

HCJD/C-121  
**JUDGMENT SHEET**

**ISLAMABAD HIGH COURT**  
**ISLAMABAD**

**W.P. NO. 4066/2012**

**M/S ATTOCK GEN LIMITED.**

*VERSUS*

**ADDITIONAL COMMISSIONER (AUDIT), LARGE TAXPAYER UNIT,  
ISLAMABAD, & 3 OTHERS.**

Petitioners by : **Mr Shaukat Ali Qureshi, advocate in W.P.  
Nos.4066/2012, 2241/2013, 3896/2013,  
4474/2013 and 307/2014.**

**Hafiz Muhammad Idrees, advocate in W.P.  
Nos.2481/2013, 305/2014 & 306/2014.**

**Mr Nadeem Anjum, advocate in W.P. No.562/2014.**

Respondents by : **Mr. Muhammad Bilal, Mr Saeed Ahmed Zaidi,  
Hafiz Munawar Iqbal, Mr Babar Bilal, Dr. Farhat  
Zafar and Sheikh Anwar ul Haq, advocates.**

Date of Hearing : **09-06-2015.**

**ATHAR MINALLAH, J.-** Through this consolidated judgment, this Court shall decide and dispose of the instant Writ Petition along with the petitions listed in "Annexure-A", as common grievance and questions of law are involved.

2. The facts, in brief, are that the petitioners are juridical persons incorporated under the Companies Ordinance 1984. They have assailed respective show cause notices issued under Section 122(9) read with 122(5A) of the Income Tax Ordinance 2001 (*hereinafter referred to as the 'Ordinance'*). The petitioners had filed their respective returns for the relevant tax years under Section 120(1) of the Ordinance. The impugned show cause notices have been issued in respect of the Workers

Welfare Fund. The petitioners have also assailed the vires of the various amendments made in the Worker Welfare Fund Ordinance 1971 (hereinafter referred to as the "Ordinance of 1971") through the Finance Act 2006 and 2008. It is alleged that as the petitioners fall within the definition of an industrial establishment, defined under Section 2(f) of the Ordinance of 1971 they are, therefore, required to pay the Workers Welfare Fund @ of 2% of the accounting profit for the relevant period. The alleged liability in each case has been specified in the respective show cause notices. The petitioners have assailed the show cause notices on the ground that the amendments made in the Ordinance of 1971 through the Finance Act, 2006 and 2008 are *ultra vires* the Constitution of the Islamic Republic of Pakistan 1973 (*hereinafter referred to as the 'Constitution'*), and consequently the proceedings initiated are also without jurisdiction.

3. The learned counsels appearing on behalf of the petitioners, at the very outset, were asked to assist this Court on the question of maintainability of the petitions under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

4. The learned counsels appearing on behalf of the petitioners have contended that; the petition under Article 199 of the Constitution is maintainable if the vires of the law has been challenged; the petition is also maintainable if the matter involves a dispute in relation to the determination of fiscal rights, and when a question is raised regarding the misapplication of law or abuse of powers by public functionaries, reliance has been placed on the cases "The Burmah Oil Company (Pakistan

Trading) Ltd, Chittagong versus The Trustees of the Port of Chittagong” [PLD 1962 S.C. 113], “Messrs Usmania Glass Sheet Factory Ltd. Chittagong versus Sales Tax Officer, Chittagong” [PLD 1971 S.C. 205], “Messrs Julian Hoshang Dinshaw Trust and others versus Income Tax Officer, Circle XVIII South Zone, Karachi and others” [1992 SCMR 250] and “Attock Cement Pakistan Ltd. Versus Collector of Customs, Collectorate of Customs and Central Excise, Quetta and 04 others” [1999 PTD 1892]. It is contended that the *vires* of the amendments made in the Ordinance of 1971 through the Finance Act 2006 and 2008 have been considered and decided by three different High Courts, namely, the Sindh High Court, Lahore High Court and the Peshawar High Court. It was further contended that the latter two High Courts have held the amendments to be *ultra vires*, while the Sindh High Court has decided otherwise. The learned counsels have also stressed that the question as to the difference between a fee and tax has now been further interpreted by the august Supreme Court in the judgment dated 22-08-2014 in the case of *Federation of Pakistan and another v. M/s Durrani Ceramics and others*. The Supreme Court, in the said judgment, had considered the *vires* of the Gas Infrastructure Development Cess. They have also relied on '*Mir Muhammad Idris v. Federation of Pakistan through Secretary Ministry of Finance*' [PLD 2011 SC 213] and '*Sindh High Court Bar Association through Secretary v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad*' [PLD 2009 SC 789] in support of their contention that the amendments made through Money Bills, as in the case of the Ordinance of 1971, is *ultra vires*. On the question of maintainability of the instant petitions, the learned counsels have argued that the *vires* of

a law has been challenged and, therefore, the petitions are maintainable, despite the fact that show cause notices have been assailed therewith.

5. On the other hand, the learned counsels appearing on behalf of the department have argued that; the show cause notice is not an adverse order; the question of vires of the amendment made through the Finance Act 2006 and 2008 in the Worker Welfare Fund Ordinance 1971 was not a question of first impression at the time when the instant petitions were filed; three High Courts have decided the question of vires; a Full Bench consisting of three Hon'ble Judges of the Sindh High Court has upheld the vires of the amendment made in the law; the Peshawar High Court and the Lahore High Court on the other hand have declared the amendment as ultra vires; the adjudicating officers who have issued the show cause notices are competent to decide the matter in the light of the well reasoned judgments delivered by three High Courts; it is not the case of the petitioners that the respective show cause notices have been issued by officers who lack jurisdiction, nor have they alleged malafide. However, on merits the learned counsels have taken another objection to the efficacy of the proceedings before this Court under Article 199 of the Constitution, as disputed questions are involved and any decision would require calculation of tax, even if it is held that the view taken by the High Courts of Lahore and Peshawar shall prevail. They have, therefore, stressed that the *vires* have already been determined by the various High Courts, therefore, the adjudicating officer may not be deprived of the statutory power to consider the two different views and, after hearing the petitioners, pass a speaking order. It has further been contended that

allowing the petition in the circumstances would weaken the statutory forums and, thereby circumvent the legislative intent.

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

7. The question before this Court is whether the petitions should be entertained when, admittedly, the question of vires relating to amendments made in the Ordinance of 1971 through various Finance Acts is no more a question of first impression, particularly when only respective show cause notices have been issued and there is no adverse order in the field. It is also not the case of the petitioners that the issuance of the respective show cause notices is based on malafide, or that the respective officers who exercised power had no jurisdiction under the relevant provisions.

8. It is noted that three High Courts have already considered and delivered exhaustive judgments on the question of the vires of the amendments made through the Finance Act 2006 and 2008. The Sindh High Court in *M/s Mutual Funds* case (2010) 102 Tax 132 (H.C. Kar.) also reported as 2010 PTD 1924, and in *M/s Shahbaz's* case (2013) 107 Tax 59 (H.C. Kar.) also reported as 2013 PTD 969, after exhaustively examining the law adjudged the impugned levy to be a tax and, therefore, validated the introduction and enactment thereof through a Money Bill. The latter judgment of the Sindh High Court has been delivered by a Full Bench of the Court. The Lahore High Court, on the other hand, in *Pakistan Chrome Tannery's* case (2012) 105 Tax 81 (H.C. Lah.) also reported as 2011 PTD

2643 and *M/s Azgards case (2014) 109 Tax 57 (H.C. Lah)* also reported as "M/S Azgard Nine Ltd. Versus Pakistan through Secretary and others" PLD 2013 Lahore 282, has declared the impugned levy, made through the amendments in the Ordinance of 1971 vide the Finance Act 2006 and 2008 as a fee and not a tax, and thus struck down the legislation as being *ultra vires*. The Peshawar High Court, through judgment dated 29-05-2014 in *Associated Industries Limited, Amangarh Industrial Area, Nowshera and others v. Federation of Pakistan* in W.P. No.1425/2010, after discussing in detail the judgments of the Sindh High Court and the Lahore High Court and other precedent law, declared the amendments made through Money Bills as *ultra vires*.

9. It is, therefore, obvious that three distinct High Courts have delivered exhaustive and well reasoned judgments regarding the vires of the amendments made in the Worker Welfare Fund Ordinance 1971. It is, therefore, not a question of first impression. It also cannot be assumed that the person vested with powers under the Ordinance, and who will be adjudicating the respective show cause notices, would not consider or take into consideration the judgments of the superior courts, or would not be able to appreciate and comprehend the exhaustive and eloquent reasoning. The judgments of the three High Courts are in the field, as this Court has been informed that none of them have been suspended, though leave has been granted by the august Supreme Court in each case. It is, therefore, in this background that this Court has to decide whether to proceed with the petitions, or to give effect to the legislative intent by allowing the statutory forums created under the Income Tax Ordinance

2001 and conferred with powers to adjudicate matters entrusted to them by an Act of the Parliament.

10. In all the petitions the respective petitioners have been issued show cause notices by officers having jurisdiction under Section 122(9) read with Section 122(5A) of the Ordinance. It is not disputed that the two High Courts have held the amendments made in the Ordinance of 1971 as *ultra vires*, while the Sindh High Court has held otherwise.

11. While exercising jurisdiction under Article 199 of the Constitution, the powers of a High Court are circumscribed by certain limitations and trappings, as expressly provided therein. The petitioner invoking jurisdiction has to satisfy the Court that it comes within the fold of an 'aggrieved party'; there is no other adequate remedy provided by law; the person against whom relief is being sought satisfies the test laid down in sub article 5 of Article 199 of the Constitution, and no disputed question of fact is involved.

12. A person is aggrieved if rights are infringed or an adverse order has been passed affecting or threatening to affect rights. The question for this Court to answer, therefore, is whether a show cause notice can be treated as an adverse order. If the answer is in the negative, then under what circumstances may a show cause notice make a person an aggrieved party for the purposes of Article 199 of the Constitution.

13. We may start with the determination of the nature of the instrument known as a 'Show Cause Notice'. The Black's Law Dictionary, 8<sup>th</sup> Edition, defines the '*show cause*' as "*to produce a satisfactory explanation or excuse, usu. in connection with a motion or application to a Court*". Likewise, '*notice*' is defined as "*legal notification required by law or agreement, or imparted by operation of law as a result of some fact (such as the recording of an instrument); definite legal cognizance, actual or constructive, of an existing right or title. A person has notice of a fact or condition if that person (1) has actual notice of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as official filing or recording*". 'Due notice' is defined as "*sufficient and proper notice that is intended to and likely to reach a particular person or the public; notice that is legally adequate given the particular circumstance*". 'Reasonable notice' is defined "*notice that is fairly to be expected or required under the particular circumstances*". Words and Phrases, Vol. 28-B, Permanent Edition, inter alia, describes a 'notice' as meaning 'intelligence by whatever means communicated; information; knowledge; a constitutional requirement of due process, which includes allegations, opportunity to answer, and trial according to some settled course of procedure'.

14. A show cause notice is essentially an instrument whereby an authorised person under the law informs a person regarding allegations, material or facts which may form the basis for proceedings against such person, and may eventually culminate in an adverse order. A show cause notice is indeed the first requirement of compliance with 'due process' to inform the person against whom proceedings are intended to be initiated.



The purpose is to put the person to notice by giving sufficient information so as provide an adequate opportunity of submitting an explanation. An authorised person empowered under the law, after issuing a show cause notice, is under a mandatory obligation to provide a purposive and meaningful opportunity of hearing, depending on the facts and circumstances in each case, allow the person proceeded against to produce evidence and where necessary an opportunity of cross examination. After incorporation of Article 10-A of the Constitution the aforementioned requirements have become an integral part of the fundamental right of 'due process'.

15. Show Cause Notice is, therefore, the first step of the proceedings in compliance with the mandatory requirements of due process. By no stretch of the imagination can a show cause notice be treated or construed as an adverse order, so as to make a person an aggrieved person or party within the context of Article 199 of the Constitution. It is, rather, to enable the person, the subject, to rebut the allegations contained in the show cause notice. If satisfied with the explanation, the authorised officer is under a statutory duty to vacate the show cause notice and terminate the proceedings. However, the only two exceptions 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 there under. It is noted that difficulty may arise if the ground of challenge is malafide as, unless the facts of a case are clearly admitted, a petition under Article 199 may still not be maintainable because of the settled law that disputed questions of fact cannot be resolved under the said jurisdiction. What if a show cause notice has been issued under a law, the vires whereof are challenged by invoking the jurisdiction under Article 199 of the Constitution? The petition, in the discretion of the Court, may be maintainable to the extent of the challenge to the vires, but what about the show cause notice? It is settled law that when the vires of a law are challenged then an injunctive order cannot be passed, and reliance in this regard is placed on "Federation of Pakistan versus Aitzaz Ahsan and another" [PLD 1989 SC 61]. In such an event the proceedings pursuant to the issuance of the show cause notice will continue. It would be pertinent to briefly examine the principles enunciated by the precedent law.

16. The jurisdiction under Article 199 of the Constitution can be exercised only if an aggrieved party can demonstrate that an adequate remedy under the law is not available, or that the same is illusory. Reliance in this regard is placed on '*Muhammad Hussain Kazi v. Govt. of the Punjab*' [PLD 1983 SC 187], '*Allah Warayo Chana v. Aijaz Ahmad Khari*' [1999 SCMR 1880] and '*Collector of Customs, Customs House, Lahore v. S.M. Ahmad & Company (Pvt.) Limited, Islamabad*' [1999 SCMR 138]. The august Supreme Court has consistently held and observed that the tendency to bypass statutory remedies, or to circumvent legislative intent by pressing into service the constitutional jurisdiction of the High

Court is to be discouraged. Reliance is placed on *Commr. of Income Tax v. Hamdard Dawa Khana (Waqf) Pak'* [PLD 1992 SC 847] and '*Commissioner of Income Tax versus Eli Lilly Pakistan (Pvt.) Ltd.*' [2009 SCMR 1279]. In '*Muhammad Akram versus The State*' [PLD 1996 SC 246] it has been observed that the powers and jurisdiction under Article 199 of the Constitution must be used sparingly, particularly when the statute provides for alternate remedies. In '*Commissioner of Income Tax versus Eli Lilly Pakistan (Pvt.) Ltd.*' [2009 SCMR 1279] the august Supreme Court has emphasised that the rule barring jurisdiction in the case of exercising powers under Article 199 of the Constitution when a show cause notice has been assailed is not an absolute rule, but rather a rule by which the jurisdiction is regulated, reference in this regard may be made to "Gatron (Industries) Ltd. Versus Government of Pakistan and others" [1999 SCMR 1072] and "The Murree Brewery Co. Ltd. Versus Pakistan through Secretary to GOP, Works and Division and 02 others" [PLD 1972 SC 279]. The exercise of jurisdiction in the case of a show cause notice would, therefore, be justified when the impugned show cause notice is palpably without jurisdiction and/or *malafide*, or has been served in an oppressive manner. When the legislature has provided a machinery for enforcement of a right, the party complaining of a breach must first avail the remedy provided under the relevant statute. In the first instance the person, the tax payer, ought to approach the hierarchy and the forums provided for under the statute "The Tariq Transport Company, Lahore versus The Sargodha-Bhera Bus Service, Sargodha, etc" [PLD 1958 SC 437] and "M/s Amin Textile Mills Pvt. Ltd. Versus Commissioner of Income Tax and 02 others" [2000 SCMR 201]. What would be the extent of the question of jurisdiction and would any

jurisdictional error, e.g. an erroneous interpretation of the law, also render a show cause notice amenable to the jurisdiction under Article 199 of the Constitution? The august Supreme Court in '*Muhammad Ismail v. Fazal Zada*' [PLD 1996 SC 246] has divided jurisdictional errors into three categories i.e. want of jurisdiction, excess of jurisdiction and wrong exercise of jurisdiction. The difference has been succinctly illustrated in the said judgment, and, therefore, on the same analogy the jurisdiction under the Ordinance may be discussed. If an authority having no power to decide a case under the statute issues a show cause notice, it will tantamount to lack or want of jurisdiction e.g. the power vests in the Commissioner but a show cause notice is issued by an Assistant Commissioner. Where there is limitation of pecuniary jurisdiction and a show cause notice has been issued by an officer/authority in excess of his/her pecuniary jurisdiction, it will be termed as having acted in excess of jurisdiction. However, if an authority has both pecuniary as well as power to exercise jurisdiction, but misinterprets a law or provision of the statute, then it would be wrong exercise of jurisdiction. The latter category of jurisdictional error would not be amenable to the jurisdiction under Article 199. As a corollary, not every jurisdictional error would make a show cause notice amenable to the jurisdiction of this Court under Article 199 of the Constitution. It could not be presumed that the authority vested with powers by the legislature under the relevant statute would act otherwise than in accordance with law. There is always a presumption that the authorities vested with powers under the statute shall exercise the same in accordance with the objects and purposes of the statute, and by strictly adhering to the settled principles. It could also not be assumed that the said authority would neither give a fair and

reasonable hearing or would act in a manner prejudicial to the interests of a taxpayer.

17. This Court is also guided by the principles laid down in '*Tariq Transport Company Lahore v. Sargodha Bhera Bus Service Sargodha*' [PLD 1958 SC 437] to the effect that the High Court, while exercising jurisdiction under Article 199 of the Constitution, ought to exercise restraint, so as not to create distrust in statutory forums and tribunals of competent jurisdiction, and avoid casting an undeserved reflection on the honesty and competence of the authorities vested with powers and jurisdiction, and thereby defeat the legislative intent.

18. It would be pertinent to refer to the precedent law expounded by the Supreme Court of India with regard to entertaining constitutional petition when the challenge is against a show cause notice. It is well settled principle propounded by the Court that ordinarily no writ lies against a show cause notice. It has been a consistent view of the Court in India that a mere show cause notice is not an adverse order and, therefore, the petition invoking jurisdiction against a show cause notice is considered premature. The rational or reason is discussed in various judgments. It is noted that the authority after hearing the subject and considering the explanation or reply, if satisfied, may drop the proceedings. The only two exceptions to the rule that ordinarily writ will not be issued against a show cause notice are, (a) when the Court is satisfied that the show cause notice is totally non est. i.e. want of jurisdiction of the issuing authority and (b) issued malafidely e.g. to merely harass the subject. Reference in this regard may be made to

"Union of India and another versus Kunisetty Satyanarayana" (2006) 12 Supreme Court Cases 28, "Secretary, Min. of Defence & Others versus Prabhash Chandra Mirdha" [AIR 2012 SC 2250], "Union of India versus Hindalco Industries" (2003) 5 Supreme Court Cases 194, "Special Director and another versus Muhammad Ghulam Ghouse and another" (2004) 3 Supreme Court Cases 440 and "Union of India & another Versus Kunisetty Satyanarayana" [AIR 2007 SC 906].

19. In the light of the settled principles, it may be concluded as follows;

- (i) Show cause notice is not an adverse order unless it could be clearly shown to the satisfaction of the Court that it has been issued by an authority not vested with jurisdiction or it was issued for malafide reasons.
- (ii) The exception relating to want of jurisdiction does not include every jurisdictional error. A wrong exercise of jurisdiction or interpretation of the law cannot be treated as want of jurisdiction.
- (iii) Constitutional jurisdiction is exercised if the Court is satisfied that the person is an 'aggrieved party' within the context of Article 199 of the Constitution and no adequate remedy is provided by law. If adequate statutory remedies are provided under the relevant statute, it is to be taken into consideration while exercising discretion under Article 199 of the Constitution.

- (iv) By passing or circumventing statutory forums is to be discouraged.
- (v) The approach should be to advance the object and purpose of a statute and every effort made to uphold the sanctity of the legislative intent rather defeating it.

20. In the light of the above discussion, this Court has two options, either to proceed with the petitions and decide the vires of the amendments made in the Ordinance of 1971 or to give effect to the legislative intent behind the Ordinance by refusing to interfere so that the statutory authorities and forums may proceed with the respective impugned show cause notices. In the instant petitions the latter course would be just and proper. The respective adjudication authorities have the benefit to be guided by the well reasoned and exhaustive judgments of three distinct High Courts. It is expected that they shall afford a reasonable opportunity of hearing to the petitioners and proceed to decide the respective show cause notices in accordance with law, particularly taking into consideration the law and principles enunciated by three distinct High Courts in their respective judgments.

21. The petitions are, therefore, disposed of in the above terms.

**(ATHAR MINALLAH)**  
**JUDGE**

Announced in open Court on \_\_\_\_\_

**JUDGE**

*Asad K/*\*

*Approved for reporting.*

**ANNEXURE-A**

S. No.	W.P. No.	Title
1.	307/2014	M/s Attock Gen Limited v. The Addl. Commissioner IR, LTU, Islamabad
2.	562/2014	M/s Orient Power Company (Pvt.) Ltd. v. The Addl. Commissioner IR, LTU, Islamabad.
3.	3896/2013	M/s Attock Petroleum Limited v. The Deputy Commissioner, etc.
4.	2241/2013	M/s Attock Gen. Ltd. V. The Addl. Commissioner IR, LTU, Islamabad
5.	2481/2013	M/s Saif Power Ltd. Vs. Officer Inland Revenue, RTO, Islamabad.
6.	4474/2013	M/s Attock Petroleum Limited v. Deputy Commissioner, LTU, Islamabad.
7.	305/2014	M/s Uch II Power Company (Pvt.) Ltd. vs. Addl. Commissioner, Inland Revenue, LTU, Islamabad.
8.	306/2014	M/s Uch II Power Company (Pvt.) Ltd. vs. Addl. Commissioner, Inland Revenue, LTU, Islamabad