

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.3186/2020

Polish Oil and Gas Company, Islamabad, through its Deputy Managing Director.

Vs.

Additional Commissioner Inland Revenue, Audit-II, Islamabad & others.

PETITIONER BY: Hafiz Muhammad Idris and Syed Farid Ahmed Bukhari, Advocates.

RESPONDENTS BY: Syed Ishfaq Hussain Naqvi and Mr. Muhammad Nawaz Gondal, Advocates.

DATE OF HEARING: 24.02.2022.

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BABAR SATTAR, J.- Through this judgment this Court will decide Writ Petitions No.3186, 3187, 3188 & 3189 of 2020 and Writ Petition No.4598 of 2021 as the petitioners are aggrieved by show cause notices issued by the Additional Commissioner Inland Revenue, Islamabad ("**Commissioners**"), under Section 122(9) of the Income Tax Ordinance, 2001 ("**Ordinance**"), read together with Section 122(5A) of the Ordinance.

2. The learned counsel for the petitioners submitted that the Commissioners while issuing the impugned show cause notices exceeded their jurisdiction as they did not give adequate reasoning for disallowing the provisions made by the petitioners in the tax returns and further did not explain how the deemed assessment order is erroneous and prejudicial to the interest of revenue as required by Section 122(5A) of the Ordinance. And

that the Commissioners have essentially exercised their powers to undertake an audit under Section 177 of the Ordinance.

3. The learned counsel for the respondents contended that the petitions were not maintainable as they impugned show cause notices, which were issued by the authority competent to issue such notices under the Ordinance. And the notices included detailed reasoning as to why the Commissioners had concluded that assessment filed by the petitioners was erroneous in so far as it was prejudicial to the interests of revenue. He submitted that law on challenges brought against show cause notices is now settled and relied upon **Messrs Attock Gen Limited vs. Additional Commissioner (Audit), Large Taxpayer Unit, Islamabad and 3 others (2019 PTD Islamabad 692), Messrs Pakistan Oilfields Limited through General Manager vs. Federation of Pakistan through Ministry of Finance and 4 others (2020 PTD Islamabad 110), PKP Exploration Limited and others vs. Federal Board of Revenue through Chairman and others (2021 PTD Islamabad 1644)** and **Commissioner Inland Revenue and others vs. Jahangir Khan Tareen and others (2022 SCMR 92)**.

4. The learned counsel for the parties also furnished arguments on the scope of inquiry that can be undertaken pursuant to Section 122(5A) of the Ordinance, which need not be reproduced here as the petitions can be decided without engaging in an interpretation of the scope of Section 122(5A) of the Ordinance.

5. Pursuant to the impugned show cause notices the Commissioners have granted the petitioners an opportunity to explain as to why the deemed assessment may not be amended in exercise of powers under Section 122(9) of the Ordinance read together with Section 122(5A) of the Ordinance. In exercising such authority, the Commissioners have provided reasons for forming a preliminary opinion that the provisions made by the petitioners in their tax return are to be disallowed and granted the petitioners an opportunity to convince the tax authorities that the tax return as filed, which constitutes deemed assessment, may not be revised.

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

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

Once the Income Tax Commissioner is satisfied on a *prima-facie* basis that a deemed assessment order is erroneous and prejudicial to the interest of revenue, he is required to provide the taxpayer an opportunity of hearing prior to ordering amendment of the assessment. Such inquiry for purposes of Section 122(5A) of the Ordinance, in which the taxpayer is provided an opportunity to convince the tax authority that a case for amendment of assessment under Section 122(5A) of the Ordinance is not made out, doesn't tantamount to exercise of audit powers under Section 177 of the Ordinance. If the contention of the petitioners were accepted every show cause

notice issued in exercise of powers under Section 122(5A) (providing the taxpayer an opportunity to establish through record that the tax return is not erroneous and prejudicial to the interest of revenue and should thus not be amended), would amount to exercise of audit powers. It is in the final order to be passed by the Commissioners at the culmination of proceedings in exercise of authority under Section 122(5A) of the Ordinance read with Section 122(9) of the Ordinance that the Commissioners would record detailed reasons as to why the return has been found to be erroneous and prejudicial to the interest of revenue requiring amendment. And such order would then be appealable under provisions of the Ordinance.

7. Merely because a taxpayer disagrees with the *prima facie* view formed by the Commissioners that there has arisen the need to exercise jurisdiction under Section 122(5A) of the Ordinance, the order affording the taxpayer an opportunity to establish that the grounds for exercise of such jurisdiction are not made out doesn't get tainted by a jurisdictional defect. This Court in its constitutional jurisdiction can only take cognizance of a show cause notice which is palpably and wholly without jurisdiction. After discussion of the law as laid down by the august Supreme Court in relation to bringing a challenge against a show cause notice the circumstances in which a challenge could be brought were detailed by this Court in **PKP Exploration Limited and others vs. Federal Board of Revenue through Chairman and others (2021 PTD Islamabad 1644)** as follows:

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

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

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

8. The law on show cause notices was most recently reiterated by the august Supreme Court in **Commissioner Inland Revenue and others vs. Jahangir Khan Tareen and others (2022 SCMR 92)**, where premature challenge to show cause notices was censured and it was held that, *"the challenge to show cause notices in writ jurisdiction at premature stages and tendency to bypass the remedy provided under the relevant statute is by and large deprecated and disapproved in many dictums laid down in local and foreign judgments in which courts have considered the interference as an act of denouncing and fettering the rights conferred on the statutory functionaries specially constituted for the purpose to initially decide the matter."*

9. This Court is not convinced that the impugned show cause notices have been issued for the collateral purpose of exercising powers vested in tax authority under Section 177 of the Ordinance. It has not been argued that the impugned show cause notices are without jurisdiction for being *coram non judice* or are non-est for being issued for a purpose alien to the Ordinance. The matters in question require no interpretation of any statutory provision at this stage. The impugned show cause notices afford the petitioners an opportunity to be heard instead of undermining their fundamental rights to fair trial and due process. The petitioners can furnish their arguments in relation to scope of inquiry permissible in exercise of jurisdiction under Section 122(5A) of the Ordinance during the show-cause proceedings and/or before the adjudicatory forums provided under the Ordinance in case of an adverse order. If any question

of law regarding such scope emerges from such decisions, it can always be brought before this Court in the reference jurisdiction bestowed on it under the Ordinance.

10. The learned counsel for the petitioners has therefore failed to satisfy this Court that these cases qualify the test under which the Court can be called upon to exercise its judicial review powers in relation to a show cause notice.

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

(BABAR SATTAR)
JUDGE

Announced in the open Court on 17.05.2022.

JUDGE