

# IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Junaid Ghaffar and Agha Faisal, JJ.**

CP D-2867 of 2018 : Van Oord Dredging and  
Marine Contractors B.V. vs.  
Federation of Pakistan & Others

For the Petitioner : Mr. Hyder Ali Khan, Advocate

For the Respondents : Mr. Muhammad Ahmer  
(Assistant Attorney General)

Mr. Ameer Bux Maitlo, Advocate

Dates of hearing : 12.10.2020 & 13.10.2020

Date of announcement : 13.10.2020

## JUDGMENT

**Agha Faisal, J:** The present petition assails a show cause notice dated 21.03.2018 (“Impugned Notice”) issued by the Federal Board of Revenue, pursuant to section 122 of the Income Tax Ordinance 2001 (“Ordinance”), whereby the petitioner has been provided an opportunity and a forum to present its case.

2. Briefly stated, the petitioner, stated to be domiciled in the Netherlands, had contracted to undertake dredging operations in Pakistan and claimed tax exemption, in Pakistan, per the Double Taxation Treaty between Pakistan and the Netherlands (“Treaty”). The present controversy rests upon the Impugned Notice which calls the petitioner’s tax exemption claim into question and provides an opportunity thereto to dispel the impression arisen as a consequence of audit proceedings. Instead of availing the opportunity provided, per the Impugned Notice, the petitioner has opted to prefer the present petition.

3. The petitioner rests its claim<sup>1</sup> *inter alia* upon the grounds that the petitioner cannot be considered a permanent establishment in Pakistan since its sojourn<sup>2</sup> does not exceed the time period mandated by the Treaty and that the revenue authority did not properly appreciate the facts pertaining to the petitioner’s presence in Pakistan.

4. The respondents<sup>3</sup> submitted that audit proceedings were undertaken and the Impugned Notice was issued pursuant to facts that came to light as a consequence thereof. No cavil was advanced to the

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<sup>1</sup> Articulated by Mr. Hyder Ali Khan, Advocate. Learned counsel relied upon 1971 PTD 1; 1992 PTD 1; 2009 SCMR 1279 to argue maintainability.

<sup>2</sup> In so far as the relevant tax year is concerned.

<sup>3</sup> Mr. Ameer Bux Maitlo, Advocate; arguments whereof were adopted and supplemented by the learned Assistant Attorney General.

applicability of the Treaty, however, it was argued that the petitioner did not qualify for tax exempt status there under as its domestic presence exceeded the maximum threshold provided under the law. In conclusion case law<sup>4</sup> was cited to demonstrate that a show cause notice was not ordinarily justiciable in writ jurisdiction.

5. We have considered the arguments of the respective learned counsels and have also considered the law to which our attention was solicited. It is apparent that the Impugned Notice is rested upon audit proceedings and an opportunity has been provided to the petitioner to present its point of view at the statutorily designated forum. In such a scenario we consider it appropriate to ring fence this determination to consider whether the factual controversies, raised by the petitioner, merit determination before this Court in place of the designated forum.

6. A Division Bench was recently seized of a bunch of petitions wherein the issue of assailing show cause notices, incidentally issued pursuant to section 122 of the Ordinance, in the writ jurisdiction was deliberated upon at length. After consideration of a myriad of authority from the commonwealth jurisdictions and it was maintained<sup>5</sup> as follows:

"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 judge 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 assessee.

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 judge 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

<sup>4</sup> 2000 SCMR 201; 2003 PTD 1285; 2007 PTD 1347; 2015 PTD 2168; 2019 PTD 1678.

<sup>5</sup> Per *Muhammad Ali Mazhar J. in Dr. Seema Irfan & Others vs. Federation of Pakistan & Others* reported as *PLD 2019 Sindh 516* ("Seema Irfan Case").

no authority to try an accused of that offence is clearly in violation of the law and would be coram non iudice 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 iudice, 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....

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. Abstention 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 iudice. 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."

7. The ratio of the *Seema Irfan Case*<sup>6</sup> is squarely applicable to the present facts and circumstances. It is pertinent to observe that no case of abuse of process and / or want of jurisdiction is manifest before us. Furthermore, there is no reason for the Impugned Notice to be considered mala fide, unjust and / or prejudicial towards the petitioner.

8. There is another aspect to address, prior to parting herewith, being whether the determination of factual controversies is preferable in the exercise of writ jurisdiction. The audit proceedings appear to suggest

<sup>6</sup> The judgment was followed by another Divisional Bench judgment of this Court dated 04.10.2019 in *K-Electric Limited & Others vs. Federation of Pakistan & Other* (CP D 4346 of 2017).

that the petitioner's tenure in Pakistan, within the relevant tax year, exceeds the threshold delineated vide the Treaty for availing tax exemption. The petitioner seeks to demonstrate that the assumption of the taxation authority is predicated upon an incorrect assessment of the facts. The Impugned Notice narrates the basis upon which the denial of tax exemption is predicated and provides the petitioner with a forum and an opportunity to present its case.

The claims of the respective parties are rested on conflicting facts and a plethora of documentation, leading to divergent observations and interpretations. It is trite law that disputed question of fact<sup>7</sup> are not generally amenable for determination in the exercise of writ jurisdiction. The Supreme Court has recently reiterated that where a factual controversy has arisen it is settled position in law that such a matter may not be decided in exercise of writ jurisdiction<sup>8</sup>.

9. In view of the reasoning and rationale herein contained, it is our considered view that the Impugned Notice merits no interference in the exercise of Constitutional jurisdiction of this Court. Therefore, we dispose of this petition with directions to the petitioner to place its case, including without limitation the grounds taken herein, before the forum denoted vide the Impugned Notice. The respondents shall conduct the proceedings, envisaged vide the Impugned Notice, and conclude the same vide a reasoned speaking order. The petitioner shall remain at liberty to assail the findings, if aggrieved, before the forum of appropriate jurisdiction, as denoted vide the Ordinance.

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<sup>7</sup> 2016 CLC 1; 2015 PLC 45; 2015 CLD 257; 2011 SCMR 1990; 2001 SCMR 574; PLD 2001 Supreme Court 415;

<sup>8</sup> Per Mushir Alam J. in *Province of Sindh vs. Abdul Sattar Arbani (CP 654-K of 2018) & connected matters*