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Judgment Sheet

**IN THE LAHORE HIGH COURT
MULTAN BENCH MULTAN
JUDICIAL DEPARTMENT**

Case No: W. P. No. 1063 of 2012.

Northern Power Generation **Versus** Federation of Pakistan etc.
Company Limited.

JUDGMENT

Date of hearing	11.03.2015.
Petitioners by:	M/s Sh. Zafar-ul-Islam, Niaz Ahmad Khan and Tanveer Ahmad, Advocates for the petitioners in W. P. Nos. 9756, 9758, 9760 of 2011 and 1063, 9340 of 2012. Malik Mumtaz Hussain Khokhar, Advocate for the petitioners in W. P. Nos. 7120, 14459 of 2011, 2852, 3094, 3095, 3485, 3486, 5136, 5139, 5140, 5141, 8466, 8706, 9416 of 2012, 7922 of 2013 and 6131, 6132, 6133 of 2014. Ch. Muhammad Anwaar, Advocate for the petitioner in connected W. P. No. 5480 of 2012.
Respondents by:	M/s Agha Muhammad Akmal Khan and Tariq Manzoor Sial, Advocates for the respondents in W. P. Nos. 7120, 9756, 9758, 9760 of 2011, 1063, 3094, 3095, 3485, 3486, 5136, 8706, 9340 of 2012. Syed Khalid Javaid Bukhari, Advocate for the respondents in W. P. Nos. 5139, 5140, 5141 of 2012. Mian Asghar Ali Gurdaspuri, Advocate for the respondents in W. P. Nos. 6131, 6132, 6133 of 2014. Mr. Khalid Khan, Additional Commissioner Inland Revenue, Sahiwal Zone, RTO Multan.

Shahid Jamil Khan, J:- This judgment shall also decide connected writ petitions.

2. Facts, common in all the petitions, are that petitioners have challenged powers of Additional Commissioner to issue Show Cause Notice under Section 122(5A) of the Income Tax Ordinance, 2001 (“**Ordinance**”), after insertion of subsection (5AA) in the Section 122

by Finance Act, 2010. Submissions made by petitioner's side are as under:-

Mr. Sh. Zafar-ul-Islam, Advocate, learned counsel for the petitioners submits that very issuance of the notices is without jurisdiction; after the insertion of subsection (5AA) only Commissioner has and deem to had powers to amend or further amend an assessment order under subsection (5A) of Section 122.

Ch. Muhammad Anwaar, Advocate for the petitioner submits that powers under Section 122 (5A) of the Ordinance can only be invoked in an order passed by any Authority by applying his mind. Explains that powers under Section 122 (5A) cannot be invoked on an order passed under Section 120 of the Ordinance.

Malik Mumtaz Hussain Khokhar, Advocate had adopted the arguments by Sh. Zafar-ul-Islam, Advocate. He adds that the powers given under a Statute can be exercised only by a person to whom it is given and the powers cannot be further delegated.

3. These petitions are opposed from the Revenue side.

Mr. Khalid Khan, Additional Commissioner Inland Revenue, Sahiwal Zone, RTO, Multan has argued, with permission of the Court. Submits that by insertion of subsection (5AA), in Section 122, it is simply clarified that subsection (5A) is invocable for a part of assessment order that is not subject matter in an appeal. Argues that no change is brought to the powers of Commissioner, including its powers of delegation under Section 210.

Agha Muhammad Akmal Khan, Advocate for the respondent-department has adopted the arguments made by Mr. Khalid Khan, Additional Commissioner. However, adds that the provisions of subsection (5AA) are not independent, rather by inserting this subsection, powers of Commissioner to be exercised under subsection (5A) of Section 122 of the Ordinance are clarified.

Syed Khalid Javaid Bukhari, Advocate, submits that these petitions, against issuance of show cause notice, are not maintainable in view of various judgments by August Supreme Court of Pakistan.

4. Arguments heard, record perused.

5. The provisions of subsection (5AA) of Section 122 are reproduced hereunder:-

“122. Amendment of assessments.--

(5AA) In respect of any subject matter which was not in dispute in an appeal the Commissioner shall have and shall be deemed always to have had the powers to amend or further amend an assessment order under sub-section (5A).”

6. Plain reading of the language, *prima facie*, supports the assertions made by Revenue side that subsection (5AA) is clarificatory in nature. Nevertheless, conclusive findings on interpretation of the subsection are being deliberately avoided. It is noticed that exercise of powers by Additional Commissioner for invoking subsection (5A) of Section 120 has been raised and decided by Appellate Tribunal Inland Revenue in number of appeals, against which Tax References are pending before this Court for opinion in exercise of powers under Section 133 of the Ordinance. Petitioners have not challenged vires of any provision of the Ordinance. The question of jurisdiction to issue show cause notice is based on interpretation of the provisions in question. For which Revenue has a different interpretation.

In my opinion, if this Court ventures to interpret any provision of the Ordinance in exercise of its Constitutional jurisdiction, it would amount to bypass the whole statutory hierarchy provided under the Ordinance. Hon’ble Supreme Court of Pakistan in Messrs Central Insurance Co. and others Vs. The Central Board of Revenue, Islamabad and others (1993 SCMR 1232), while holding that any interpretation of a statutory provision by Central Board of Revenue (now Federal Board of Revenue) cannot be treated as judicial interpretation, also held **“The interpretation of any provision of the Ordinance can be rendered judicially by the hierarchy of forums**

provided for under the provisions of the Ordinance, namely, the Income Tax Officer, Appellate Assistant Commissioner, Appellate Tribunal, the High Court and the Supreme Court and not by Central Board of Revenue.”

As per Hon’ble Courts dictum, the Income Tax Officer (Taxation Officer) is competent to interpret the provisions of Ordinance, therefore, it would be appropriate for the petitioners to raise all these objections before the Taxation Officer, in their respective replies to the impugned Show Cause Notices.

7. August Supreme Court of Pakistan has enunciated, in a series of its decisions, on the issue of constitutional jurisdiction to be exercised by High Court, against Show Cause Notice or an order where statutory remedy is available. Tracing back the history would bring to our notice, the expression by Apex Court in Nagina Silk Mill Lyallpur v. The Income Tax Officer, A-Ward, Lyallpur (PLD 1963 S.C. 322), where it was held that *in case of absence or excess of jurisdiction writ of certiorari may be granted even though the right of statutory appeal had not been availed of*. Latest case in favour, to exercise jurisdiction by High Court is Commissioner of Income Tax v. Messrs Eli Lilly Pakistan (Pvt.) Ltd (2000 PTD 1392). The Apex Court followed its earlier decision in Muree Brewery Case (PLD 1972 SC 279) and reiterated :-

“...56. It was further held that the rule that the High Court would not entertain a writ petition when other appropriate remedy was yet available was not a rule of law barring jurisdiction, but a rule by which the Court regulated its jurisdiction. It was noted that one of the well recognized exceptions to the general rule was a case where an order was attacked on the ground that it was wholly without authority. Where a statutory functionary acted mala fide or in a partial, unjust and oppressive manner, the High Court in the exercise of its writ jurisdiction had power to grant relief to the aggrieved party.”

However in a subsequent judgment, Messrs Ocean Pakistan Ltd. V. Federal Board of Revenue, Islamabad and others (2012 PTD 1374) the Hon’ble Court has further elaborated the general rule and

exception for exercise of constitutional jurisdiction by High Courts.

Relevant part is reproduced for ease of reference:-

“7. Learned counsel for the petitioner, when confronted with the preliminary objections raised by the learned counsel for the respondent has relied upon the case of *Commissioner of Income Tax V. Messrs Eli Lilly Pakistan (Pvt.) Ltd.* (2009 SCMR 1279) and read out part-56 from the judgment; the substance of para-56 is that this Court, while discussing the observation made earlier in the case of *Commissioner of Income Tax v. Hamdard Dawakhana (Waqf) PLD 1992 SC 874*) i.e. “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” has approved the same by further holding that “when the impugned order/action was palpably without jurisdiction and/or mala fide, forcing the aggrieved person in such a case to approach the forum provided under the relevant statute, may not be just and proper”. It is further held in the judgment (*supra*) that “where a statutory functionary acted in mala fide or in a partial, unjust and oppressive manner, the High Court in exercise of its writ jurisdiction had power to grant relief to the aggrieved party.

8. Some of the judgment where the exercise of jurisdiction is deprecated are;

In *Deputy Commissioner of Income Tax/Wealth Tax, Faisalabad and others Vs. Messrs Punjab Beverage Company (2007 PTD 1347)*, while observing that the jurisdiction cannot be invoked for convenience, it was held:-

“.....4. We have held in the judgment that such practice is to be deprecated because if merely on the basis of show-cause notice proceedings are started then in such position department would never be in a position to proceed with the cases particularly the recovery of revenue etc.”

In *Messrs H.M. Abdullah v. The Income Tax Officer, Circule V, Karach and 2 others (1993 SCMR 1195)* it is observed that:-

“...5. 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.”

AC Ahram Builders (Pvt.) Ltd V. Income Tax Appellate Tribunal (1993 SCMR 29) the Hon’ble Court held as under:-

“... 9. 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 malafide.”

In Income-Tax Officer and another V. M/s. Chappal Builders' case (1993 SCMR 1108) the August Court withdrew its leave granting order to observe:-

“When after considerable arguments we had already reached the above conclusion and had also announced it and the consequential dismissal of the appeals was yet to be announced, the learned counsel for the appellants brought to our notice that the respondent in this case approached the High Court in its writ jurisdiction without seeking and exhausting the statutory remedies. In several of the very recent judgments we have not approved in such situation the interference by the High Court in tax matters, when the normal course being adopted by almost all the High Courts in the matters other than tax, rule of alternate remedy is being followed.

In the above extraordinary position when we had made part announcement, there is no alternative left except to withdraw the leave grant order and disposed of the appeal. We order accordingly, with no order as to costs.”

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 sub-section (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.

10. These petitions, questioning jurisdiction to issue show cause notices, on the basis of interpretation of statutory provision, are held not maintainable. However, the Taxation Officer/ Commissioner is directed to take up all the objections taken or to be taken before him in reply to the show cause notice and decide through speaking order.

11. The petitions being not maintainable are **Dismissed**.

12. For the reasons given in this judgment, the writ petitions, detailed hereunder, are also dismissed for the same reasons.

W.P. Nos. 7120, 9756, 9758, 9760, 14459 of 2011, 2852, 3094, 3095, 3485, 3486, 5136, 5139, 5140, 5141, 5480, 8466, 8706, 9340, 9416 of 2012, 7922 of 2013 and 6131, 6132, 6133 of 2014.

(Shahid Jamil Khan)
Judge

APPROVED FOR REPORTING

Judge

A.W.