ORDER SHEET
HIGH COURT OF SINDH AT KARACHI

C.P.Nos.D-5956, 5957, 5958, 5959, 5960, 5961, 5962, 5963 & 5964 OF 2018

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before:-
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Agha Faisal

1. Dr. Seema Irfan & others (in C.P. No.D-5956/2018)
2. Dr. Nazia Riaz & others (in C.P. No.D-5957/2018)
3. Dr. Khalid Samad & others (in C.P. No.D-5958/2018)
4. Dr. Aamir Hameed Khan & others (in C.P. No.D-5959/2018)
5. Tashfeen Ahmed & others (in C.P. No.D-5960/2018)
6. Kauser Jabeen & others (in C.P. No.D-5961/2018)
7. Iffat Ahmed & others (in C.P. No.D-5962/2018)
8. Tariq Moatter & others (in C.P. No.D-5963/2018)
9. Husnain Zafar & others (in C.P. No.D-5964/2018)....Petitioners

Versus

Federation of Pakistan & others.....Respondents

Date of hearing: 06.03.2019

M/s. Ovais Ali Shah and Aamir Khosa Advocate for the petitioners.

Mr. Kafeel Ahmed Abbasi, Advocate for the respondents (FBR)

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Muhammad Ali Mazhar, J: These Constitution Petitions have been brought to challenge show cause notices issued to the petitioners individually by the Additional Commissioner, Range-I, Zone-I, RTO III, Inland Revenue for the Tax Year 2012.

2. The short-lived facts of the case are that the petitioners are teachers/researchers at the Agha Khan University and paying tax liabilities in accordance with law. The terms and conditions of employment in the role of teachers and researchers are assimilated and encompassed in the appointment letters. Being

salaried person, tax is deducted by Agha Khan University at the time of payment of salary. The petitioners filed Tax returns for the Year 2012 by virtue of Section 120(1) of the Income Tax Ordinance, 2001 that were deemed as assessment orders. On the word of petitioners as full time teachers and researchers, they were entitled to reduction of tax under clause 1(2) of Part III of the Second Schedule to the Ordinance. Keeping in mind this provision, the withholding tax deducted by Agha Khan University was also adjusted so that the total amount of withholding tax against salary was reduced by the percentage allowed by clause 1(2) of Part III of the Second Schedule. In the show cause notices issued under Section 122 (5A) of the Ordinance, the Additional Commissioner has questioned the claim of rebate under clause 1(2) of Part III of the Second Schedule to the Ordinance. He has also called upon to produce employment contract, salary slips and bank statements.

3. The Commissioner Inland Revenue filed the comments with the standpoint that the petitioners are unlawfully claiming the rebate on tax at the rate of 75% of their income under sub clause (2) of clause (1) of Part-III of Second Schedule of the Income Tax Ordinance, 2001. It was further contended that the impugned notices have been issued as per law. The petitioners may join the proceedings and contest the same but the petitions against the show cause notices are not maintainable.

4. The learned counsel for the petitioners argued that the impugned Notices are without jurisdiction and liable to be struck down. The issue of rebate has already decided in the case of Agha Khan University. The order of the Commissioner (Appeals) has not been appealed. The Show Cause Notices have been issued as if the respondent No.3 wants to conduct an enquiry and audit which is nothing but a roving exercise. The thrust and impetus of argument was that the powers to conduct enquiry was conferred

under Section 122 (5A) through Finance Act 2012 which was off course applicable for Tax Year 2013. The Finance Act, 2012 did not have retrospective application. It was further averred that the tax department can only proceed after conducting an audit under Section 177 of the Ordinance. In support of this contention, the learned counsel referred to case of **Allied Engineering Vs. Commissioner of Income Tax [2015 PTD 2562] & Messrs.' Kurdistan Vs. Commissioner Income Tax [2014 PTD 339].**

5. The learned counsel further argued that the respondent No.3 has previously taken up the same issue with respect to Tax Year 2010 and 2011. The petitioners contested the same before the departmental hierarchy. The assessing officer passed assessment orders against the petitioners and held that the rebate had been incorrectly claimed. The petitioners preferred appeals to the Commissioner whereby partial relief was granted, however it was further held that the rebate had been incorrectly claimed with respect to lump sum clinical incentives. The petitioners then preferred appeals to the Appellate Tribunal, Inland Revenue against the findings with respect to lump sum clinical incentives. It was further contended that during pendency of these petitions, the Appeals have been decided against the petitioners and the petitioners have filed ITRA which are pending in this court.

6. The learned counsel for the FBR argued that the Appellate order passed in respect of employer M/s. Agha Khan University for the tax year 2012 has no relevance with the assessment proceedings initiated u/s 122 (5A) against the alleged employees of the respondent No.3. He further argued that M/s. Agha Khan University had appealed against the order passed u/s 161 which pertains to monitoring of withholding taxes, however, the proceedings initiated under section 122 (5A) are assessment proceedings against the employees which are entirely different in nature. It was further contended that in case of petitioners there

is no need to make any enquiry as the deemed assessment orders were found erroneous and prejudicial to the interest of revenue. The apprehension of undue hardship is baseless. The proceedings were initiated under section 122 (5A) pertaining to tax year 2012 due to limitation of time. The clinical supplement and lump sum clinical incentive cannot be termed as part of salary as the lump sum clinical incentives was never part of employment contract; the amount of above two components vary from time to time meaning thereby the same are variable components hence the same cannot be the part of salary in terms of the definition of employment as defined under Section 2 of Clause (22) of Income Tax Ordinance 2001 which grants reduction in tax liability only to fulltime teacher or researcher; employment in a non-profit education or research institution and income should be derived under the head of salary. In support of this contention, he referred to case **Commissioner of Income Tax versus M/s. Riverside Chemicals Pvt. Ltd. (PLD 2008 SC 446)**

7. Heard the arguments. The show cause notices were issued individually to the petitioners under Section 122 (9) to amend assessment under Section 122 (5A) of the Income Tax Ordinance, 2001 for the tax year 2012. In the show cause notices the Additional Commissioner-IR referred to e-filing of income tax return for the tax year 2012 as deemed to be assessment order under Section 120 (1) of the Income Tax Ordinance, 2001. The petitioners were informed that the perusal of return and withholding statement reveals that the assessment order was erroneous as well as prejudicial to the interest of revenue on some discrepancy such as the tax liability was reduced by 75% as rebate under sub-clause (2) of clause (1) of Part-III of Second Schedule which the petitioners were not entitled to claim. The petitioners were also communicated that as part of major duties

and responsibilities the petitioners do not enjoy the status of full time teacher or researcher which is one of the basic conditions for claiming the rebate under the aforesaid clause. Moreover, the petitioners also declared other incomes in addition to their salaries, therefore, the Additional Commissioner-IR cogitated and ruminated in the show cause notices that the *"other income"* is basically earned by the petitioners from *"clinical work and surgical procedures"* which may be treated as professional/business income. After describing some more details in the show cause notices, the petitioners were called upon to explain as to why the assessment order may not be amended under Section 122 (5A) of the Ordinance. The reply was sought through supporting documents such as employment contract and salary slips for the with complete bank statement(s) for the relevant tax year.

8. As far as this argument developed by the learned counsel for the petitioners that the similar issue has been conclusively decided by the Commissioner (Appeals), therefore, the issuance of show cause notices is unwarranted under the law. The copy of attached order unequivocally and unambiguously expresses that the order was passed on 28.02.2013 in the appeal filed by Aga Khan University. The order point towards the arguments of Appellant Representative that rebate was allowed only to the faculty members who conducted clinics at the AKU which involved the students and principals at all stages where the employees handled the patients. Such employees of AKU were bound not to engage in private practice. On this line of reasoning, the Commissioner Inland Revenue (Appeals-IV), Karachi held that the case has to be considered in the perspective of the activity of imparting knowledge at various levels in a medical profession which beyond doubt cannot be completed without meeting the essential teaching at clinics/hospitals and any consequential income generated during this exercise in the form of patient charges, surgeries etc., and remuneration of an employee

determined on such basis does not change the character of the income so the full time teachers/researchers are entitled to claim rebate under clause (2) of Part III of Second Schedule to the Ordinance. So far as the same heated discussion for the tax year 2013 onward, the learned counsel for the petitioners self-confessed that the Appellate Tribunal Inland Revenue have dismissed the appeals of the petitioners and now the ITRA filed by the same petitioners are pending in this court.

9. In the show cause notices, the department has raised very crucial and substantial query whether the petitioners are performing the duties as full time teachers or researchers which is an essential and indispensable condition for the claim of rebate with another bone of contention whether they are also earning from clinical work and surgical procedures which cannot be treated as a part of salary but it is income from profession/business income.

10. A momentary look to Section 122 of the Income Tax Ordinance deciphers that it germane to amend the assessments. Sub-Section (5) was substituted by the Finance Act, 2003, whereas Sections 5A and 5B were also inserted by the Finance Act, 2003, however, the words ***"after making, or causing to be made, such enquiries as he deems necessary"*** were inserted under Sub-section 5A by the Finance Act, 2012 assented on 26.06.2012, so what is the difference and divergence between the original text of Section 5A and after insertion of the aforesaid words, the simple distinction can be drawn that earlier under sub-section 5A, it was provided that ***"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. After insertion of the aforesaid words, now sub-section 5A is read as under:

> **"Subject to sub-section (9), the Commissioner may, *after making, or causing to be made, such enquiries as he deems necessary, 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." [emphasis applied]**

11. According to learned counsel for the petitioners, the amendments made in sub-section 5A will be applicable to tax year 2013, hence the Additional Commissioner-IR could not have any power or justification to issue show cause notices under Section 5A for holding any inquiry which powers were conferred and vested in sub-section 5A by virtue of insertion through Finance Act, 2012, whereas the counsel for the tax department argued that the Additional Commissioner-IR has not initiated any inquiry but the petitioners were confronted on the basis of already available record to explain their position as the powers to amend could be exercised after confronting the matter to the petitioners and providing an opportunity of hearing to them.

12. The learned counsel for the petitioners referred to the case of **Kurdistan Trading Company vs. Commissioner Inland Revenue reported in 2014 PTD 339** in which the learned Division Bench of this court held that normally amendments introduced in fiscal statutes through Finance Act apply prospectively in the year in which it has been inserted unless some retrospective effect is given by the legislature. In the cases where the amendment introduced is remedial and beneficial in nature, it has to be given retrospective effect and also to apply to all pending cases on the date of amendment/enactment as well unless some prospective effect is given by the legislature or it is made prospective by its implication. **[Reference: Commissioner**

of Income Tax vs. Shahnawaz Ltd. (1993 SCMR 73) and Commissioner of Income Tax, Karachi vs. Messrs.' B.R.R. Investment (Pvt.) Ltd., Karachi (2011 PTD 2148). The learned counsel further referred to the case of **Messrs.' Allied Engineering Services Ltd. vs. Commissioner of Income Tax (2015 PTD 2562)** in which the learned Division Bench being fortified with dictum laid down in the case of **Commissioner Income Tax v. Messrs.' Eli Lily Pakistan (Pvt.) Ltd. (2009 SCMR 1279)** held that the Appellate Tribunal Inland Revenue was not justified to hold that enactment of Section 122 (5A) of Income Tax Ordinance, 2001 vide Finance Act, 2003 was applicable to tax year, 2003 more particularly when the Appellate Tribunal Inland Revenue held that amendment introduced through Finance Act, 2003 by inserting Section 122 (5A) of Income Tax Ordinance, 2001 was prospective in nature. The apex court held that the provision of Section 122 (5A) will not apply retrospectively in respect of tax year ending on 30th June 2003 and will be applicable prospectively to the tax year beginning with effect from July 2003 and ending on 30-6-2004. Whereas the learned counsel for tax department relied on **PLD 2008 S.C. 446 (Commissioner of Income Tax/Wealth Tax Companies Zones, Peshawar vs. Messrs.' River Side Chemicals (Pvt.) Ltd. Gadoon)** in which apex court held that the grant of concession in the nature of exemption from payment of duties must be given strict interpretation and the person getting such benefit must satisfy all conditions for such exemption but once the required conditions are complied with, the exemption available to a person under the law cannot be taken away by the concerned authorities in their discretion.

13. In the case in hand the crux of the counsel for the petitioners' arguments is that issuance of show cause notices under Section 122 (5A) amounts to holding and initiating an inquiry which

power to enquire was inserted on 26.06.2012, therefore, these powers cannot be exercised by the Additional Commissioner-IR for the tax year 2012 but these can be exercised for tax year 2013. The original text of Sub-section (5A) of Section 122 cannot be read in isolation or seclusion. In our comprehension in line with commonsensical interpretation, if the power for making enquiry is reckoned not to be applicable for the tax year 2012 as rightly argued by the counsel for the petitioners, even then in the original text which was applicable to tax year 2012, more stringent and rigorous powers were already in field to amend the assessment by the Commissioner if the assessment order found to be erroneous and prejudicial to the interest of revenue but subject to the niceties of sub-section (9). The department has not asked to conduct an enquiry and based their assumption on the available record but one more facet cannot be lost sight that due to aforesaid amendment in fact a provision has been created in favour of the tax payers that before amending assessment order on the plea that the assessment is erroneous and prejudicial to the interest of revenue, the competent authority has to enquire before an action of amending the assessment order which was deemed to be assessed by fiction of law. So for all intents and purposes, if the power of making or causing enquiry conferred under Sub-section 5A is obliterated due to its non-application with retrospectivity for the year 2012, even then the power to amend was available to the concerned authority in the original text if the assessment order was found to be erroneous or prejudicial to the interest of revenue subject to fulfilment of the requirements envisaged under sub-section 9.

14. At the moment, the petitioners have only been issued show cause notices to submit their reply which do not mean nor it can be preempted that the issuance of show cause always entail or lead to an adverse order against the petitioners. It is most commonly noticed that whenever a show cause notice is issued by

the hierarchy provided under the tax laws calling upon the tax payer/assesse to submit the reply, the assesse immediately jump in with both feet to challenge the show cause notice in writ jurisdiction with the presumption or presupposition that the show cause notice means an adverse order. The factual controversies or the factual disputes raised in the show cause notice cannot be decided in the writ jurisdiction but it is the dominion of the competent authority to decide the fate of show cause notice after providing ample opportunity of hearing with right to fair trial and then pass the orders in accordance with the law.

15. A show cause notice is delivered to a person by an authority in order to get the reply back with a reasonable cause as to why a particular action should not be taken against him with regard to the defaulting act. By and large, it is a well-defined and well-structured process to provide the alleged defaulter with a fair chance to respond the allegation and explain his position with reasonable timeframe that he has not committed any unlawful act or misdemeanor. Even in case of an adverse order, the remedies are provided under the tax laws with different hierarchy or chain of command. In the matters of show cause, this court cannot assume a supervisory role in every situation to pass an interim order with the directions to the authority concerned to proceed but no final order should be passed till decision of the constitution petition or to suspend the operation of show cause notice for an unlimited period of time or keep the matters pending for an indefinite period. By saying so, we do not mean that the show cause notice cannot be challenged in any situation but its challenge must be sparing and cautious. This court in exercise of its extraordinary constitutional jurisdiction may take up writs to challenge the show cause notice if it is found to be lack of jurisdiction, barred by law or abuse of process of the court or coram non judice and obviously in such situation, may quash it

but not in every case filed with the expectation and anticipation of ad-interim order by the assesse.

16. The lack of jurisdiction means lack of power or authority to act in a particular manner or to give a particular kind of relief. It refers to a court's total lack of power or authority to entertain a case or to take cognizance. It may be failure to comply with conditions essential for exercise of jurisdiction or that the matter falls outside the territorial limits of a court. The Abuse of process is the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so, and with resulting damages. In its broadest sense, abuse of process may be defined as misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process. Abuse of process is a tort comprised of two elements: (1) an ulterior purpose and (2) a willful act in the use of process not proper in the regular conduct of the proceeding. Abuse of process is the malicious misuse or misapplication of process in order to accomplish an ulterior purpose. However, the critical aspect of this tort remains the improper use of the process after it has been issued. Ref: DeNardo v. Maassen, 200 P. 3d 305 (Supreme Court of Alaska, 2009), McCornell v. City of Jackson, 489 F. Supp. 2d 605 (United States District Court, Mississippi, 2006), Montemayor v. Ortiz, 208 SW 3d 627 (Court of Appeals of Texas at Corpus Christi-Edinburg, 2006), Reis v. Walker, 491 F. 3d 868 (United States Court of Appeals, 2007), Sipsas v. Vaz, 50 AD 3d 878 (Appellate Division of the Supreme Court of the State of New York, 2008). Whereas coram non judice is a Latin word meant for "not before a judge," is a legal term typically used to indicate a legal proceeding that is outside the presence of a judge or with improper venue or without jurisdiction. Any indictment or sentence passed by a court which has no authority to try an accused of that offence is

clearly in violation of the law and would be coram non judice and a nullity. When a lawsuit is brought and determined in a court which has no jurisdiction in the matter, then it is said to be coram non judice, and the judgment is void. Manufacturing Co. v. Holt, 51 W. Va. 352, 41 S. E. 351. Here in this case, the department has issued show cause notices with the allegation that the petitioners have shown the other income also which is not possible as a full time teacher or a researcher employed in a non-profit education or research institution hence the petitioners have been confronted that their other income seems to be earned through clinical work and surgical procedures and for this reason they have been called upon to submit their response along with few documents which are much essential to resolve the petitioners entitlement to rebate or reduction in tax and this is being done on the basis of available documents came into knowledge of the Tax department through Aga Khan University case when they claimed rebate on account of their full time employees as teachers/researchers.

17. Here we would like to cite some judicial precedents from local and foreign jurisdiction with regard to challenge to the show cause notice and maintainability of writ petitions:

1. **2012 PTD 1374 (Messrs.' Ocean Pakistan Ltd. vs. Federal Board of Revenue, Islamabad). 10. In above view of the matter, irrespective of what has been argued before us by the learned counsel for the petitioner, we are of the considered opinion that since all the legal arguments referred to in the preceding paras, raised on behalf of the petitioner-company, are similarly raised before the competent forum, which has issued show-cause notice to the petitioner-company, any finding on any of the legal objections by this Court is likely to cause prejudice to the case of the petitioner-company before the Income Tax hierarchy. Even the learned Single Judge in Chambers of the High Court has left it open for the Additional Commissioner Inland Revenue to decide the issues whether the sale of 'working interest' falls outside the purview of agreement and consequent to the sale, the petitioner is to be governed by the Ordinance, 2001.**

In view of the facts noted herein above i.e. filing of reply to show-cause notice by the petitioner-company wherein all objections raised before us, noted hereinabove, have been duly raised before the competent forum, and that there is no final determination by the competent authority on the issues involved in the matter, coupled with the fact that the petitioner can raise all possible factual and legal objections before the authority, which has sought its explanation by issuing show-cause notice, we intend to agree with the findings recorded by the learned Single Judge in Chambers of the High Court by means of the impugned judgment; as such this petition is dismissed being devoid of merits. Leave declined.

2. **2002 SCMR 805 (Khalid Mahmood Ch. vs. Government of the Punjab). Disputed show-cause notice was still at preliminary stage. Competent Authority after considering petitioners' replies, if came to the conclusion that it was a case of taking further proceedings under the Ordinance then it would be required to constitute an Enquiry Committee or appoint an Enquiry Officer. Constitutional petition had rightly been held to be premature and dismissed as such.**

3. **2011 PTD 2103 (Karachi Bulk Storage and Terminals (Pvt.) Ltd. vs. Collector of Central Excise and Land Customs). Constitutional petition challenging issuance of show-cause notice by authority. Petition involving questions as to whether such notice was issued with lawful authority or not; and whether interpretation of Section 2(6) of Sales Tax Act, 1951 made by authority was in accordance with law or not. Petitioner had questioned jurisdiction of authority and its action in issuing such notice was alleged to be prejudicial, unjust and mala fide. Constitutional petition was maintainable in circumstances.**

4. **Union of India (UOI) and others vs. Vicco Laboratories (Equivalent Citation: 2008 (3) ALLMR (SC) 453, 2008 (2) CTC 511, 2007 (123) ECC 278, 2007 (149) ECR 278 (SC), 2007 (218) ELT647 (SC), (2008 4 MLJ 1272 (SC), (2007) 13 SCC 270, [2007] 1 SCR 534).**

   Normally, the writ court should not interfere at the stage of issuance of show cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the concerned authorities and to satisfy the concerned authorities about the absence of case for proceeding against the person against whom the show cause notices have been issued. Abstinence from interference at the stage of issuance of show cause notice in order to relegate the parties to the proceedings before the concerned authorities is the normal rule. However, the said rule is not without exceptions. Where a Show Cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to

interfere even at the stage of issuance of show cause notice. The interference at the show cause notice stage should be rare and not in a routine manner.

5. **SBQ Steels Limited vs. The Commissioner of Customs, Central Excise and Service Tax, Guntur Commissionerate. (Equivalent Citation: 2013 (2) ALD 158, 2014 (300) ELT 185 (A.P.)**

   It is off course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show-cause notice.

6. **State of Uttar Pradesh vs. Brahma Datt Sharma (Equivalent Citation: AIR 1987 SC 943, 1987 AWC 760 SC, [1987 (54) FLR 524], JT 1987 (1) SC 571, 1987 Lab IC 689, 1987 (1) SC ALE 457, (1987) 2 SCC 179, [1987] 2 SCR 444, 1987 (2) UJ 55).**

   The High Court was not justified in quashing the show cause notice. When a show cause notice is issued to a Govt. servant under a statutory provision calling upon him to show cause, ordinarily the Govt. servant must place his case before the authority concerned by showing cause and the courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. The purpose of issuing show cause notice is to afford opportunity of hearing to the Govt. servant and once cause is shown it is open to the Govt. to consider the matter in the light of the facts and submissions placed by the Govt. servant and only thereafter a final decision in the matter could be taken. Interference by the Court before that stage would be premature.

7. **The Special Director and others vs. Muhammad Ghulam Ghouse and others (Equivalent Citation: 2004 (2) ACR 1844 (SC), AIR 2004 SC 1467, 2004 (55) ALR 95, 2004 (106 (2) BOMLR 569, (2004) 3 CALLT 8 (SC), [2004] 120**

Comp.Cas 467 (SC), 2004 (91) ECC 299, 2004 (112) ECR 501 (SC), 2004 (164) ELT 141 (S.C.), JT 2004 (1) SC 206, 2004 (2) PLJR 237, 2004 (1) SCALE 330, (2004) 3 SCC 440, [2004] 50 SCL 93 (SC), [2004] 2 SCR 399, 2004 (1) SCT 671 (SC), 2004 (1) UJ 744).

This Court in a large number of cases has deprecated the practice of the High Court's entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the show cause notice was totally non est. in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the Court. Further, when the Court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, not granted.

8. **Union of India and others vs. Kunisetty Satyanarayana (Equivalent Citation: AIR 2007 SC 906, [2007 (112) FLR 325], 2007 (1) PLJR 121, 2006 (12) SCALE 262, (2006) 12 SCC 28, (2007) 2 SCC (LS) 304, [2006] Supp. (10) SCR 257, 2007 (1) SCT 452 (SC), 2007 (3) SLJ 338 (SC).**

The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be

exercised by quashing a show-cause notice or charge sheet.

9. M/s. Kirloskar Computer Service Limited, Bangalore vs. Union of India and others (Equivalent Citation: 1997 (73) ECR 651 (Karnataka), 1998 (98) ELT. 355 (Kar.)

Court interference is justifiable only if the excise authorities have acted beyond the scope of the power available to them under the statute, i.e. if they have acted without jurisdiction. When the authorities are fully empowered to decide whether computer software development on a commercial scale amounts to manufacture or not, there decision, whether correct, partially correct, or even incorrect, is fully within their jurisdiction. Their finding cannot be said to be without jurisdiction merely because it adversely affects the assesse. As there is no inherent lack of jurisdiction in the CCE's order, the Court declines to intervene in the matter. .....The test for determining whether the order is competent, is not whether the same is as accurate as ought to be, but whether the power which the authority has involved to pass the order is truly available to it under the statute. If the answer be in the affirmative it would matter little whether the conclusion drawn by the authority was wholly correct, partially correct and particularly incorrect or wholly incorrect, if the Collector eventually comes to a conclusion adverse to the petitioner, the same can be assailed in appeal before the prescribed appellate authority, but just because the Collector may pass an order which may not be to the liking of the petitioner, or may not eventually stand the test of scrutiny by a higher authority or Court would not affect the jurisdiction of the Authority to pass an order. In other words the jurisdiction to pass an order is different from a duty to pass a correct order. If there is no inherent lack of jurisdiction then just because the order that the Authority has passed or may propose to pass is not or may not be a correct order is no reason why the authority should be prevented from exercising its jurisdiction. Similarly if the Authority lacks inherent jurisdiction to pass an order, then even if the conclusion arrived at by it on merits may be legally unexceptionable, the order shall have to be set aside. Law not only requires that correct orders should be passed by it also requires that the same must be passed by the Authorities competent to do so. The remedy against an incorrect order passed by an Authority competent to do so is not a short cut to the High Court but recourse to the statutory remedies prescribed by the Act. In that view therefore I see no reason to short circuit the proceedings initiated by the Collector....."

18. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse

order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice, the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. This Court ought to be careful when it passes an interim order to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition. Abstinence from interference at the stage of issuance of show cause notice in order to relegate the parties to the proceedings before the concerned authorities is the normal rule.

19. The whys and wherefores lead us to a finale that neither the show cause notice has been issued without jurisdiction nor it can be considered an abuse of process of law nor it is totally non est. in the eye of law for absolute want of jurisdiction or coram non judice. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved person could approach the high court. A reasonable reading of show-cause notice does not unearth or establish that it is an empty ceremony nor an impenetrable wall of prejudged opinion in which a fair procedure with reasonable opportunity of defence may not commence or afforded so in our good judgment, the interference at the show cause notice stage should be rare and in an exceptional circumstances but not in a routine manner. However a significant attribute cannot be disregarded that when a show cause notice is issued then obviously a fair chance to

contest must also be provided. In our Constitution, right to fair trial is a fundamental right. This constitutional reassurance envisaged and envisioned both procedural standards that courts must uphold in order to protect peoples' personal liberty and a range of liberty interests that statutes and regulations must not infringe. On insertion of this fundamental right in our Constitution, we ought to analyze and survey the laws and the rules/regulations framed thereunder to comprehend whether this indispensable right is accessible or deprived of? In case of stringency and rigidity in affording this right, it is the function rather a responsibility of court to protect this right so that no injustice and unfairness should be done to anybody, therefore, we direct that the respondent No.3 shall provide fair opportunity to the petitioners to defend the show cause notice and with proper application of mind consider the grounds raised in the response to rebut the show cause for which a clear provision is already envisaged and integrated under Sub-section (9) of Section 122 of the Income Ordinance 2001.

20. As a result of above discussion, the petitions are dismissed.

Judge

Judge

Karachi:-
Dated.31.5.2019