

SINDH HIGH COURT, KARACHI

Petitioner:

M/s. Maritime
Agencies (Pvt.) Ltd.

Versus:

Respondents:

The Assistant
Commissioner-II of SRB
and others.

Present:

Mr. Justice Aqeel Ahmed Abbasi and Mr. Justice Zafar Ahmed Rajput.

Constitutional Petition No. D-769 of 2014, held on dated 24th April, 2014.

**CONSTITUTION OF THE ISLAMIC REPUBLIC OF
PAKISTAN, 1973**

Article 199

Tendency to impugn show cause notice issued by the Public Functionaries under taxing statutes, under Article 199 by bypassing the remedy provided under special statutes is to be discouraged.--The tendency to impugn the Show Cause Notices issued by the Public Functionaries under taxing statutes, before this Court under Article 199 of the Constitution, and to casually bypass the remedy as may be provided under a Special Statute is to be discouraged as it tends to render the statutory forums as nugatory. Moreover, if the proceedings initiated under Special Taxing Statutes do not suffer from jurisdictional error or gross illegality the same are required to be responded and resolved before the authority and the forums, provided under the Statute for such purpose, whereas, any departure from such legal procedure will amount to frustrate the proceedings which may be initiated by the public functionaries under the law and will further preempt the decision on merits by the authorities and the forums which may be provided under the statute for such purpose. [Para 6 at B]

In the case of adverse decision by Assistant Commissioner on the proposed show cause notice, an appeal can be filed before Commissioner (Appeals) under Section 57

of Sindh Sales Tax on Services Act, 2011 since no final adjudication on the proposed show cause notice has been made so far, the petition under Article 199 is pre-mature.--See Section 57 of Sindh Sales Tax on Services Act, 2011.

SINDH SALES TAX ON SERVICES ACT, 2011

Section 57

In the case of adverse decision by Assistant Commissioner on the proposed show cause notice, an appeal can be filed before Commissioner (Appeals) under Section 57 of Sindh Sales Tax on Services Act, 2011 since no final adjudication on the proposed show cause notice has been made so far, the petition under Article 199 is pre-mature.--Through instant petition, the petitioners have impugned the mere Show Cause Notice issued by the respondents, whereas no final order whatsoever has been passed so far in the instant case, nor any demand against the petitioner has been raised by the respondent as proposed through impugned Show Cause Notice.

In the instant case a Show Cause Notice has been issued by the respondent who admittedly has the jurisdiction over the case of the petitioner, wherein, certain queries have been made and the petitioner has been provided an opportunity to respond to such Show Cause. Petitioner is at liberty to file detailed reply and to raise all such legal objection, as raised through instant petition, which shall be decided by the respondent strictly in accordance with law, after providing complete opportunity of being heard to the petitioner with particular reference to the provisions of Section 3 of Sindh Sales Tax on Services Act, 2011, read with Rule 32 of the Sindh Sales Tax on Services Rules, 2011 as argued by the learned counsel for the petitioner before us. If the petitioner is aggrieved by any adverse decision by the respondent in this regard, a remedy as provided under the law in terms of Section 57 of Sindh Sales Tax on Services Act, 2011 can be availed by filling an appeal before the Commissioner (Appeals) Sindh Revenue Board. Similarly an appeal is also provided against the order of CIT (Appeals) in terms of Section 61 before the Appellate Tribunal, whereas, after the order of Appellate Tribunal, a Reference can also

be filed before this Court in terms of Section 63 of the Sindh Sales Tax on Services Act, 2011 in respect of questions of law which may arise from the order of the Tribunal. Since in the instant case, no final adjudication on the proposed Show Cause Notice has been made so far by the respondent and merely a Show Cause Notice has been issued; therefore, we are of the view that instant petition is pre-mature, whereas no cause of action has accrued to the petitioner which may justify the filing of instant petition.

In the case of *M/s. Roche Pakistan Ltd. vs. Deputy Commissioner of Income Tax and Others*, reported in 2001 PTD 3090 and *M/s. Sitara Chemical Industries Ltd. and another vs. Deputy Commissioner of Income-Tax* reported in 2003 PTD 1285, the Division Benches of this Court after having examined the case law of the superior Courts on the issue of maintainability of Constitution petition, were pleased to dismiss the Constitution Petitions, which were filed on mere issuance of show cause notices.

By applying the ratio of decisions to the facts of this case, we are of the opinion that the instant petition is misconceived in law and facts, which is hereby dismissed in *limine*.

[Paras 4, 6, 7, 8 at A, C & D]

REPRESENTED:

Petitioner by: Mr. Emadul Hassan, Advocate.

Respondent Nos. 1 & 2: Mr. Zainuddin Shaikh, Advocate.

Respondent No. 3: Mr. Saifullah, AAG.

RESULT:

Order accordingly.

ORDER:

MR. JUSTICE AQEEL AHMED ABBASI.-(1). Through instant petition, the petitioner has impugned the show cause notice No. SRB-COM-II/AC-11/SA/9521/2013, dated 8th January 2014, which has been issued by respondent No. 1, whereas following relief has been sought by the petitioner.

- "A. Declare that the Sales Tax under the Sindh Sales Tax on Services Act, 2011 cannot be levied on the entire Commission Income and Agency Fee of the Petitioner.
- B. Declare that the Show Cause Notice SRB-Com-II/AC-11/SA/9521/2013 dated 08.1.2014 is devoid of any legal force hence a nullity in the eyes of law.
- C. Declare that the petitioner is not liable to pay the alleged demand of Rs. 4,429,702/- alongwith default surcharge and penalties.
- D. Declare that the petitioner is entitled to claim refund/adjustment of the Input Tax paid on vessel handling and other services.
- E. Restrain the respondents their servants, agents, attorneys, assignees or any other person acting under their behalf from levying Sales Tax under the Sindh Sales Tax on Services Act, 2011, on entire Commission Income and Agency Fee till the disposal of the instant petition as the petitioner is being *prejudiced* illegally by burdening the petitioner with an illegal levy.
- F. Cost of the petition may be awarded.
- G. Any other relief, which this Hon'ble Court may deem fit and proper under the circumstances may be awarded as held in *2010 SCMR 984.*"

2. Learned counsel for the petitioner submits that the petitioner is a Shipping Agent Company registered with the Sales Tax Department and is making payment of its tax liability regularly on its income which is based on "net ocean freight amount of cost and freight" only. However, per learned counsel, through impugned show cause notice the respondents are intending to charge the entire amount of income of the petitioner which also includes fee and agency receipts, which according to the learned counsel for the petitioner, do not fall within the charge of Sindh Sales Tax on Services, nor the same is covered under Rule 32(2) of the Sindh Sales Tax on Service Rules, 2011. Per learned counsel, earlier, a policy letter was issued which was duly challenged, whereafter respondent did not act upon such policy letter. However, per learned counsel, the respondents have once again issued the impugned show cause notice and there is an apprehension that the respondent will tax the entire commission income of the petitioner,

whereas, additional tax and penalty will also be imposed upon the petitioner. It has been prayed that the impugned show cause notice may be set aside and the respondents may be directed not to charge sales tax from the petitioner at their gross income which includes agency and fee, whereas, tax may be charged on "net ocean freight amount of cost and freight", in accordance with law and as per Rule 32 of the Sindh Sales Tax on Services Rules, 2011.

3. Conversely, the learned AAG has raised an objection as to maintainability of instant petition and submitted that instant petition is not maintainable as no final order has been passed against the petitioner, therefore, the petitioner is not an aggrieved person in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. It is further contended that remedy is also provided under the Sindh Sales Tax on Service Act, 2011, in terms of Section 57 whereby against an order passed by the Assistant Commissioner, an appeal before the Commissioner (Appeals) can be filed. It is further contended by the learned AAG that the petitioner cannot be allowed to bye-pass statutory remedy and to directly approach this Court under Article 199 of the Constitution, therefore, instant petition may be dismissed in *limine*.

4. We have heard the learned counsel for the petitioner and learned AAG, perused the record as well as the impugned Show Cause Notice issued by the respondent No. 1 in the instant case. Without dilating upon the merits of the case or taxability or otherwise of the gross income of the petitioner under the Sindh Sales Tax on Services Act, 2011 read with Rule 32 of Sindh Sales Tax on Services Rules, 2011, we may observe that through instant petition, the petitioners have impugned the mere Show Cause Notice issued by the respondents, whereas no final order whatsoever has been passed so far in the instant case, nor any demand against the petitioner has been raised by the respondent as proposed through impugned Show Cause Notice as referred to hereinabove. Admittedly, the petitioner has already furnished reply of the impugned Show Cause Notice before the respondent No. 1, whereby submitted to the jurisdiction of the respondent No. 1.

5. Learned counsel for the petitioner was inquired as to whether the respondent No. 1 has the jurisdiction to issue a Show

Cause Notice to the petitioner in respect of sales tax on services, in response to which, learned counsel has candidly stated that the impugned Show Cause Notice by itself does not suffer from any jurisdictional error or illegality, and the respondent is authorized in law to issue such Show Cause Notice, however, per learned counsel, the proposed action of taxing the entire gross income of the petitioner and to raise demand thereon is not in accordance with law.

6. The tendency to impugn the Show Cause Notices issued by the Public Functionaries under taxing statutes, before this Court under Article 199 of the Constitution, and to casually bye-pass the remedy as may be provided under a Special Statute is to be discouraged as it tends to render the statutory forums as nugatory. Moreover, if the proceedings initiated under Special Taxing Statutes do not suffer from jurisdictional error or gross illegality the same are required to be responded and resolved before the authority and the forums, provided under the Statute for such purpose, whereas, any departure from such legal procedure will amount to frustrate the proceedings which may be initiated by the public functionaries under the law and will further preempt the decision on merits by the authorities and the forums which may be provided under the statute for such purpose. In the instant case a Show Cause Notice has been issued by the respondent who admittedly has the jurisdiction over the case of the petitioner, wherein, certain queries have been made and the petitioner has been provided an opportunity to respond to such Show Cause. Petitioner is at liberty to file detailed reply and to raise all such legal objection, as raised through instant petition, which shall be decided by the respondent strictly in accordance with law, after providing complete opportunity of being heard to the petitioner with particular reference to the provisions of Section 3 of Sindh Sales Tax on Services Act, 2011, read with Rule 32 of the Sindh Sales Tax on Services Rules, 2011 as argued by the learned counsel for the petitioner before us. If the petitioner is aggrieved by any adverse decision by the respondent in this regard, a remedy as provided under the law in terms of Section 57 of Sindh Sales Tax on Services Act, 2011 can be availed by filing an appeal before the Commissioner (Appeals) Sindh Revenue Board. Similarly an

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appeal is also provided against the order of CIT (Appeals) in terms of Section 61 before the Appellate Tribunal, whereas, after the order of Appellate Tribunal, a Reference can also be filed before this Court in terms of Section 63 of the Sindh Sales Tax on Services Act, 2011 in respect of questions of law which may arise from the order of the Tribunal. Since in the instant case, no final adjudication on the proposed Show Cause Notice has been made so far by the respondent and merely a Show Cause Notice has been issued, therefore, we are of the view that instant petition is premature, whereas no cause of action has accrued to the petitioner which may justify the filing of instant petition.

7. In the case of *M/s. Roche Pakistan Ltd. vs. Deputy Commissioner of Income Tax and Others*, reported in 2001 PTD 3090 and *M/s. Sitara Chemical Industries Ltd. and another vs. Deputy Commissioner of Income-Tax* reported in 2003 PTD 1285, the Division Benches of this Court after having examined the case law of the superior Courts on the issue of maintainability of Constitution petition, were pleased to dismiss the Constitution Petitions, which were filed on mere issuance of show cause notices. It will be advantageous to reproduce the relevant findings of the Court in both the cases are hereunder:

(i) *Roche Pakistan Ltd. v. Deputy Commissioner of Income-Tax and others* 2001 PTD 3090.

"18. In view of the above discussion, we are of the opinion that the Impugned Notice under section 62 of the Ordinance issued by respondent No. 1 to Roche is strictly in accordance with law and was not without jurisdiction and/or *mala fide*. Consequently, it could not be assailed by filing a Constitutional petition under Article 199 of the Constitution. Moreover, as adequate alternate remedy by way of appeal before the Commissioner of Income-Tax, a second appeal before the Income-Tax Appellate Tribunal and thereafter a reference to the High Court under section 136 of the Ordinance are available to the petitioner, this petition is not maintainable.

19. It would not be out of place to mention here that after filing of this petition, the petitioner submitted his further reply in relation to the question of applicability of section 79 which was withheld by it in the earlier reply to the notice. The

conduct of the petitioner in withholding its response to the applicability of section 79 in its reply to the Notice under section 62, filing the present Constitutional petition and thereafter submitting its reply on the question in issue in order to justify the maintainability of the Constitutional petition cannot validate the proceedings which may otherwise be not maintainable. Respondent No. 1 would now consider the reply filed by Roche, apply his mind and make the assessment in accordance with law. If Roche is aggrieved by the order passed by respondent No. 1 it would be open to it to resort to the statutory remedies available under the law."

(ii) *Sitara Chemical Industries Ltd. v. Deputy Commissioner of Income-Tax 2003 PTD 1285.*

"The purpose of citing the above cases is to show that the Assessing Officer have been exercising jurisdiction to consider the tax related issues arising out of amalgamation of the companies and consequently, the impugned show-cause notice issued by the Deputy Commissioner of Income-Tax is within his competent and jurisdiction to which no exception can be taken. The petition is pre-mature and without any substance which stands dismissed accordingly."

8. In view of hereinabove facts and by applying the ratio of aforesaid decisions to the facts of this case, we are of the opinion that the instant petition is misconceived in law and facts, which is hereby dismissed in *limine* alongwith listed applications. D

9. However, it is expected that the respondents shall provide complete opportunity of being heard to the petitioner and shall pass an order strictly in accordance with and the relevant rules as referred to hereinabove.

Space for noting:

Comparative Citation (if any):

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