable, unequivocal, unhidden, unmasked, unmistakable, unobscure, unobscured, unquestionable, unscreened, unshrouded, unveiled, visible*

24. It was held by the learned Karachi High Court in Abdul Salam Qaureshi Vs. Judge, Special Court of Banking (PLD 1984 Karachi 462) that a wrong decision does not render the decision without jurisdiction and that, "to amount to a nullity, an act must be non-existed in the eye of law, that is to say, it must be wholly without jurisdiction or performed in such a way that law regarded that as were colourable exercise of jurisdiction or unlawful usurpation of jurisdiction."

25. There also appears the proclivity to bypass statutory remedies on the basis that they are illusory. The term "illusory" is defined in various dictionaries as follows:

Black's Law Dictionary	*Deceptive; based on a false impression*
Advanced Law Lexicon	*Deceiving by false appearances; nominal, as distinguished from substantial; fallacious; illusive…* *…….* *……* *Relating to, or marked by illusion; based on or producing illusion.*
The Chambers Dictionary (10th Edn)	*…adj misleading by false appearances; false appearances; false, deceptive, unreal…*
Burton's Legal Thesaurus	*IILUSORY, adjective Casuistic, casuistical, chimerical, conjuring, counterfeit, deceiving, deceptive, deluding, delusive, fabricated, fallacious, false, falsus, fancied, fanciful, fatuitous, feigned, fictitious, hatched, illusive, imaginary, imagined, insidious, insubstantial, invented, make-believe, misleading, mythic, mythological, not true, notional, phantasmal, pretended, sophistic, sophistical, suppositional, tenuous, tricky, unactual, unauthentic, unreal, unsubstantial, unsupportable, vanus, visionary* *ASSOCIATED CONCEPTS: illusory agreement, illusory appointment, illusory contract, illusory promise, illusory transfer,*

	illusory trust.

26. As above, it was held by the august Supreme Court in Khalid Mehmood Vs. Collector of Customs (1999 SCMR 1881) that the High Court will be slow to entertain matters entrusted to another Tribunal, even if its jurisdiction is not ousted. And further that where the High Court is itself the repository of the ultimate appellate, revisional or referral powers, conferred by statute, it will only be in the rarest of cases that the High Court will exercise its constitutional jurisdiction in a manner that circumvents the statutory machinery.

27. It was held by the learned Lahore High Court in Northern Power Generation Company Ltd. Vs. Federation of Pakistan and others (2015 PTD 2052) that:

> *9. In light of various enunciations by Hon'ble Supreme Court of Pakistan it can safely be concluded that where alternate remedy is available, non exercise of jurisdiction under Article 199 of the Constitution by High Court, is a rule to be applied for regulating its constitutional jurisdiction. Exceptions to this rule are that the show cause notice or order is ultra vires, palpably without jurisdiction or with mala-fide intent; availing of statutory remedy, against which, would be inefficacious because such action is to be nipped in the bud. In presence of the exceptions, the High Court should lean its discretion in favour of the petitioner to provide him speedy and efficacious justice by issuing writ of certiorari.*
>
> *However, where petitioner approaches High Court for issuance of a writ of certiorari by pleading jurisdictional issue, on an interpretation of his choice and relevant provision is susceptible to various interpretations, the issuance of show cause notice or an order cannot said to be palpably without jurisdiction or mala fide.*
>
> *As pointed out, supra, the question of Additional Commissioner's jurisdiction to invoke the provisions of subsection (5A), under*

delegation by Commissioner, has already reached this Court under Advisory Jurisdiction through various Tax References, hence exercise of writ jurisdiction would amount to circumvent this Court's jurisdiction under Section 133 of the Ordinance, which has to be exercised by two Judges. If matters of interpretation simplicitor are taken up in writ jurisdiction, on the pretext of inefficacious remedy, intent of Legislature, of vesting this Court with Advisory jurisdiction on questions of law, would be frustrated."

28. It was held by the learned Sindh High Court in Next Capital Limited Vs. Assistant Commissioner (2020 PTD 808) that:

"We are of the view that pendency of a legal question before this Court in a reference jurisdiction, and similar treatment given by the departmental authorities to a legal controversy alone, cannot be a valid ground to abandon and bypass a statutory forum, which can otherwise decide such legal issue in accordance with law. However, in appropriate cases, an aggrieved party can approach this Court by filing a Constitutional Petition under Article 199 of the Constitution if there is violation of any fundamental right or if some constitutional point is agitated relating to the legislative competence and jurisdiction of legislative body has been challenged."

29. The crux of the decisions above, that guide the High Court in regulating and exercising its jurisdiction in relation to challenges brought against show cause notices without first availing statutory remedies, can be restated 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

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.

30. Now applying the law to the facts and circumstances of the petitions before this Court, it has already been held that the decision of the learned Tribunal is only binding upon the parties in the appeal decided by the Tribunal and is not a binding precedent for subsequent cases for purposes of any question of law that it decides while deciding such appeal. The contention of

the learned counsel for the petitioners that the statutory remedies against the show cause notice are illusory is therefore without merit.

31. In view of the law laid down by the learned High Court in Mughale-e-Azam Banquet Complex v. Federation (2011 PTD 2260) that elucidates the "doctrine of ripeness", the instant petitions that challenges a show cause notice are pre-mature as the petitioners cannot yet be regarded as aggrieved persons for purposes of Article 199 of the Constitution as no adverse order has been passed against them.

32. As under the Sales Tax Act, 1990, a remedy against decisions by statutory adjudicatory forums lies against a division bench of this Court in its reference jurisdiction, this Court will be loath to exercise its discretionary constitutional jurisdiction to decide a question of law involving interpretation of language used in an SRO which will have the effect of usurping the reference jurisdiction of this Court.

33. The learned counsels for the petitioners have failed to make out a case that the impugned show cause notices are palpably without jurisdiction or suffer from malafide or otherwise fall within the principles summarized in para 29 above, and therefore these petitions are not maintainable and are according dismissed. Given that the question of whether or not the decisions of the Tribunal constitute binding precedent for taxation authorities deciding the fate of show cause notices and

assessment authorities, was a case of first impression this Court does not deem it appropriate to pass any order as to costs.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **18.06.2021**.

JUDGE

Approved for reporting.

Saeed.