IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 574 of 2012

Plaintiff:	**Kirthar Pakistan BV** **Through Hussain Ali Almani Advocate.**
Defendants No.1 & 2:	**Federation of Pakistan & another** **Through Mr. Ghulam Mohiuddin, Assistant Attorney General.**
Defendant No.3:	**Deputy Commissioner Inland Revenue** **Through Mr. Ameer Bakhsh Metlo Advocate Along with Abdul Salam Assistant Commissioner and Ghulam Murtaza Nizamani, Deputy Commissioner Inland Revenue.**

1) For hearing of CMA No. 6870/2016.
2) For hearing of CMA No. 5247/2012.
3) For hearing of CMA No. 11279/2012.
4) For hearing of CMA No. 5807/2013.
5) For hearing of CMA No. 5920/2013.
6) For hearing of CMA No. 600/2015.
7) For hearing of CMA No. 18742/2015.

Dates of hearing:	**15.01.2020, 14.02.2020, 21.02.2020, 06.03.2020**
Date of Order:	**19.03.2020**

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through this Suit the Plaintiff has impugned Show Cause Notice dated 15.5.2012 issued under Section 172(5) read with Section 172(3) of the Income Tax Ordinance, 2001 (**Ordinance 2001**) as being without lawful authority, with a further declaration to the effect that Plaintiff is not a representative of Shell Petroleum N.V (**Shell**) or KUFPEC Pakistan Holding B.V (**KUFPEC**) for the purposes of Section 172 of the Ordinance 2001.

2. Learned Counsel for the Plaintiff has referred to the impugned Notice and has contended that the same is without lawful authority inasmuch as the Plaintiff is not a representative either of Shell or for that matter KUFPEC, within the contemplation of Section 172 of the Ordinance, 2001; that Plaintiff's parent company was bought by KUFPEC Pakistan pursuant to an Agreement dated 7.12.2010, whereas, the requisite

NOC has already been issued by the Director General Petroleum and the transaction is now past and closed; that the Department's interpretation of invoking Section 172 (3)(f) independently for the purposes of the present transaction is illegal and against the settled principles of interpretation; that the explanation in Section 172(3)(b) ibid has been incorporated subsequently, after completion of the transaction; hence, even otherwise, is not applicable; that as to issue No.1 regarding maintainability of this Suit, the same now stands settled by the Hon'ble Supreme Court through its Judgment reported as ***Searle IV Solution (Pvt.) Ltd. and others v. Federation of Pakistan and others*** **(2018 SCMR 1444)** inasmuch as this Court is now a Constitutional Court; hence, Issue No.1 / objection regarding maintainability of this Suit must be answered in the affirmative; that without prejudice, Shell who has sold the company is a foreign resident and is covered by a double treaty of taxation therefore, even Shell is also not liable for any tax on the transaction in question; that the Department has already made up its mind to treat the Plaintiff as a representative of any of the two companies in question which otherwise, is without lawful authority, as at the most, the Plaintiff could be a representative of any one of the companies; that the word business connection has been explained through explanation in Section 172(3)(b) by Finance Act, 2013 and even if there is any business connection of the Plaintiff with a non-resident, said explanation cannot operate retrospectively; that even otherwise, the transaction in question does not include any transfer of an asset or business in Pakistan by a non-resident and therefore, no tax is payable on the transaction in question; that the transaction in question was completed on 15.3.2011 and when the Show Cause Notice was issued the Plaintiff even otherwise, was no more a representative of Shell and therefore, there is no question of treating the Plaintiff as a representative within the contemplation of Section 172 ibid. In support he has relied upon the cases reported as ***Searle IV Solution (Pvt.) Ltd. and others v. Federation of Pakistan and others*** **(2018 SCMR 1444)**, ***Commissioner of Income-tax, Calcutta, v. T.I. & M. Sales Ltd.*** **(AIR 1987 Supreme Court 1234),** ***Commissioner of Income Tax, Tamil Nadu-V v. Fried Krupp Industries*** **(1981 (128) ITR 27)**, ***Commissioner of Income-Tax, Bombay City-I v. Gulf Oil (Great Britain) Ltd.*** **(108 ITR 874)**, ***Asia Petroleum Limited through Kh. Izz Hamid, Managing Director v. Federation of Pakistan through Secretary Finance, Ministry of Finance, Government of Pakistan Pak Secretariat, Islamabad and 3 others (1999 PTD 1313)***, ***General Bank of Netherland Limited v. Commissioner of Income Tax, Central Karachi*** **(PLD 1991 Supreme Court 675)**.

3. On the other hand, learned Counsel for the Defendants has contended that Plaintiff admittedly represented itself before Director General Petroleum, and therefore, cannot say that they are not representatives within the contemplation of Section 172

ibid; that Plaintiff was previously owned by Shell and now by the purchaser KUFPEC; hence, the argument is misconceived; that Plaintiff has a business connection as explained in Section 172(3)(b) of the Ordinance, 2001, whereas, explanation can be applied retrospectively; that even otherwise, in terms of Section 172(3)(f) any taxpayer can be declared by the Commissioner through an order in writing to be the representative of a non-resident person and for such purposes merely a show Cause Notice has been issued to explain the transaction; that the Plaintiff has approached this Court prematurely and without any cause of action inasmuch as neither an assessment order had been passed nor a liability was created through the impugned Show Cause Notice; that the concern of the Plaintiff is apprehensive in nature. In support he has relied upon the cases reported as ***Deputy Commissioner of Income Tax Wealth Tax, Faisalabad and others v. Messrs Punjab Beverage Company (Pvt.) Ltd.*** **(2007 PTD 1347), Commissioner of Income Tax, Companies-II and another v. Hamdard Dawakhan (Waqf), Karachi (PLD 1992 Supreme Court 847), Messrs Amin Textile Mills (Pvt.) Ltd. v. Commissioner of Income-Tax and 2 others (2000 SCMR 201),** ***Messrs Pakistan Petroleum Ltd. through Deputy Chief Commercial v. Additional Commissioner Inland Revenue and 2 others*** **(2015 PTD 2168),** ***Commissioner of Income Tax v. Messrs ELI Lilly Pakistan (Pvt.) Ltd.*** **(2009 SCMR 1279).**

4. I have heard both the learned Counsel and perused the record. Since only a legal controversy is involved and parties had agreed not to lead any evidence, therefore, vide order dated 10.11.2015 following issues were settled: -

> "1) Whether Suit is maintainable under the law?
>
> 2) Whether the Defendants can tax a transaction between two companies incorporated in the Netherlands, which took place outside Pakistan and relates to the sale and purchase of shares of a company incorporated in the Netherland?
>
> 3) Whether the Plaintiff can be declared as the representative of Shell Petroleum N.V?
>
> 4) What should the decree be?"

Issue No. 1

5. It appears that Plaintiff was issued a Show Cause Notice under Section 172(5) read with 172(3)(f) of the Ordinance, 2001 on 15.5.2012 and the said Show Cause Notice reads as under:-

6.

"GOVERNMENT OF PAKISTAN
Large Taxpayer Unit
Deputy Commissioner Inland Revenue
Audit Unit-2, Range-A, Zone-III,
PRC Towers, 32-A, Lalazar, M. T. Khan Road Karachi

No. DCIR/Audit Unit-02/Zone-III/LTU/2012 Dated: 15.05.2012

To,
The Principal Officer,
M/S Kirthar Pakistan BV,
80-Khayaban-e-Iqbal, F-6/2, Margala Road,
Islamabad.

C/o Ernst & Young Ford Rhodes Sidat Hyder,
Chartered Accountants,
Progressive Plaza, Beaumount Road,
Karachi.

SUB: **SHOW CAUSE NOTICE U/S 172(5) READ WITH SECTION 172(3) OF THE INCOME TAX ORDINANCE, 2001**

Dear taxpayer,

Please refer to the above referred subject.

Whereas, the undersigned intends to declare your company as the representative of M/s Shell Petroleum N.V and M/s KUFPEC Pakistan Holding B.V, both non-resident companies, in terms of section 172(3)(f) of the Income Tax Ordinance, 2001 due to following reasons:

1. 100% shareholding of your company was previously owned by M/s Shell Petroleum N.V through M/s Shell Upstream Gas Holding B.V which now has been transferred to M/s KUFPEC Pakistan Holding B.V vide Sale and Purchase Agreement (SPA) executed between M/s Shell Petroleum N.V and M/s KUFPEC Pakistan Holding B.V on 17.12.2010.

2. This transaction is liable to tax in Pakistan and as per sub-clause 2.6 of clause 2 of aforementioned SPA; the tax liability shall be responsibility of both seller and purchaser. For ready reference, sub-clause 2.6 of clause 2 is reproduced as under:-

> *"it is agreed that the Seller and the Purchaser shall each be responsible for the payment of its own Tax, duties or other charges* ***deriving from the transfer under this Agreement in accordance with laws of Pakistan*** *or other applicable laws."*

3. Since you have already represented on behalf of both seller and purchaser (M/s Shell Petroleum N.V and M/s KUFPEC Pakistan Holding B.V) before the Ministry of Petroleum, Government of Pakistan for issuance of NOC regarding transfer of concession rights from previous owner to new owner; hence on the same basis this office intends to treat you as representative of aforementioned non-resident companies. This fact is evident from your letter, dated 05.01.2011 submitted to the Director General of Petroleum Concessions (DGPC) for issuance of NOC regarding transfer of concession rights. In response to your request, the office of DGPC issued NOC vide letter, dated 21.02.2011 inter alia with the following specific condition:

"the Government revenue and operations of the joint venture will not be adversely affected after this transaction;"

It is pertinent to mentioned here that while issuing NOC, the office of DGPC endorsed a copy thereof to the Chairman FBR (CBR) with the request to indicate as to whether the aforesaid foreign E & P companies have fulfilled their tax and other obligation with the FBR.

You are requested to please furnish your explanation / objection, if any supported by documentary evidences on or before **21.05.2012**.

Please note that in case of non-compliance / partial compliance, it will be inferred that you have no objection on the above treatment and in subsequence you will be declared the representative of M/s Shell Petroleum N. V and M/s KUFPEC Pakistan Holding B.V, both non-resident companies in terms of section 172(3)(f) of the Income Tax Ordinance, 2001 by passing order under the said provision accordingly.

Assuring you of best possible facilitation.

Sd/-
(GIRDHARI MAL)
DEPUTY COMMISSIONER INLAND REVENUE
Audit Unit-2, Zone III, LTU Karachi"

7. Perusal of the above Show Cause Notice reflects that the officer concerned has confronted the Plaintiff with his intention to declare the Plaintiff as a representative of Shell and KUFPEC, both non-resident Companies in terms of Section 172(3)(f) of the Ordinance, 2001 on the ground that previously the Plaintiff was 100% owned by Shell through another company M/s Shell Upstream Gas Holding B.V which now stands transferred to KUFPEC through a Sale / Purchase Agreement dated 17.12.2010 and as per sub-clause 2.6 of clause 2 of the Agreement, the liability of any tax is the responsibility of both the seller and the purchaser. It has been further alleged in the Show Cause Notice that since the Plaintiff represented Shell and KUFPEC before Ministry of Petroleum for issuance of NOC regarding transfer of concession rights; hence, the Plaintiff is a representative of the non-resident companies. The Plaintiff instead of contesting the matter before the Department, has impugned the said Show Cause Notice by way of present Suit and on 24.5.2012 Defendants were restrained from taking any coercive / adverse action against the Plaintiff. The issue of maintainability has been raised by the Defendants and insofar as the objection as to whether this Court has any jurisdiction to try and entertain the Civil Suit, is now settled by the Hon'ble Supreme Court in the case of ***Searle IV Solution (Pvt.) Ltd. (*supra)** and to this extent, I need not go into any further deliberation. Moreover, this aspect of the objection has not been pressed upon on behalf of the Defendants except, the otherwise maintainability of the Suit without availing departmental remedy. To that extent I am in agreement with

the contention of the learned Counsel for the Defendants that the exception as to the maintainability of an action impugning a mere issuance of a Show Cause Notice would still apply. Even if this Court is a competent Court having jurisdiction like a Constitutional Court, for entertaining a Civil Suit; the bar of not availing the alternate remedy before approaching a Court of law still subsists; and it cannot be said that if a Suit is otherwise competent, then this bar also whisks away. Admittedly, it is only a Show Cause Notice whereby, the Plaintiff has been confronted with certain allegations / observations to the effect that why not the Plaintiff be treated as a representative of the non-resident companies under Section 172 ibid. Neither any adverse orders have been passed against the Plaintiff e.g. an assessment order; nor a demand has been raised as yet, which otherwise could be a cause of being prejudiced. It is not the case of the Plaintiff that the officer concerned has no jurisdiction to issue such notice under section 172 ibid. It is merely the alleged illegality, coupled with the very merits of the case which have been impugned and challenged by way of this Suit directly. It is by now a settled proposition of law (barring exceptions which do not appear to be present here) that a mere Show Cause Notice cannot be challenged directly before a Court and instead ordinarily, the taxpayer must respond to the said Show Cause Notice before the departmental hierarchy. The exception being a notice without jurisdiction or with malafide intention, which as per the Plaintiff are not present in this case; nor they have been so argued on behalf of the Plaintiff. In fact, it is the merits of the case which have been argued more aggressively. Not only this even an attempt has been made to defend the case on behalf of the non-resident companies.

8. The question that whether a Show Cause Notice could be challenged directly before a Court of law has been dealt with in a number of Judgments by the High Courts as well as the Hon'ble Supreme Court and it has been a consistent view that such tendency to impugn a Show Cause Notice issued under a taxing law and to casually bye-pass the remedy as provided under a Special Law is to be discouraged as it amounts to ruining the statutory norms as meaningless, more so, when the proceedings initiated by the Department does not suffer for want of jurisdiction and malafides. In addition, the very Special Law provides a complete mechanism of Appeals up to the level of Special Tribunals and then by way of a reference before the High Courts, and therefore, ultimately such question of law has to come before the High Court for its final adjudication. For these reasons, time and again the Courts have held that ordinarily a tax payer must respond to such Show Cause Notice and contest the matter before the Departmental hierarchy inasmuch firstly, the Department being a specialized forum has been conferred with such powers; and secondly, until a determination (adverse or otherwise) is made; mere issuance of such a notice by the department cannot be looked

into on mere suspicion and apprehension of a tax-payer. A learned Division Bench of this Court in the case reported as ***Messrs Maritime Agencies (Pvt.) Ltd. through Company Secretary, V. Assistant Commissioner-II of SRB and 2 others*** **(2015 P T D 160)** wherein a show cause Notice was directly challenged before the Court has been pleased to observe as under: -

> "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 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, A 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.
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> 7. In the case of Messrs ROCHE PAKISTAN LTD. V. DEPUTY COMMISSIONER OF INCOME TAX AND OTHERS, reported in 2001 PTD 3090 AND Messrs SITARA CHEMICAL INDUSTRIES LTD. AND ANOTHER V. 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 Constitutional petition, were pleased' to dismiss the Constitutional 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:--
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> (i) Roche Pakistan Ltd. v. Deputy Commissioner of Income-Tax and others 2001 PTD 3090.
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> "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 along with listed applications.

9. Similarly, in the case reported as ***Dr. Seema Irfan and 5 others V. Federation of Pakistan through Secretary and 2 others*** **(2019 P T D 1678)** again a learned Division Bench while dealing with a Show Cause Notice issued under Section 122(5)(A) of the Ordinance, 2001 has been pleased to hold as under: -

"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 pre-empted 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/assessee to submit the reply, the assessee immediately jumps 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 wilful 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 beearned through clinical work and surgi cal procedures and for this reason theyhave been called upon to submit their respons e 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 authorityto i nitially decide the matter and ensure that ultimate relief which may or maynot be fin ally 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."

10. The Hon'ble Supreme Court in the case reported as ***Indus Trading and Contracting Company V. Collector of Customs (Preventive) Karachi and others*** **(2016 S C M R 842)** while dealing with a case wherein the levy of regulatory duty through a Notification was challenged directly in writ jurisdiction has been pleased to hold as under: -

4. Before examining the merits of the case, we find it necessary to state that at the stage when regulatory duty was charged, the appellant ought to have challenged the same before the forum provided under the Customs Act. Instead of doing that, the appellant invoked the jurisdiction of the High Court under Article 199(1) of the Constitution of Pakistan. Ordinarily, the jurisdiction of the High Courts under Article 199 of the

> Constitution should not be invoked where alternative forum under a special law, duly empowered to decide the controversy is available and functioning. Where a special law provides legal remedy for the resolution of a dispute, the intention of the legislature in creating such remedy is that the disputes falling within the ambit of such forum be taken only before it for resolution. The very purpose of creating a special forum is that disputes should reach expeditious resolution headed by quasi judicial or judicial officers who with their specific knowledge, expertise and experience are well equipped to decide controversies relating to a particular subject in a shortest possible time. Therefore, in spite of such remedy being made available under the law, resorting to the provisions of Article 199(1) of the Constitution, as a matter of course, would not only demonstrate mistrust on the functioning of the special forum but it is painful to know that High Courts have been over-burdened with a very large number of such cases. This in turn results in delays in the resolution of the dispute as a large number of cases get decided after several years. These cases ought to be taken to forum provided under the Special law instead of the High Courts. Such bypass of the proper forum is contrary to the intention of the provisions of Article 199(1) of the Constitution which confers jurisdiction on the High Court only and only when there is no adequate remedy is available under any law. Where adequate forum is fully functional, the High Courts must deprecate such tendency at the very initial stage and relegate the parties to seek remedy before the special forum created under the special law to which the controversy relates. We could have relegated the appellant to seek remedy before the appropriate forum, however, as the dispute in the present case is now more than twenty years old, we for this reason only as matter of indulgence, proceed to decide the controversy on its merits."

11. Therefore, in view of the law settled as above and being binding in nature on this bench, there is hardly any other ground in the given facts of the case which can justify maintainability of this Suit before this Court directly. The cause of the Plaintiff is more apprehensive than real, and probably more so, because of certain proceedings which have taken place in this matter. It appears that an ad-interim order was passed on 24.5.2012, whereas, for some unexplained ill advice, when it was not extended on one of the dates i.e. the department passed an order against the Plaintiff, and the Plaintiff even filed an appeal against the said order which was dismissed, and then filed a further appeal before the Inland Revenue Tribunal. Thereafter on an application of the Plaintiff contempt proceedings were initiated and the said orders were also suspended. On 15.01.2020 when Plaintiff's Counsel had made part submissions, the Court directed him to seek instructions as to the remand of the matter to the Department; first for a final determination that whether the Plaintiff can be held to be a representative of the non-resident companies in question; however, subsequently, Counsel pleaded that since during pendency of this Suit and notwithstanding the fact that a restraining order was operative, the Defendants went on to pass an adverse order which was then recalled on the orders of this Court, the Plaintiff apprehends that a similar order would be passed and remand of the matter would not serve any useful purpose. To that it may be observed that though conduct of the Department in carrying out such an exercise, notwithstanding the fact that a restraining order was in field is not appreciable; but at the same time, it is a matter of record that those orders stand recalled and are no more in

field, whereas, even otherwise, those were Ex-parte orders and the stance of the Plaintiff was never placed or take up by the departmental hierarchy. Therefore, I do not see this to be so convincing an argument so as to hold that instant Suit is otherwise maintainable in the given facts of this case. This, in my view, is not an impediment in answering issue No.1 against the Plaintiff and sending the matter back to the Department for proceeding afresh.

12. In view of hereinabove facts and circumstances of this case, it appears that the present Suit is premature and without a proper cause of action having been instituted against merely a Show Cause Notice issued to the Plaintiff for providing explanation as to the allegations; hence Issue No. 1 is answered in negative. And in view of such positon, other issues need not be answered. It is held that Suit is not maintainable being premature and without a proper and just cause of action, whereas, the Plaintiff is directed to respond to the Show Cause Notice in question, whereafter, the Defendants shall pass and proceed with appropriate orders in accordance with law after providing opportunity of being heard and without being influenced or prejudiced with the earlier orders passed by them which are no more in field.

13. The Suit stands dismissed as not maintainable; however, subject to the above observations. All pending applications are also dismissed as infructuous.

Dated: 19.03.2020

J U D G E

Arshad/