IN THE HIGH COURT OF SINDH, KARACHI

CP No.D-6084 of 2017

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

BEFORE: Irfan Saadat Khan,
Zulfiqar Ahmed Khan,JJ

Reliance Petrochem Industries
(Pvt.) Ltd.,
Petitioner : through Mr.Ovais Ali Shah,
Advocate.

Vs.

Federation of Pakistan
Respondent No.1 : through Mr. G.M. Bhutto,
Assistant Attorney General.

Federal Board of Revenue,
Respondent No.2 :

Assistant Commissioner, IR
Respondent No.3 :

Commissioner, IR
Respondent No.4 : through Mr. Muhammad Aqeel Qureshi,
Advocate.

Date of hearing : 08.09.2022

Date of decision : 30.09.2022

JUDGEMENT

Irfan Saadat Khan,J. This petition has been filed with the prayer that the show cause dated 7.9.2017 issued to the petitioner may be declared illegal, malafide and void abinitio.

2. Briefly stated the facts of the case are that the petitioner is a company incorporated under the Companies Ordinance, 1984 and is engaged in Bulk Packaging Solutions, manufacture of PP Woven Bags, PE Liners and Woven Fabrics, base oil and lubricants and is being regularly assessed in the income tax. It is the claim of the petitioner that since the petitioner company was incorporated in

the year 2013, therefore, they were entitled for the Tax credit benefit, as provided under Section 65D of the Income Tax Ordinance, 2001 (hereinafter referred to as “the Ordinance”). The petitioner filed its return of total income for the tax year 2014 by declaring total income at Rs.20,028,091/-, which was treated as deemed assessment under Section 120 of the Ordinance. Thereafter the department issued a show cause notice under Section 122(5A) of the Ordinance requiring certain details from the petitioner. The petitioner vide letter dated 27.6.2016 replied to those queries, raised in the said show cause. Thereafter an order under Section 122(5A) of the Ordinance dated 28.06.2016 was passed by accepting the stance of the petitioner and a refund of Rs.12,625,338/- was created in its favour. Thereafter a notice dated 12.7.2017 was issued to the petitioner informing that its case has been selected for audit under Section 177 of the Ordinance, and was required to produce complete record etc. The petitioner through its letter dated 31.7.2017 replied that since assessment under Section 122(5A) of the Ordinance has already been made by the Department therefore, it cannot be selected for audit, as that would amount to reopening of an already completed assessment and requested for dropping the proceedings. The Department disagreeing with the contention of the petitioner, issued a notice dated 07.9.2017 to the petitioner calling upon the petitioner to furnish reply in respect of the queries raised in the said notice issued under Section 122(9) of the Ordinance. It is against this show cause notice that the present petition has been filed.

3. Mr. Ovais Ali Shah, Advocate has appeared on behalf of the petitioner and stated that the show cause notice issued under Section 122(9) of the Ordinance, seeking to further amend the assessment previously made under Section 122 (5A) of the Ordinance on similar grounds, is illegal. He stated that an assessment cannot be amended on the basis of same set of facts, which were previously considered, as the same would amount to "change of opinion". He stated that he is mindful of the fact that in a latest decision given by the Hon'ble Supreme Court of Pakistan reported as *Commissioner Inland Revenue and others ..Vs.. Jahangir Khan Tareen and others* (2022 SCMR 92), wherein the Hon'ble Supreme Court of Pakistan has held that "a show cause notice cannot be challenged in a writ petition even if it suffers from jurisdictional defect or otherwise and only in the cases when the show cause notice is time barred then it could be challenged in the High Court in writ petition". He however, stated that in the instant matter since the impugned show cause notice was an abuse of process of the law; hence according to him the instant petition is maintainable. He stated that the issue of maintainability, since is the preliminary issue, going to the roots of the matter, hence in the cases where the Courts come to the conclusion that the show cause notice issued to a person is concerning his fiscal rights, the same could be challenged through a writ petition. The learned counsel stated that in the instant matter the Department, since has already amended an assessment under Section 122(5A) of the Ordinance, hence the selection of the case of the petitioner for audit, under Section 177 of the Ordinance and thereafter issuing notice under Section 122(9) of the Ordinance, is illegal and therefore, the petition is maintainable.

4. Mr. Shah stated that the Hon'ble Supreme Court of Pakistan in a number of decisions has held that where the impugned action is without jurisdiction and mala fide, writ is amenable before the High Court. In support of his above contention the learned counsel has placed reliance on the following decisions.

i. *Usmania Glass Sheet Factory..Vs.. Sales Tax Officer, Chittagong* (**PLD 1971 SC 205**)

ii. *Burma Oil Company (Pakistan Trading)., ..Vs.. The Trustees of the Port of Chittagong* (**PLD 1962 SC 113**)

iii. *Commissioner of Income Tax..Vs..Hamdard Dawakhana (QAQF), Karachi* (**PLD 1992 SC 847**)

iv. *Murree Brewery Co. Ltd.,..Vs.. Pakistan through the Secretary to Government, of Pakistan, Works Division* (**PLD 1972 SC 279**)

v. *ICI Pakistan Limited ..Vs.. Federation of Pakistan* (Civil Appeal No.**36 of 2006**)

vi. *Julian Hoshang Dinshaw Trust)., ..Vs.. Income Tax Officer* (**1992 SCMR 250**)

vii. *Al Ahram Builders..Vs.. Income Tax Appellate Tribunal* (**1993 SCMR 29**)

5. Mr. Shah next contended that apart from above submission, in his view the present action of the Department squarely falls under the ambit of "change of opinion". According to him previously the Department dilated upon Section 65D of the Ordinance and has passed a detailed order under Section 122(5A) of the Ordinance on the said issue therefore, according to him amending or reopening the matter on the issue of exemption claimed by the petitioner under Section 65D of the Ordinance is nothing but a change of opinion, which cannot be made and therefore the action of the department is illegal. In support of his contention, the learned counsel has placed reliance on the following decisions.

i. *Edulji Dinshaw Limited ..Vs.. Income Tax Officer* (**PLD 1990 SC 399**)

ii. *Messrs S.N.H Industries Pvt. Ltd., ..Vs.. Income Tax Department and another* (**2004 PTD 330**)

iii. *Pakistan Herald Limited..Vs..Inspecting Assistant Commissioner and Chairman, Panel-02, Companies-III, Karachi and another* (**1996 PTD 186**)

iv. *Commissioner of Income Tax, Companies-II, Karachi..Vs..Syedk Khalid Jamal* (**2003 PTD 1093**)

v. *Dewan Khalid Textile Mills Ltd.,..Vs.. Commissioner of Income Tax (Legal Division), Large Taxpayers Unit, Karachi* (**2019 SCMR 158**)

vi. *Decision given in CP No.D-8028 of 2019 and CP No.D-8029 of 2019.*

6. Mr. Muhammad Aqeel Qureshi, Advocate appeared on behalf of the Department and, at the very outset, stated that the instant petition is not maintainable as the petitioner has challenged a show cause notice whereto the petitioner should have filed a proper reply and gotten its matter resolved with the tax authorities. The learned counsel placed reliance on the latest decision given by the Hon'ble Supreme Court in the case of Jahangir Tareen (mentioned supra). The learned counsel readout paragraphs No.11 to 15 of the said judgment and pointed out that only in two conditions a show cause notice could be held to be illegal, one when it is barred by law, and secondly when it is an abuse of process of the law. He stated that none of these conditions are prevalent in the matter as it is not the case of the petitioner that the show cause notice was issued to it after the limitation period as the same has been issued within the limitation period, provided under Section 122 of the Ordinance.

7. Mr. Qureshi, next stated that the show cause notice is also not the result of any abuse of process of law as the Assessing

Officer while examining the matter of the assessee was of the view that certain conditions for claiming exemption under Section 65D of the Ordinance were not fulfilled or met by the petitioner and thereafter required it to explain these points. According to Mr. Qureshi, it was incumbent upon the petitioner to reply to those queries in accordance with law and in his view this process could not be termed an abuse of process of the law as it is the duty of the tax officials to call from the taxpayer, falling within their jurisdiction, details in respect of the matters which required explanation or further deliberations as he can further amend an assessment.

8. Mr. Qureshi, stated that if the process of challenging show cause notice is not curbed, the Income Tax Department would never be able to finalize any assessment either upon receiving certain information or in respect of the matters requiring explanation from the taxpayer. He stated that if the facts of the present matter are examined, it would be noted that when the case of the taxpayer was selected under Section 177 for audit, the taxpayer was duly informed. He stated that no objection with regard to the said selection for audit was raised by the taxpayer, however when the Department issued a notice under Section 122(9) of the Ordinance, read with Section 174(2) and 177(10) of the Ordinance, to the taxpayer calling for certain details and documents and that in case of non-production of these details to reduce the claim of deduction and to disallow certain expenses by adding the same to the income of the petitioner, instead of filing a proper reply and giving details, the present petition has been filed,

which according to him is not maintainable being abuse of the process of law.

9. Mr. Qureshi, stated that perusal of the notice dated 12.7.2017, would clearly reveal that the grounds for selecting the case for audit were duly intimated to the petitioner, who requested for grant of some time, as the data asked for was voluminous in nature. According to the learned counsel, the petitioner then sought a number of extensions for furnishing details and on each occasion the department graciously granted time, however instead of filing those details and documents, the petitioner disguised the department and filed the instant petition. He then read out the contents of the show cause notice to supplement his arguments. He stated that the reason for selecting the case for audit and inquiring about the tax credit, being claimed by the petitioner under Section 65D of the Ordinance are duly mentioned in the two notices, which are totally different from the reasons on which the previous proceedings under Section 122(5A) of the Ordinance were initiated and later on dropped by the department. According to the learned counsel, the petitioner should have responded to the show cause notice by giving appropriate replies, instead he filed the instant petition. He stated that no doubt vide order dated 28.6.2016 under Section 122(5A) of the Ordinance, the exemption claimed under Section 65D on the basis of certain queries raised by the department, which were later on replied by the petitioner, and then the proceedings were dropped, but perusal of the impugned show cause notice shows that the basis of present action of further amending the assessment is based on altogether different footing, which do not fall within the ambit of change of opinion, as these were never probed, enquired or replied by the

petitioner. Thus in his view the petitioner was obliged to furnish demanded details and documents, hence this is not a case of change of opinion. He stated that under the provisions of Section 122(5) and 122(5A), Commissioner is fully empowered to amend or further amend the assessment order if the situation so warrants, as enumerated in these sub-sections.

10. Mr. Qureshi, stated that the decisions relied upon by the learned counsel for the petitioner, with regard to maintainability of the petition, are of no help to him as these are quite distinguishable from the facts obtaining in the instant matter. Moreover according to him in view of the guidelines given by the Hon'ble Supreme Court in Jahangir Khan Tareen's case (supra) vide para-15 of the said decision, the petitioner should file its reply before the Tax Authorities in respect of the objections with regard to the jurisdiction or on the factual aspects, as the case may be, raised in the impugned show cause notice. He stated that in view of the above facts, firstly this petition is not maintainable i.e., is liable to be dismissed, and if for the argument's sake, it is assumed that it is maintainable, even then the petitioner has no case since this is not a case of change of opinion rather a case of further amendment on the basis of queries raised in the impugned notice and being confronted to the petitioner, for giving a plausible reply.

11. The learned counsel stated that if the petitioner is so adamant that there is nothing wrong with the claim of exemption made by them under Section 65D of the Ordinance and the petitioner fulfills requisite criteria of claiming exemption, as provided under the said section, then why it is avoiding to furnish required details to the Department. He stated that if upon

examination of those details and documents etc. the petitioner satisfactorily explains its position and satisfies the Department that the relief claimed was as per the situations mentioned under Section 65D of the Ordinance, the present proceedings could be dropped, which according to him has specifically been mentioned in the show cause notice. Mr. Qureshi in the end submitted that this petition may therefore be dismissed by directing the petitioner to give a proper reply of the impugned notice alongwith all the relevant details and documents etc. so that the matter could be finalized at the earliest.

12. Mr. G. M. Bhutto, learned Assistant Attorney General has adopted the arguments as advanced by Mr. Qureshi.

13. We have heard all the learned counsel at some length and have also perused the record and the decisions relied upon by them.

14. Before proceeding further, we deem it appropriate to reproduce hereinbelow the relevant provisions, for the sake of brevity:-

> ***122. Amendment of assessments.***
> *1).....*
> *(2).....*
> *(3).....*
> *(4).....*
> *(4A).....*
>
> *(5) An assessment order in respect of a tax year, or an assessment year, shall only be amended under sub-section (1) and an amended assessment for that year shall only be further amended under sub-section (4) where, on the basis of [audit or on the basis of definite information] the Commissioner is satisfied that--*
>
> *(i) any income chargeable to tax has escaped assessment; or*

(ii) total income has been under-assessed, or assessed at too low a rate, or has been the subject of excessive relief or refund; or

(iii) any amount under a head of income has been mis-classified.]

(5A) 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.

(5AA)…….

(5B)……
(6)……
(7)……
(8)……

(9) No assessment shall be amended, or further amended, under this section unless the taxpayer has been provided with an opportunity of being heard.

***"65D. Tax credit for newly established industrial undertakings**. — (1) Where a taxpayer being a company formed for establishing and operating a new industrial undertaking [including corporate dairy farming] sets up a new industrial undertaking [including a corporate dairy farm], it shall be given a tax credit equal to "[an amount as computed in sub-section (1A)] of the tax payable [including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance] on the taxable income arising from such industrial undertaking for a period of five years beginning from the date of setting up or commencement of commercial production, whichever is later.*

"(1A) The amount of a person's tax credit allowed under sub-section (1) for a tax year shall be computed according to the following formula, namely:—

A x (B/C)

where—

A is the amount of tax assessed to the person for the tax year before allowance of any tax credit for the tax year;

B is the equity raised through issuance of new shares for cash consideration; and

C is the total amount invested in setting up the new industrial undertaking.

(2) Tax credit under this section shall be admissible where—

(a) the company is incorporated and industrial undertaking is setup between the first day of July, 2011 and 30th day of June, 2021;

(b) industrial undertaking is managed by a company formed for operating the said industrial undertaking and registered under the Companies Ordinance, 1984 (XLVII of 1984) and having its registered office in Pakistan;

(c) the industrial undertaking is not established by the splitting up or reconstruction or reconstitution of an undertaking already in existence or by transfer of machinery or plant from an industrial undertaking established in Pakistan at any time before 1st July 2011; and

(d) the industrial undertaking is set up with [at least seventy per cent] equity [raised through issuance of new shares for cash consideration:

Provided that short term loans and finances obtained from banking companies or non-banking financial institutions for the purposes of meeting working capital requirements shall not disqualify the taxpayer from claiming tax credit under this section.

(3) ……..

(4) Where any credit is allowed under this section and subsequently it is discovered, on the basis of documents or otherwise, by the Commissioner Inland Revenue that [the business has been discontinued in the subsequent five years after the credit has been allowed or] any of the [conditions] specified in this section [were] not fulfilled, the credit originally allowed shall be deemed to have been wrongly allowed and the Commissioner Inland Revenue may, notwithstanding anything contained in this Ordinance, re-compute the tax payable by the taxpayer for the relevant year and the provisions of this Ordinance shall, so far as may be, apply accordingly.]

[(5) For the purposes of this section and sections 65B and 65E, an industrial undertaking shall be treated to have been setup on the date on which the industrial undertaking is ready to go into production, whether trial production or commercial production.]

The arguments of Mr. Shah are two fold, firstly; that the show cause notice is barred by law being abuse of process of law, and secondly result of change of opinion, hence the same is illegal and may therefore, be declared void ab-initio and of no legal effect.

15. Perusal of the record reveals that the petitioner filed its return of total income for the tax year 2014 by declaring an income of Rs.20,028,091/-, which was treated as an assessment under Section 120 of the Ordinance. Subsequently the Department initiated proceedings under Section 122(5A) of the Ordinance on the following grounds:-

> *i). That you have claimed the credit under Section 65D but column of new addition shows 'nil' addition. You have obtained long-term loan which attracts provision of Section 39(3) of the Ordinance.*
>
> *ii). Though purchases have been shown but no sales were made in the said year.*

It is noted that a comprehensive reply was furnished by the petitioner in respect of the above referred queries made by the Department and thereafter proceedings under Section 122(5A) of the Ordinance were dropped, by incorporating the replies of the petitioner, in the order dated 28.6.2016. Thereafter, vide order dated 29.6.2016, under Section 170(4) of the Ordinance, a refund of Rs.12,625,338/- was created in favour of the petitioner. No documents are attached alongwith the petition to show that whether any appeal against the above referred order was preferred by the petitioner or not.

16. Subsequently vide notice under Section 177(1) of the Ordinance dated 12.7.2017 the petitioner was informed that its case has been selected for audit and detailed description for selecting the case for audit was given in the said notice. The petitioner then sought a number of extensions of time for furnishing details and documents etc., as the same were claimed to be voluminous in nature. It may be noted that at each time the

department granted extension of time to the petitioner. Record also reveals that after selection of the case under Section 177(1) of the Ordinance for audit, the Department required the petitioner to give certain details in respect of the exemption claimed by it, under Section 65D of the Ordinance by issuing a notice under Section 122(9) of the Ordinance to amend the assessment. However, subsequently the petitioner instead of giving details and documents etc., filed the instant petition and got the interim orders in its favour from this Court, vide order dated 13.9.2017 that "*no adverse order will be passed against them till the next date of hearing".*

17. It is worthwhile to note that the provisions of Section 122 of the Ordinance authorizes the Department to amend and / or to further amend an assessment either on the basis of the audit or on the basis of some definite information or in the case where the assessment is found to be erroneous in so far as prejudicial to the interest of revenue. It may be noted that the case of the petitioner was selected for audit on the basis of certain observations, which needed to be thrashed out and clarified by the petitioner in accordance with law. It is a settled proposition of law that department is saddled with the responsibility that in case it comes across any information or needs any information from the petitioner, it could ask the taxpayer to clarify those aspects; whether during the course of the assessment or after completion of the assessment as the case may be subject to the fulfillment of the conditions as prescribed under Section 122 of the Ordinance.

18. Now if the facts of the present case are examined, it would be noted that the basis of conducting the audit and to examine

admissibility of the exemption, as claimed under Section 65D of the Ordinance by the petitioner, in the notices issued under Section 177(1) and 122(9) of the Ordinance, some new and different queries, which were neither part nor were the subject of the previous proceedings, have been raised by the department. It may further be noted that the reasons for making further amendment in the assessment were duly intimated to the petitioner, which on examination are found to be different from the reasons, upon satisfaction of which the previous proceedings were dropped. For the sake of brevity the reasons contained in the present show cause notice to enquire about the exemption claimed by the petitioner under Section 65D of the Ordinance are summarized below, which in our view appears to be new queries requiring explanation or clarification and submission of details and documents etc.,

i. The accounts reflect capital work in progress of Rs.108.659 million as on 30.6.2013 which was transferred to assets within two months from the commencement of production this raises doubts about its allowability as per clause 'C' of subsection 2 of Section 65D of the Ordinance.

ii. The Long term loans received from the Directors to the tune of Rs.232.570 million in the year 2014 did not find any mention in the wealth statements of the shareholders.

iii. The first proviso to Section 65D of the Ordinance allows short term loan and finances obtained from banking and non-banking financial institutions for the purposes of meeting capital requirements. You have declared long term loan of Rs.253.790 million, hence you are not entitled for tax credit under Section 65D of the Ordinance as you have failed to meet conditions of the said section hence please explain, as to why the said facility of the tax credit may not be disallowed under Section 65D(4) of the Ordinance and the tax payable may not be recomputed.

iv. You have claimed cost of sales / service to the tune of Rs.242,937,534/- and Management, Administrative, Selling and Financial expenses at

> Rs.20,435,346/- but no evidence and record in support of the claim was provided.

19. It was also pointed out in the notice that if the above required details are not furnished, then action under Section 174(2) of the Ordinance, for disallowing the claim or deduction would be taken and action under Section 177(10) would also be initiated. Perusal of the above summarized queries raised by the Department clearly envisages that these queries were not raised in the past as these are new queries, and on the basis of these queries the Department has sought to further amend the assessment, as per the provisions of Section 122(5) of the Ordinance.

20. Now coming back to the stance taken by Mr. Shah that show cause notice is barred by law, abuse of process of law and change of opinion; suffice to state the department is fully authorized through Section 122 of the Ordinance to amend or further amend an assessment, subject to fulfilling applicable legal requirements. In the instant matter, when the Department came to the conclusion that there were certain aspects which required clarifications, either with regard to the claim of the exemption made by the petitioner under Section 65D of the Ordinance or with regard to disallowance of certain expenses, proceedings under Section 177 & 122(9) of the Ordinance were initiated and we see no illegality or irregularity in the same, as in our view the Department is fully saddled with the responsibility to inquire and to ask from the taxpayer in respect of certain aspects or to obtain information from them, subject to the fulfillment of parameters as mentioned under Section 122(5) of the Ordinance, to amend or to further

amend an assessment in accordance with law. It may further be noted that when an action is taken without there being any backing of the law, the same amounts to abuse of the process of law. Moreover, if any, Court passes an order to meet the ends of justice that would be to prevent the abuse of the process of law**.** In the cases where there is no likelihood of any adverse inference against any person asking that person to go through a process of law in our view, is also an abuse of process of law. If the facts of the present case are examined, it would be noted that the Department has proceeded, as per the relevant provisions of law within the timeline as prescribed by the law hence the question of the notice either being barred by law or abuse of process of law hardly arises. It may further be noted that since the present action is based on certain new queries and some new and additional information were sought from the petitioner, there hardly arise a question of change of opinion in the instant matter.

21. The decisions relied upon by the learned counsel for the petitioner on the cases of *Usmania Glass Sheet Factory, Burma Oil Company (Pakistan Trading), Hamdard Dawakhana, Murree Brewery Co.Ltd., Julian Hoshang Dinshaw Trust, Al Ahram Builders* (supra) are quite distinguishable from the facts obtaining in the instant matter as in all these judgments the Hon'ble Supreme Court has held that writ is not maintainable when the impugned order or notice is palpably without jurisdiction or authority, whereas in the present case the issuance of notices for audit under Section 177 of the Ordinance, and thereafter issuance of notice under Section 122(9) of the Ordinance for certain queries have been made by the Authority who possess the jurisdiction over the petitioners' matter. It may further be noted that it is not the case

of the petitioner that they are being assessed at jurisdiction 'A' whereas their case has been selected for audit and were being issued show cause notice by the Authority 'B'. Had this been the situation, the matter would have been totally different, but it is an admitted position that the case selected under Section 177(1) of the Ordinance and the issuance of notice under Section 122(9) of the Ordinance were by the Assessing Authority who possess the jurisdiction over the assessee assessment matters, there could be no element of either lack of jurisdiction or attribution of a malafide action or that of abuse of the process of law on the part of the department.

22. Moreover the issues raised in the show cause notice only require furnishing of certain details or information which were neither thrashed out nor deliberated upon earlier, hence in our view, it would not fall under the definition of "change of opinion". Hence in our view the decisions relied upon by Mr. Shah, on the cases of *Edulji Dinshaw Limited, S.N.H Industries Pvt. Ltd., American Express, Pakistan Herald Limited, Syed Khalid Jamil, Dewan Khalid Textile Mills Ltd.,* (supra) and the two unreported decisions of this Court hardly have any bearing on the issue involved in the instant petition as in the above mentioned decisions it was held by the Hon'ble Supreme Court and the High Court that change of opinion arises with regard to doing something on the aspects upon which an assessment or some deliberations have already been made by the department or the issues upon which certain opinion on these aspects have already been formed by the department. This aspect, in our view, is lacking in the instant petition.

23. We are mindful of the fact that dilating on the issues upon which the department has already formed an opinion and had deliberated upon constitutes change of opinion but in the cases where the issues were neither deliberated upon nor any opinion was formed by the department would not fall under the ambit of change of opinion simply on the ground that there was neither any opinion nor any deliberation on the said matter. Hence in our view department is fully authorized under the law to reopen an assessment, amend, further amend, as the case may be, looking to the circumstances of that matter if the chargeable tax has escaped assessment, assessed at a lower rate or has been subject to excessive relief or refund or has been mis-classified and other factors as given under Section 122 of the Ordinance. Therefore none of the judgments relied upon by Mr. Shah, in our view, either on the issue of legality or otherwise of the show cause notice or that of change of opinion are applicable to the present circumstances.

24. In the CP No.D-3548 of 2019 *M/s. Yunus Textile Mills Limited ..Vs.. Federation of Pakistan,* this bench observed as under:-

> 14. The next issue raised by Mr. Mushtaq Hussain Qazi is with regard to change of opinion. Though the term "change of opinion" has not been defined anywhere but the various pronouncements given by this Court or the other Courts or the Hon'ble Supreme Court denotes a change of opinion on the part of the department on the basis of same facts upon which an opinion has already been formed earlier by the department, for instance if the details of assessee are examined and the department on those very facts has formed an opinion, the department under the law has no jurisdiction on the same given facts to change its opinion and to come to another conclusion. Now if the facts of the present case are examined, it may be seen that originally the tax credit was granted to the petitioner by categorically mentioning "subject to

verification". Even in the refund order also tax credit /refund was granted to the petitioner by categorically mentioning "subject to verification". These words clearly denote that while making the original assessment and while amending the said assessment the department has accepted the version with regard to tax credit /refund in its entirety by categorically mentioning that the same would be subject to verification. In the SCN it is evident that the department has simply required from the petitioner to furnish evidences with regard to certain equipments claimed as plant and machinery that whether these were used directly in the manufacturing activity or not and that whether these could come and fit in within the meaning of plant and machinery used by the petitioner in its manufacturing activity. In our view, this exercise could only be undertaken after obtaining explanations and complete details from the petitioner. It is apparent from the SCN that the department has not questioned those equipments directly used in the manufacturing process and the same have been accepted as plant and machinery, but has enquired in respect of those equipments detail of which has been given in the SCN, which as per the department do not fall within ambit of plant and machinery and requires verification. In our view the onus in this regard lies squarely upon the petitioner to prove with cogent material, details and explanation with regard to its claim of these equipments claimed by it as plant and machinery for the purposes of grant of tax credit, which would ultimately result in a refund to the petitioner.

15. The department, in our view, has the jurisdiction to enquire from the petitioner with regard to its said claim of tax credit and if the petitioner satisfies the department that their claim was justified and they were entitled to the tax credit /refund, the department is obliged to grant the said tax credit /refund to the petitioner, as from the documents, available on the record, previously this exercise was not done and was left open by clearly mentioning "subject to verification", hence on this aspect also we do not agree with the contention raised by Mr. Qazi that there has been a change of opinion on the part of the department, we see no adjudication of the department so far as the claim of tax credit /refund is concerned as through the present SCN the department has simply asked the petitioner to furnish the details with regard to the said claim of tax credit made by them in accordance with law. Hence, on this aspect also we do not find any reason to interfere in the SCN issued by the department.

16. In a recent decision given by this Court in C.P. No.D-1359 of 2021 (M/s. Sakrand Sugar Mills Limited

Vs. Federation of Pakistan and others) and other connected petitions it was observed that since the High Court cannot assume the supervisory jurisdiction with regard to the issuance of SCN, the contention of the petitioners in that petitions was not accepted. The relevant extracts of the decision given in the said petition are reproduced herein below:

> *13. In the instant matters it is noted that the department has issued the SCNs to the petitioners requiring from them certain explanations /details, which require factual findings before imposition of the penalty; hence, it could not be said that these SCNs either lack jurisdiction or were not in accordance with law, since by issuing the SCNs the department has provided an opportunity to the petitioners to give valid /cogent reasons based on facts that penalty could not be imposed upon them by the department. It is also a settled proposition of law that in the matters of issuance of SCN, the High Court cannot assume the supervisory jurisdiction with regard to the factual aspects, which could only be decided /considered after obtaining reply from the petitioners. Hence, in our view, the petitioners are not entitled to bypass the remedies available to them by invoking writ jurisdiction without firstly replying to the SCNs issued by the department.*
>
> *14. In the case of Messrs Castrol Pakistan (Pvt.) Ltd. Through Accountant Vs. Additional Commissioner Inland Revenue and others (2015 PTD 2467) a Divisional Bench of this Court has deprecated the tendency of challenging the SCNs by way of writ jurisdiction when the petitioners have the remedy to file appeals in case of any adverse order is passed against them. In the present cases also, in worst scenario, if penalty is imposed by the department, under the provisions of Section 182 of the Ordinance, upon the petitioners, they have the legal remedy to file an appeal against the said penalty order before the Commissioner (Appeals) under Section 127 of the Ordinance. In the case of Deputy Commissioner of Income Tax/Wealth Tax, Faisalabad and others Vs. Messrs Punjab Beverage Company (Pvt.) Ltd. (2007 PTD 1347) the Hon''ble Supreme Court of Pakistan has categorically deprecated the tendency of filing the petitions before the High Court on the basis of SCNs bypassing the remedy as provided under the law. In the case of Roche Pakistan Ltd. Vs. Deputy Commissioner of Income-Tax and others (2001 PTD 3090) a Divisional Bench of*

this Court has observed that in case of availability of adequate alternate remedy by way of appeal the petition is not maintainable. In the decision given in the case of Messrs Pakistan Telecommunication Company Ltd. Through duly Authorized Attorney and others Vs. Province of Sindh through Secretary, Ministry of Finance and 2 others (2015 PTD 2072) a Divisional Bench of this Court did not find any ground to interfere under Article 199 of the Constitution in respect of the SCN issued by the department. In the case of Messrs Maritime Agencies (Pvt.) Ltd. Through Company Secretary Vs. Assistant Commissioner-II of SRB and 2 others (2015 PTD 160) a Divisional Bench of this Court has declined to interfere in respect of the SCN issued by the authority. The decisions relied upon by the learned counsel for the petitioners are found to be distinguishable from the facts obtaining in the instant petitions.

18. We agree with the learned counsel for the petitioner that where statutory right of a person is infringed writ is the proper remedy but in the instant matter, as noted above, no statutory right of the petitioner has been found to be infringed as in the SCN the petitioner was simply directed to furnish some details /explanations and the matter with regard to adjudication on those aspects is yet to be made by the department, hence, it could not be said that any statutory right of the petitioner has been infringed so as to invoke the writ jurisdiction. Thus the decisions relied upon by Mr. Qazi on this aspect also are found to be distinguishable and not applicable on the present petition.

19. It was held in a number of decisions given by the High Court that where the department seeks an explanation or directs a person to produce documentary evidence, the said action could not be challenged in a writ jurisdiction. Reliance in this regard may be made to the decision given in the cases of *Noor Hospital Vs. I.A.C. of Income Tax* ***[(1994) 70 Tax 20 (H.C. Lah.)]*** and *Ahmad Fabric Vs. Inspecting Additional Commissioner of Income Tax and others* ***[(1999) 80 Tax 93 (H.C. Lah.)]***. It was held by the High Courts that where a deduction has wrongly been allowed or where the assessee was called upon to explain his investment, the reassessment proceedings are valid. Reliance in this behalf may be made to the decisions given in the cases of *Commissioner of Income Tax, Rawalpindi Zone, Rawalpindi Vs. Safdar and Company, Gujrat* ***[(1980) 42 Tax 171 (H.C. Lah.)]*** and *J.L. Wei and Co. Vs. Commissioner of Income Tax* ***[(1989) 59 Tax 108 (H.C. Kar.)]***.

> 20. The upshot of the above discussion is that the petitioner is directed to pursue the matter with regard to the SCN issued by the department since a reply in the instant matter has already been filed by the petitioner to them. The department is also directed to finalize the matter within one month's time from the date of receipt of this order strictly in accordance with law, after providing opportunity of hearing to the petitioner. Needless to state that the department is legally bound to consider the reply /replies already filed or would be filed subsequently by the petitioner and thereafter decide the matter through a well-reasoned and speaking order, strictly in accordance with law. With these directions the instant petition, along with listed /pending application(s), stands disposed of.

In the decision given by the Hon'ble Supreme Court in Civil Appeal No.36 of 2006, it was observed as under:-

> 12. This Court in a number of cases has taken the view that mere issuance of notice does not ordinarily furnish sufficient cause for invoking constitutional jurisdiction of the Courts instead of submission of replies to such notices, waiting for decisions of the departmental authorities and then if necessary following further statutory remedies. This is of course subject to exceptions in appropriate cases where such notices are found to be mala fide, patently illegal, issued without jurisdiction. In the facts and circumstances of the present case, we are not persuaded to hold at his stage, on the basis of material available before us, that the impugned notice is ex facie mala fide, without jurisdiction or issued illegally. Hence the learned High Court was justified in refusing to exercise its extraordinary constitutional jurisdiction which is discretionary in nature.

The Hon'ble Supreme Court in the case of Jahangir Khan Tareen observed as under:-

> 12. At this point in time, the respondent has only been issued a show cause notice to submit the reply which does not mean on pre-empt that the issuance of show cause will entail or lead to an adverse order or action against the respondent No. 1. It is most commonly noticed that whenever a show cause notice is issued by the hierarchy provided under the tax laws calling upon the taxpayer to submit the reply, they immediately challenge the show cause notice in writ jurisdiction with the presumption or presupposition that the show cause notice means an adverse order against them, so in our considerate appraisal, 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 must be the normal rule. The challenge to show cause notices in writ jurisdiction at premature stages and tendency to bypass the remedy provided under the relevant statute is by and large deprecated and disapproved in many dictums laid down in local and foreign judgments in which courts have considered the interference as an act of denouncing and fettering the rights conferred on the statutory functionaries specially constituted for the purpose to initially decide the matter. The excerpts .....
>
> 13.....
>
> 14.....
>
> 15. As a result of above discussion we reached to the finale that the respondent No. 1 should raise all grounds of challenge to the show cause notice including the alleged jurisdictional error in the reply before the Additional Commissioner who shall after providing ample opportunity of hearing first establish the conditions laid down in Section 210 of the Income Tax Ordinance, 2001 with regard to the delegation of authority before he can proceed on the merits of the case. This petition was converted into appeal and allowed vide short order dated 15.09.2021. Above are the reasons. MW A/C- 20/SC Appeal Allowed.

In the decision given by this Court in the case of M/s. Sakrand Sugar Mills Limited & others CP No.D-1359 of 2021 it was observed as under:-

> 13. In the instant matters it is noted that the department has issued the SCNs to the petitioners requiring from them certain explanations /details, which require factual findings before imposition of the penalty; hence, it could not be said that these SCNs either lack jurisdiction or were not in accordance with law, since by issuing the SCNs the department has provided an opportunity to the petitioners to give valid /cogent reasons based on facts that penalty could not be imposed upon them by the department. It is also a settled proposition of law that in the matters of issuance of SCN, the High Court cannot assume the supervisory jurisdiction with regard to the factual aspects, which could only be decided /considered after obtaining reply from the petitioners. Hence, in our view, the petitioners are not entitled to bypass the remedies available to them by invoking writ

jurisdiction without firstly replying to the SCNs issued by the department.

14. In the case of *Messrs Castrol Pakistan (Pvt.) Ltd. Through Accountant Vs. Additional Commissioner Inland Revenue and others* ***(2015 PTD 2467)*** a Divisional Bench of this Court has deprecated the tendency of challenging the SCNs by way of writ jurisdiction when the petitioners have the remedy to file appeals in case of any adverse order is passed against him.

25. In view of whatever noted and observed above, it is evident that the impugned show cause notice issued by the department is neither barred by law, is an abuse of process of law, nor the case in hand is a case of change of opinion. Hence under the circumstances, we direct the petitioner to appear before the concerned Tax Authority by filing a proper reply in respect of all the queries raised in the said notices issued to it. The Department is directed to consider the reply alongwith the documents attached thereto (if any) and thereafter decide the matter strictly in accordance with law, after providing opportunity of hearing to the petitioner, through a well-reasoned and speaking order. It is expected that the above exercise would be completed within one month's time from the date of receipt of this order.

26. With these directions the instant petition alongwith the listed application(s) stands disposed of.

JUDGE

JUDGE

Karachi
Dated:30.09.2022

SM