

FORM NO.HCJD/C
JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Sr. No.	Writ Petition No.	Title
1.	I.C.A.No.183-W-2012	M/s Pak Telecom Mobile Limited Vs. Federal Board of Revenue through its Chairman, Islamabad etc.
2.	I.C.A.No.184-W-2012	M/s Pak Telecom Mobile Limited Vs. Federal Board of Revenue, Islamabad etc.
3.	I.C.A.No.211-W-2012	Pakistan Mobile Communication Ltd. Vs. Additional Commissioner, Inland Revenue (Audit-II), LTU, Islamabad & Another
4.	I.C.A.No.212-W-2012	M/s Link Direct International Pvt. Ltd. Vs. Additional Commissioner, Inland Revenue (Audit-II), LTU, Islamabad & Another
5.	I.C.A.No.213-W-2012	M/s Link Direct International Pvt. Ltd. Vs. Additional Commissioner, Inland Revenue (Audit-II), LTU, Islamabad & Another
6.	I.C.A.No.214-W-2012	Pakistan Mobile Communication Ltd. Vs. Commissioner Inland Revenue (Audit), LTU, Islamabad & Another
7.	I.C.A.No.215-W-2012	Pakistan Mobile Communication Ltd. Vs. Additional Commissioner, Inland Revenue (Audit-II), LTU, Islamabad & Another
8.	I.C.A.No.216-W-2012	M/s Pakistan Mobile Communication Ltd. Vs. Additional Commissioner, Inland Revenue (Audit-II), LTU, Islamabad & Another
9.	I.C.A.No.217-W-2012	M/s Link Direct International Pvt. Ltd. Vs. Additional Commissioner, Inland Revenue (Audit-II), LTU, Islamabad & Another
10.	I.C.A.No.221-W-2012	M/s Telenor Pakistan Pvt. Ltd. Vs. Federation of Pakistan through Ministry of Finance, Islamabad etc.
11.	I.C.A.No.222-W-2012	M/s Telenor LDI Communications Pvt. Ltd. Vs. Federation of Pakistan through Ministry of Finance, Islamabad etc.
12.	I.C.A.No.223-W-2012	Pakistan Telecommunication Company Ltd. Vs. Additional Commissioner, Inland Revenue (Audit-II), LTU, Islamabad & Another
13.	I.C.A.No.226-W-2012	Pakistan Telecommunication Company Ltd. Vs. Additional Commissioner, Inland Revenue (Audit-II), LTU, Islamabad & Another
14.	I.C.A.No.227-W-2012	Pakistan Tobacco Company Limited Vs. Additional Commissioner, Unit-II, Taxation Officer, LTU, Islamabad
15.	I.C.A.No.228-W-2012	Pakistan Tobacco Company Limited Vs. Additional Commissioner, Unit-II, Taxation Officer, LTU, Islamabad
16.	I.C.A.No.229-W-2012	Pakistan Telecommunication Company Ltd. Vs. Additional Commissioner, Unit-II, Taxation Officer, LTU, Islamabad
17.	I.C.A.No.239-W-2012	M/s Pakistan Oilfields Limited Vs. Additional Commissioner Inland Revenue (Audit-I), LTU, Islamabad etc.

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18.	I.C.A.No.240-W-2012	M/s Pakistan Oilfields Limited Vs. Additional Commissioner Inland Revenue (Audit-I), LTU, Islamabad etc.
19.	I.C.A.No.271-W-2012	Pakistan Tobacco Company Limited Vs. Federation of Pakistan through Ministry of Finance, Islamabad etc.
20.	I.C.A.No.330-W-2012	M/s POF Welfare Trust Vs. Federation of Pakistan through Chairman, FBR, Islamabad etc.

Appellants by : Mr. Nasim Sikandar, Advocate
Raja Nowsherwan Akhtar & Muhammad Zahid Mahboob Khan, Advocates
Mr. Nasar Ahmad, Advocate
Sardar Ahmad Jamal Sukhera, Advocate
Hafiz M. Idrees, Advocate
Mr. M. Naseem Khan, Advocate

Respondents by : Hafiz Munawar Iqbal & Abdul Khaliq Thind, Advocates
Mr. Saeed Ahmed Zaidi, Advocate
Mr. Muhammad Bilal, Mr. Babar Bilal & Shazia Bilal, Advocates

Dates of hearing : 23.04.2013 & 25.04.2013.

NOOR-UL-HAQ N. QURESHI J.- Since all the above captioned Intra Court Appeals involve common question of law and facts therefore, the same are being decided vide this consolidated judgment.

2. All these above tiled Intra Court Appeals are directed against the judgment dated 27.04.2012 passed by the learned Single Judge-In-Chambers dismissing W.P. No.2412/2009 along with other connected writ petitions. The appellants have requested to set aside the impugned judgment, declare the issuance of show cause notices as without lawful authority and suspend the operation of impugned show cause notices.

3. Precisely, the facts relevant for disposal of the Appeals are that show cause notices were issued to all the appellants by the Additional Commissioner/Taxation Officer, Large Taxpayers Unit, Islamabad u/s 122 (9) read with Section 122 (5A) of the Income Tax Ordinance, 2001 on the basis that assessments already framed were erroneous as well as prejudicial to the interest of revenue. According to the appellants, returns filed for the respective

returns as mentioned in the appeals, were deemed to be the 'assessment orders'

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passed by the Commissioner u/s 120 of the Income Tax Ordinance, 2001, hence the Additional Commissioner had no authority to issue show cause notices for amendment of already framed assessments. Against issuance of show cause notices, all the appellants preferred writ petitions, which were dismissed vide consolidated judgment dated 27.04.2012 passed by the learned Single Judge-in-Chambers, hence these appeals.

4. First point argued by the learned counsel for the appellants is regarding the power of the Commissioner Inland Revenue to amend his own order. As returns submitted by the taxpayers u/s 120 of the Income Tax Ordinance, 2001 are to be deemed the 'assessment orders' passed by the Commissioner, even then the Commissioner has no power to amend his own order, as nobody can be a judge in his own cause. Moreover, the judicial remedy of revision is always exercised by a higher authority against an order of a subordinate authority. The person who has issued an order cannot exercise power of revision in respect of the same order, as there is every likelihood that he would be biased and interested to uphold his own order and therefore can never be impartial. The learned Single Judge-in-Chambers has mentioned in the impugned judgment that in exercise of powers u/s 122 (5A), the Commissioner revised his own order and that ordinarily power of revision cannot be exercised by the authority, who passed the original order, but despite holding so, the learned Single Judge-in-Chambers has erred by observing that original consequences attached to revision would not apply to an order passed u/s 122(5A), because Income Tax Ordinance, 2001 does not treat it as revision. In support of these contentions, reliance was placed upon case laws reported as 2003 PTD 734, 2009 PTR 23 (Supreme Court of Pakistan).

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5. Second contention is regarding delegation of powers by the Commissioner u/s 210 of the Income Tax Ordinance, 2001. Learned counsel for the appellants have argued that the learned Single Judge-in-Chambers did not consider the legal points on the issues of delegation of powers by the Commissioner and jurisdiction. He submits that the Additional Commissioner Inland Revenue had no authority whatsoever, to issue the show cause notices by invoking Section 122 (5A) of the Income Tax Ordinance, 2001, rather the Commissioner had the authority to pass such an order, but despite clear provision of law, the Additional Commissioner has exercised that authority, which clearly shows malafide intention on the part of respondents. Thus the Additional Commissioner has travelled beyond the jurisdiction which was not vested in him. This sole ground was sufficient to set aside the impugned show cause notices, but learned Single Judge-in-Chambers has failed to appreciate this fact. Under the said provision of law, before issuing such show cause notices for amendment of assessment, the Commissioner is required to apply his conscious mind, but in the instant case, he failed to apply his mind judiciously and independently.

It was argued that the power of amending the assessment order cannot be delegated to a subordinate officer thus revisional authority cannot be exercised by any subordinate officer. The learned Single Judge-in-Chambers has held that when the Commissioner delegates powers to the Additional Commissioner to amend the assessment, such powers would include the functions of the Commissioner i.e. scrutiny of the assessment, proper application of mind etc. The amendment of assessment is a 'power' of amendment and consideration as to whether the order is erroneous and prejudicial to the interest of revenue as "function". After having held so, the learned Single Judge-in-Chambers has erred in law to appreciate that under the

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actual order of delegation, only amendment of assessment u/s 122(5A) has been delegated to the Additional Commissioner, which means that power to amend the assessment order has been delegated and function prior to exercise of such amendment has not been delegated, which makes the exercise of such function by the Additional Commissioner patently without jurisdiction. Moreover, if the Commissioner can amend his own order, Section 210(1) & (1-A) have to be read down so as to exclude from their purview Commissioner's power to delegate to his subordinate, power to amend an assessment order issued by him, as otherwise it would be violative of the basic judicial discipline and hence violative of due process that a subordinate cannot revise an order passed by a superior. If delegation of power u/s 210 of the Income Tax Ordinance, 2001 is permissible in case of power to amend under section 122(5A), the obligation/duty/function to 'consider' Section 122(5A) that assessment is erroneous and prejudicial to the interest of revenue, cannot be delegated, as the Commissioner has to apply his own mind.

As far as the maintainability of writ petitions, learned counsel for the appellants have argued that the learned Single Judge-in-Chambers was not justified to hold that alternate remedy was available to the appellant. In the Income Tax Ordinance, 2001, no remedy is available against illegal and unjustified issuance of show cause notice. Through the impugned judgment, the learned Single Judge-in-Chambers agreed with a number of submissions made on behalf of appellants but refused to grant relief as prayed for. The learned learned Single Judge-in-Chambers has issued rule nisi, which could either be made absolute or discharged. A refusal to interfere after issuance of this rule is not in consonance with the practice and procedure of a

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 In support of contentions, following case laws have been
 relied upon: -

- i) (1970) 22 Tax 229 (S.C.)
- ii) 1999 PTD 1892 (S.C.)
- iii) 1994 SCMR 2232
- iv) 2002 PTD 679 (H.C.)
- v) 1998 PTD 2012 (H.C.)
- vi) (1981) 44 TAX 93 (H.C.)
- vii) (2007) 95 TAX 60 (H.C.)

As regard the matter of time barred show cause notices, as per learned counsel, the same were per se and without jurisdiction, therefore, were amenable to writ jurisdiction. It is settled law that where the alternate remedy is merely illusory the Court can interfere through constitutional jurisdiction. In the case in hand, the respondents while admitting that on 31.12.2005, the provisions of Section 122 (2) of the Income Tax Ordinance, 2001 provided a limitation of five years nevertheless contended that case of the appellant was covered by the subsequent change in law brought about by Finance Act, 2009 (w.e.f. 30.06.2009) allowing amendment by the Commissioner after the expiry of five years from the end of financial year in which the Commissioner had issued the assessment order. Therefore, if the revenue authorities are approached in response to show cause notice, they can take a different stance or decision. In this manner, the alternate remedy had become totally unavailable to the appellant.

6. On the other hand, learned counsel for the respondents have contended that contention of the appellants that Commissioner does not have the power to amend his own order is not correct, as u/s 122 (5A) of the Income Tax Ordinance, 2001, the Commissioner is competent to amend his assessment order but can also further amend an assessment order, if in his opinion, same was erroneous and prejudicial to the interest of revenue. Reliance in this respect has been placed on 2009 SCMR 1279 & 2010 PTD 1506.

Moreover, the contention of the appellants that show cause notice issued by an Officer of Grade-18 is without jurisdiction is also incorrect. Since u/s

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208 of the Income Tax Ordinance, 2001, all appointments are made by the Board, therefore, it is prerogative of the Board to select and appoint persons for the respective posts. Reliance in this respect has been placed on 2012 SCMR 1151.

They have contended that as the writ petitions were preferred to challenge issuance of show cause notices to the appellants instead of submitting reply to those notices before the competent authority, therefore, ICAs are not maintainable. In this regard, following case law have been cited: -

- i) 1983 CLC 1352 (Lah.)
- ii) PLD 1983 Lahore 167
- iii) PLD 1968 Lahore 1455
- iv) 1990 CLC 1693
- v) 1980 SCMR 720
- vi) 1990 CLC 1086
- vii) PLD 1984 Supreme Court 344

In view of above submissions, learned counsel for the respondents have fully supported the judgment passed by the learned Single Judge-in-Chambers and have requested for dismissal of instant ICAs.

7. Arguments of both the sides have been heard, record as well as relevant provisions of law and authorities cited by both the sides have also been perused.

8. After hearing the arguments advanced by both the sides, following issues have been highlighted: -

- a) Show cause notice u/s 122 (5A) of the Income Tax Ordinance, 2001 in some cases were time barred.
- b) Assessment made u/s 122 of the Income Tax Ordinance, 2001 by the Commissioner cannot be revised by the Commissioner and the powers vested u/s 122 (5A) are revisional powers.

c) With such revisional powers, the Commissioner had no authority to delegate his powers and functions to his subordinate (Additional Commissioner), as the law confers such powers only on the Commissioner as envisaged by Section 122 (5A) to apply his own mind before issuance of show cause notice under the said provisions.

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- d) *The Additional Commissioner not holding rank of BS-18 Officer of Inland Revenue Service, thus, he is not competent to issue show cause notices.*
 - e) *The provisions of Section 122 (5A) of the Income Tax Ordinance, 2001 are ultra vires.*

9. First of all, we would like to discuss, as to whether learned Single Judge-in-Chambers has dealt with all the above issues in his judgement in view of law laid down by the Hon'ble Supreme Court of Pakistan in various pronouncements:-

From the pleadings, it emerged that assessment made u/s 122 (5A) of the Income Tax Ordinance, 2001 is previously a conversion of return of income tax into assessment order by legal fiction, as the law deems a 'return' to be an 'assessment order'. Consequently, it could be amended u/s 122 (5A) by the Commissioner.

10. The Commissioner could delegate the powers and functions u/s 122 (5A) of the Income Tax Ordinance, 2001 to an Officer, not below the rank of Additional Commissioner, therefore, he has validly delegated these powers, vested in him, as provided by Section 210 of the Income Tax Ordinance, 2001.

11. The Additional Commissioner had all the powers u/s 122 (5A) to issue a show cause notice by applying his mind to decide whether the ground existed for action under the said Section. The said powers also include that question of limitation could be agitated before the Additional Commissioner, therefore, adequate remedy was available to the appellants under the Income Tax Ordinance, 2001. This issue has been decided by an elaborate discussion in the recent pronouncement of Hon'ble Supreme Court of Pakistan in C.P. No.773 of 2012 in the case of M/s Ocean Pakistan Limited Vs. Federal Board of Inland Revenue, Islamabad & Others, which was filed after dismissal of W.P.

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No.2959/2011 as well as in W.P. No.3446/2011 decided by this Court that where a show cause notice is issued, a remedy is available by way of presenting the case before the concerned tax authorities.

12. The question of authority of Additional Commissioner exercising powers u/s 122 (5A) of the Income Tax Ordinance, 2001 was reasonably decided in the above referred decision of Hon'ble Supreme Court in Ocean Pakistan Limited case. The Hon'ble Supreme Court held that all the contentions could be raised before the Additional Commissioner, who had issued notices u/s 122 (5A) of the Income Tax Ordinance, 2001. Following the ratio of this judgment, the appellants could have submitted their reply of show cause notices by raising all these objections before the learned Additional Commissioner.

13. To clarify the clouds of doubts in this regard, the hierarchy of Inland Revenue Department is being mentioned below: -

- i) Chief Commissioner (Administrative Head)
- ii) Commissioner
- iii) Additional Commissioner
- iv) Deputy Commissioner
- v) Assistant Commissioner
- vi) Officer Inland Revenue

14. The various powers of assessment and recovery are primarily exercised by the Officer working under the supervision of Additional Commissioner. The Additional Commissioner supervises the work of his subordinates and u/s 122 (5A) he has been delegated the power, which is administrative and supervisory in nature to get corrected an assessment, which in his opinion, is erroneous in so far as it is prejudicial to the interest of revenue as defined by Section 122 (5A) itself, meaning thereby that in these conditions, the Additional Commissioner can take coercive measures to protect the interest of revenue.

15. The powers, so vested, were initially conferred by the Legislature in 1959 by enshrining Section 34 in repealed Income Tax Act, 1922. Identical

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provisions were the part of repealed Income Tax Ordinance, 1979, in which, same were expressed as Section 66-A. Simultaneously, the same have been incorporated by way of Section 122 (5A) read with Section 9 of the Income Tax Ordinance, 2001. Therefore, the learned Single Judge-in-Chambers has rightly held that it is not a power of revision rather it is supervisory authority to protect the interest of revenue. This provision is thus available on the book of statute since last 54-years.

16. The current Income Tax Ordinance, 2001 has introduced a legal fiction whereby all acts are done in the name of Commissioner. In order to avoid controversies, the powers have been delegated to subordinate officers. In this regard, attention is drawn to Article 90 of the Constitution, which provides that the executive authority of the Federation shall be exercised in the name of the President.

17. In view of law laid down in pursuance of reported judgment of the Hon'ble Supreme Court of Pakistan PLD 1984 SC 344 & 1983 CLC 1352, the proceedings having been initiated by show cause notice and ICA was incompetent u/s 3 (2) of the Law Reforms Ordinance, 1972.

18. With regard to the prayer that Section 122 (5A) of the Income Tax Ordinance, 2001 is ultra vires to the Constitution, we observe that this ground has merely been inserted as one of the prayer by the appellants, which otherwise does not attract as elaborately discussed by the learned Single Judge-in-Chambers from para-8 to para-15 of his judgement that is why, notice was not needed to be issued under Order 27-A C.P.C., which has rightly been done by the learned Single Judge-in-Chambers.

19. On several dates of hearing, arguments of learned counsel for the appellants were heard with regard to the controversies raised, even by their arguments, they tried to hit the vires of corresponding section, therefore, the

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judgment passed by learned Single Judge-in-Chambers seems to be on sound reasoning. None of the learned counsel for the appellants could point out any reason advanced thereof as to why the Hon'ble Supreme Court of Pakistan's judgement in the case of Ocean Pakistan Limited should not be followed. The only argument advanced in this regard was that Ocean Pakistan Limited had agitated the jurisdiction of Additional Commissioner. In this regard, it is further clarified and important to note that Hon'ble Supreme Court of Pakistan did not find any illegality or lack of jurisdiction with regard to the powers exercised by the Additional Commissioner, thus the question raised with regard to the vires has become redundant. As such, the Hon'ble Single Judge-in-Chambers has rightly held that Additional Commissioner was competent to exercise powers u/s 122 (5A) of the Income Tax Ordinance, 2001, which does not call for any interference.

20. Therefore, in view of above perspective, neither the appellants have been able to substantiate any ground before us nor any illegality or infirmity has been observed, on account of which, interference is required in the impugned order.

21. In view of above, all the above titled Intra Court Appeals, being devoid of merits, are dismissed.

sd
(CHIEF JUSTICE)

sd
(NOOR-UL-HAQ N. QURESHI)
JUDGE

Announced in open Court on 16-05-2013

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(CHIEF JUSTICE)

Approved for reporting.



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