

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petitions No.D-1359, 1360, 1361, 1362, 1363,
3190, 3191, 3192, 3193, 3194, 1484, 1485, 1486, 1487,
1548, 1549, 1550, 1551, 1552, 1560, 1561, 1562, 1563, 1564,
1615, 1616, 1617, 1819, 1843, 1844, 1845, 1906, 1907, 1908, 1909,
1944, 1945, 1946, 1947, 4300, 4301 and 4302 all of 2021

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Arshad Hussain Khan

M/s. Sakrand Sugar Mills Limited	: (in C.P. No.D-1359 of 2021)
M/s. Sakrand Sugar Mills Limited	: (in C.P. No.D-1360 of 2021)
M/s. Sakrand Sugar Mills Limited	: (in C.P. No.D-1361 of 2021)
M/s. Sakrand Sugar Mills Limited	: (in C.P. No.D-1362 of 2021)
M/s. Sakrand Sugar Mills Limited	: (in C.P. No.D-1363 of 2021)
Popular Sugar Mills Ltd.	: (in C.P. No.D-3190 of 2021)
Popular Sugar Mills Ltd.	: (in C.P. No.D-3191 of 2021)
Popular Sugar Mills Ltd.	: (in C.P. No.D-3192 of 2021)
Popular Sugar Mills Ltd.	: (in C.P. No.D-3193 of 2021)
Popular Sugar Mills Ltd.	: (in C.P. No.D-3194 of 2021)
M/s. Matiari Sugar Mills Limited	: (in C.P. No.D-1484 of 2021)
M/s. Matiari Sugar Mills Limited	: (in C.P. No.D-1485 of 2021)
M/s. Matiari Sugar Mills Limited	: (in C.P. No.D-1486 of 2021)
M/s. Matiari Sugar Mills Limited	: (in C.P. No.D-1487 of 2021)
M/s. Sanghar Sugar Mills Limited	: (in C.P. No.D-1548 of 2021)
M/s. Sanghar Sugar Mills Limited	: (in C.P. No.D-1549 of 2021)
M/s. Sanghar Sugar Mills Limited	: (in C.P. No.D-1550 of 2021)
M/s. Sanghar Sugar Mills Limited	: (in C.P. No.D-1551 of 2021)
M/s. Sanghar Sugar Mills Limited	: (in C.P. No. D-1552 of 2021)
M/s. Darya Khan Sugar Mills Ltd.	: (in C.P. No. D-1560 of 2021)
M/s. Darya Khan Sugar Mills Ltd.	: (in C.P. No. D-1561 of 2021)
M/s. Darya Khan Sugar Mills Ltd.	: (in C.P. No. D-1562 of 2021)
M/s. Darya Khan Sugar Mills Ltd.	: (in C.P. No. D-1563 of 2021)
M/s. Darya Khan Sugar Mills Ltd.	: (in C.P. No. D-1564 of 2021)
M/s. Khairpur Sugar Mills Ltd.	: (in C.P. No. D-1615 of 2021)
M/s. Khairpur Sugar Mills Ltd.	: (in C.P. No. D-1616 of 2021)
M/s. Khairpur Sugar Mills Ltd.	: (in C.P. No. D-1617 of 2021)
M/s. Khairpur Sugar Mills Ltd.	: (in C.P. No. D-1819 of 2021)
M/s. Digri Sugar Mills Ltd.	: (in C.P. No. D-1843 of 2021)
M/s. Digri Sugar Mills Ltd.	: (in C.P. No. D-1844 of 2021)
M/s. Digri Sugar Mills Ltd.	: (in C.P. No. D-1845 of 2021)
M/s. Faran Sugar Mills Limited	: (in C.P. No.D-1906 of 2021)
M/s. Faran Sugar Mills Limited	: (in C.P. No.D-1907 of 2021)
M/s. Faran Sugar Mills Limited	: (in C.P. No.D-1908 of 2021)
M/s. Faran Sugar Mills Limited	: (in C.P. No.D-1909 of 2021)
M/s. Ranipur Sugar Mills (Private) Limited	: (in C.P. No.D-1944 of 2021)
M/s. Ranipur Sugar Mills (Private) Limited	: (in C.P. No.D-1945 of 2021)
M/s. Ranipur Sugar Mills (Private) Limited	: (in C.P. No.D-1946 of 2021)
M/s. Ranipur Sugar Mills (Private) Limited	: (in C.P. No.D-1947 of 2021)
M/s. Habib Sugar Mills Limited	: (in C.P. No.D-4300 of 2021)
M/s. Habib Sugar Mills Limited	: (in C.P. No.D-4301 of 2021)
M/s. Habib Sugar Mills Limited	: (in C.P. No.D-4302 of 2021)
.....	Petitioners

Vs.

Federation of Pakistan and others

: (in all C.Ps)

.....Respondents.

Date of hearing : 21.01.2022.

For the petitioner : Mr. Muhammad Saleem Mangrio, Advocate
(in C.Ps. No.D-1359, 1360, 1361, 1362 and 1363 of 2021)

Mr. Taimoor Ahmad Qureshi, Advocate (in C.Ps. No.D-1484 , 1485, 1486 and 1487 of 2021)

Mr. Muhammad Faheem Bhayo, Advocate
(in C.Ps. No.D-1548, 1549, 1550, 1551, 1552, 1560, 1561, 1562, 1563, 1564, 1615, 1616, 1617, 1819, 1843, 1844 and 1845 all of 2021)

Mr. Abdul Rahim Lakhani, Advocate (in C.Ps. No.D-3190, 3191, 3192, 3193, 3194, 1906, 1907, 1908, 1909, 1944, 1945, 1946, 1947, 4300, 4301 and 4302 all of 2021)

For the Respondents : Mr. Kafeel Ahmed Abbasi, Deputy Attorney General for Pakistan (**DAG**) (for respondent No.1 in all C.Ps.)

Mr. Ameer Bux Maitlo, Advocate (for the Department /respondents No.2&3 /2, 3&4 in all C.Ps)

J U D G M E N T

IRFAN SAADAT KHAN, J. These are bunch of petitions wherein Show Cause Notice (**SCN**) issued under Section 182 of the Income Tax Ordinance, 2001 (hereinafter referred as “**the Ordinance**”) has been called in question.

2. Briefly stated, the facts of the cases are that the petitioners are Sugar Mills upon whom SCNs under Section 182 of the Ordinance have been issued by the department for imposition of the penalty as it was found that the petitioners have furnished inaccurate particulars of their income and have not disclosed the income in a proper manner in their returns for the relevant tax years. The department was of the view that since the petitioners have concealed /not explained their income under Section 111(1)(a)/(d)(i) of the Ordinance, therefore, they are liable to be penalized under the provisions of Section 182(2)

of the Ordinance at the rate of 100% of the amount sought to be evaded by them. The detail of the SCNs is given in the following manner:

<i>Sr. No.</i>	<i>Constitutional Petitions No.D-</i>	<i>Date of Show Cause Notice</i>
1.	1359 – 1363 of 2021	16.02.2021
2.	1484 – 1487 of 2021	10.02.2021
3.	1548 -1552 of 2021	16.02.2021
4.	1560 – 1564 of 2021	11.02.2021
5.	1615 – 1617 of 2021	24.02.2021
6.	1819 of 2021	04.03.2021
7.	1843 – 1845 of 2021	03.03.2021
8.	1906 – 1909 of 2021	09.02.2021
9.	1944 – 1947 of 2021	16.02.2021
10.	3190 – 3194 of 2021	26.04.2021
11.	4300 – 4302 of 2021	07.06.2021

3. Mr. Muhammad Saleem Mangrio Advocate has led the panel of the counsel for the petitioners and stated that since the amount of tax imposed in the main assessment order, passed under Section 122(1) of the Ordinance, was the subject matter of appeal before the Commissioner (Appeals), hence until and unless any decision is given by the said Commissioner (Appeals), with regard to confirmation of the income sought to be evaded by the petitioners no penalty could be imposed by the department upon the petitioners. He stated that since it is yet to be decided /finalized at the appellate stage that the income alleged to have been evaded by the petitioners was in fact a concealed income of the petitioners, therefore, the issuance of SCNs for imposition of penalty is premature hence the same may be vacated. In support of his contentions, the learned counsel has placed reliance on the decisions given in the cases of *Central Board of Revenue and*

others Vs. Chanda Motors (1992 PTD 1681) and Mst. Heemat Jehan and another Vs. Attaullah Shah (2012 CLC 686).

4. M/s. Taimoor Ahmad Qureshi, Muhammad Faheem Bhayo and Abdul Rahim Lakhani, Advocates, appearing for other petitioners have adopted the arguments of Mr. Mangrio.

5. M/s. Kafeel Ahmed Abbasi (DAG) and Ameer Bux Maitlo, Advocate, have appeared on behalf of the respondents /department and stated that positive evidence of furnishing inaccurate particulars of income in the returns was detected by the department; therefore, issuance of SCN was mandatory in the situation. They stated that penalty proceedings are reciprocal proceedings and in case the petitioners succeed in getting the main amounts taxed deleted in the appeal as a result thereof the penalties imposed, if any, would automatically be deleted. They stated that the department has simply called an explanation from the petitioner to clarify certain points and it is a settled proposition of law that under writ jurisdiction a SCN cannot be challenged, as a SCN only demands from a person to clarify certain aspects and it is not at all necessary that if a SCN is issued, it would be followed by drawing adverse inference against that person. They stated that the petitioners are at liberty to file their objections, if any, against those SCNs, which would be considered and decided in accordance with law. They stated that these petitions are premature and not maintainable; therefore, the same may be dismissed with cost.

6. We have heard all the learned counsel at considerable length and have also perused the record and the decisions relied upon. We have also made some research on our own.

7. Before proceeding any further, we would like to reproduce herein below the provisions of law on which reliance has been placed by the learned counsel for the parties:

Income Tax Ordinance, 2001

111. Unexplained income or assets.--(1) Where--

- (a) any amount is credited in a person's books of account;
 (b)
 (c)
 (d) any person has concealed income or furnished inaccurate particulars of income including-
 (i) the suppression of any production, sales or any amount chargeable to tax; or

182. Offence and penalties.--(1) Any person who commits any offence specified in column (2) of the Table below shall, in addition to and not in derogation of any punishment to which he may be liable under this Ordinance or any other law, be liable to the penalty mentioned against that offence in column (3) thereof:

TABLE

S. No.	Offences	Penalties	Section of the Ordinance to which offence has reference
(1)	(2)	(3)	(4)
12.	Where a person has concealed income or furnished inaccurate particulars of such income, including but not limited to the suppression of any income or amount chargeable to tax, the claiming of any deduction for any expenditure not actually incurred or any act referred to in sub-section (1) of section 111, in the	Such person shall pay a penalty of [one hundred] thousand rupees or an amount equal to the tax which the person sought to evade whichever is higher. However, no penalty shall be payable on mere disallowance of a claim of exemption from tax of any income or amount declared by a person	20, 111 and General.

course of any proceeding under this Ordinance before any Income Tax Authority or the Appellate Tribunal.

or mere disallowance of any expenditure declared by a person to be deductible, unless it is proved that the person made the claim knowing it to be wrong.

8. Perusal of the record reveals that the assessments of the petitioners were completed under the provisions of Section 122 of the Ordinance. While making the assessment for the relevant years the department came to the conclusion that there were certain incomes which had remained unexplained and thereafter those amounts (detail of which is mentioned in the assessment orders) were added as unexplained income or assets of the petitioners under Section 111 of the Ordinance. Being aggrieved with the said additions, made in the assessment orders, appeals were preferred before the Commissioner (Appeals) which admittedly are pending adjudication. The primary and foremost contention of the counsel appearing of the petitioners being that since the appeals filed by the petitioners are yet to be decided by the appellate authority hence it could not be said that a final determination at the appellate stage with regard to the additions made under Section 111 of the Ordinance has been made, therefore, the initiation of proceedings under Section 182 of the Ordinance are premature and therefore the SCNs issued may be vacated.

9. We have considered the matter in detail and would like to disagree with the contentions raised by the learned counsel for the petitioners firstly on the ground that the assessment proceedings and penalty proceedings are two separate and distinct proceedings and

cannot be considered to be one of the same proceedings. Moreover, it is clarified that it is not necessary that after initiating penalty proceedings the department is bound to impose penalty upon the petitioners. Penalty proceedings are always quasi criminal proceedings and do not form part of the assessment proceedings. If the taxation authority is satisfied with the reply furnished by an assessee, the said taxation authority can drop the proceedings of penalty initiated against a person. The wording of the table of Section 182 clearly reveals that penalty cannot be leviable on mere disallowance of a claim of exemption or upon disallowance of a claim of expenditure or declaration of a certain income.

10. Penalty proceedings are separate proceedings for which the department adopts separate procedure and before adopting the procedure it is mandatory upon the department to call an explanation from the assessee that whether under the given circumstances what he has to say with regard to the penalty proceedings initiated against him. There could be occasions where if any amount is added in the income of the assessee, while initiating assessment proceedings, no penalty in respect of such additions is imposed after satisfying that the reply furnished by the person is plausible or based on cogent reasons for which no penalty could be imposed.

11. Now if the facts of the instant petitions are examined, it could be seen that the department has simply asked the petitioners through a SCN to furnish their reply with regard to the facts that as to why penalty may not be imposed upon the petitioners under Section 182 of

the Ordinance since action under Section 111 of the Ordinance was initiated against them, while making their assessments under Section 122 of the Ordinance, for which, in our opinion, the petitioners were required to furnish a proper reply to the department by stating reasons satisfying the department for either dropping the penalty proceedings or for not imposing the penalty. Hence, in our view, the petitions in the present form are premature, as penalty proceedings could not be either deferred or dropped simply on the ground that appeals were filed by them before the Commissioner (Appeals) in respect of the additions made under Section 111 of the Ordinance in the main assessment proceedings under Section 122 of the Ordinance, which is pending adjudication as, in our view, as stated above, the assessment proceedings and penalty proceedings are two separate proceedings and it is not at all necessary while proceeding with the penalty matters against the petitioners the penalty is to be imposed mandatorily.

12. While hearing the matter, we specifically asked a question from Mr. Mangrio that whether the penalty proceedings have been initiated by the taxation authority who has the proper jurisdiction in their matter and who is their assessing authority, to which he replied in affirmative, which clearly means that the SCNs have been issued by the authority who has the proper jurisdiction over the petitioners' case. We again asked him that whether SCNs have been issued within the limitation period, to which also it was explained that the SCNs have been issued within the time limit as prescribed under the relevant law; hence, on this aspect also no interference is warranted. So far as

the issue of malice is concerned here again we tend to disagree with the contention raised by the learned counsel for the petitioners as the taxation authority who has issued the SCNs has simply asked from the petitioners to show cause as to why penalty proceedings may not be initiated against them in respect of some unexplained income which were added while making their assessment under Section 122 of the Ordinance; hence no malice in this regard could be attributed to the department. Moreover it is also a settled proposition of law that the factual controversy raised in SCNs could not be agitated in a writ petition before the High Court.

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.

15. We would like to state that proceedings for imposition of penalty, as stated above, are either criminal or quasi criminal in nature and burden in this regard is always upon the department to prove that the person has brought himself in the ambit of the penalty, as clearly spelt out under Sections 111 and 182 of the Ordinance, and simply on the ground that the assessee has failed to satisfactorily explain the amount /income would not /should not be considered as a valid reason warranting the department to impose the penalty. It may also be noted that in penalty proceedings the department has to establish independently, on the basis of the material available on record, the reasons for imposition of penalty.

16. In view of the above discussion, we dispose of these petitions by directing the petitioners to give a proper /detailed reply to the department in respect of the SCNs issued by them, for imposition of penalty under Section 182 of the Ordinance, and the department in this regard is legally bound to consider the said reply and thereafter to pass a speaking order after granting opportunity of hearing to the petitioners strictly in accordance with law.

All the captioned petitions, along with all the listed /pending application(s), if any, stand disposed of in the above manner. There shall, however, be no order as to cost.

JUDGE

JUDGE

Karachi:

Dated: .02.2021.

(Tahseen, PA)