

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
(JUDICIAL DEPARTMENT)

W.P. No.4201/2018

Guarantee-Salex-Thales Joint Venture

Versus

Federation of Pakistan  
through Secretary Revenue Division & others

Petitioner by : Ms Zainab Janjua, Advocate.

Respondents by : Mr Abdullah Aleem Qureshi, Advocate.  
Malik Umair Saleem, Advocate.  
Mr Manzoor Hussain, Advocate.

Mr Khalid Mehmood Dhoon, Asstt. Attorney  
General.

Date of Hearing : **15.03.2023.**

Arbab Muhammad Tahir, J.- The petitioner, through this constitutional petition has sought the following prayers.-

- I. *"Declare and set aside the Impugned Notice dated September 13, 2018 issued by the Respondent No.4 as being ultra vires Section 30 & 31 of the Sales Tax Act, 1990 read with the Islamabad Capital Territory (Tax on Services) Ordinance, 2001 and also unlawful, illegal and without any jurisdiction and thus, liable to be struck down;*
- II. *Declare that the Respondent No. 4 is not empowered to exercise any jurisdiction over the Petitioner JV, for the purposes of the Islamabad Capital Territory (Tax on Services) Ordinance, 2001, and his actions are ultra vires Section 30 & 31 of the Sales Tax Act, 1990 and contrary to the ruling of this Honourable Court in 2016 PTD 2332;*

- III. In the alternative and without prejudice to the above prayer clauses, declare that the amendment in the Schedule to the Islamabad Capital Territory (Tax on Services) Ordinance, 2001 vide Finance Act 2015 can only apply prospectively, and any subsequent levy of sales tax on construction services is to be borne by the Respondent No.5, being the recipient of such services;*
- IV. In the interim, suspend the Impugned Notices dated September 13, 2018 issued by the Respondent No.4 and restrain the Respondents from passing any final order or otherwise taking any coercive action in pursuance thereof, during the pendency of the titled Petition."*

2. Succinctly, the facts are that the petitioner is a joint venture by and between M/s Guarantee Engineers (Pvt.) Limited, M/s Thales Italia S.P.A. and M/s Leonardo S.P.A. (formerly M/s Salex Es S.P.A.) and was awarded the contract for construction of Package-04 (Special System-Baggage Handling for Passenger Terminal Building) at the new greenfield Islamabad International Airport (the **Project**) allocated by the Civil Aviation Authority (**CAA**). The scope of the Project involved import and installation of necessary plant, machinery, alongwith construction of the necessary infrastructure. The Department issued the impugned notice, dated 13.09.2018, alleging short levy/non-levy of tax amounting to Rs.479,462,677/- on rendering of contractual / construction services which as per the Department is in violation of Islamabad Capital Territory (Tax on Services) Ordinance, 2001 (**Ordinance of 2001**) read with sections 3,6,11,22,23 and 26 of the Sales Tax Act, 1990, recoverable under section 11(2) alongwith default surcharge under section 34 and penalty under section 33(5) the Sales Tax Act, 1990. It is the stance of the petitioner that since the Project is in the nature of Government

civil works, therefore, exempt from levy of tax in terms of clause 5 of the Schedule to the Ordinance of 2001.

3. The learned counsel for the petitioner has contended that; the Officer Inland Revenue appointed under section 30(1) of the Sales Tax Act, 1990 (**Act of 1990**) was not vested with power and jurisdiction to issue the impugned notice; the authority to issue the impugned notice only vested in the relevant Commissioner Inland Revenue; the Federal Board of Revenue had delegated the powers only on the relevant Commissioner; the delegated power could not have been further sub-delegated; the impugned notice is ultra vires the Ordinance of 2001 and the Act of 1990; reliance has been placed on the judgment of this Court titled "*Zaver Petroleum Corporation Limited v. Federation of Pakistan, etc.*" [2016 PTD 2332]; CAA being the service recipient is an organ of the Federal Government and thus exempt from levy of tax under clause 5 of the Schedule to the Ordinance of 2001; incorrect rate of tax has been applied in the impugned notice; the Schedule to the Ordinance has been amended thereby reducing the levy of tax from "sixteen percent" to "five percent"; the Schedule to the Ordinance of 2001 whereby the rate of levy of tax was determined as "sixteen percent" was amended through Finance Act, 2015; the contract between the petitioner and CAA was concluded prior in time, hence past and closed transaction; the amendments could not have been given retrospective effect; even if any tax has to be paid, the same is payable by the CAA; the impugned notice has been issued without lawful authority; reliance is placed on the case titled "*Sindh Revenue Board through Chairman government of Sindh and another v. The Civil Aviation Authority of Pakistan through Airport Manager*" [2017

SCMR 1344], "*Pakistan Oilfields Ltd. v. Federation of Pakistan and others*" [2022 PTD 413] and "*Pakistan Oilfields Ltd. v. Federation of Pakistan and others*" [2022 PTD 413].

4. On the other hand, the learned counsels for the respondent/Department has argued that; the impugned notice was validly and legally issued; the jurisdiction assumed by the Officer Inland Revenue was without any legal defect; the law laid down in judgment rendered by a learned Single Bench of this Court in Zaver Petroleum, relied upon by the learned counsel for the petitioner is no more relevant; reliance is placed on the case titled "*The Commissioner Inland Revenue, Zone-III, RTO-II, Lahore v. Messrs Hamza Nasir Wire and others*" [2020 SCMR 1822]; the construction work done under the Civil Aviation Authority is not Government civil work, hence not exempt; services means the time at which the services are rendered or provided; tax is charged at the time of rendering of services; the tax shall be levied at the rate of five percent from July, 2016 onward.

5. The learned counsel for the CAA has argued that; the petition has been incompetently filed; the contract includes arbitration clauses and in case of any dispute between petitioner and CAA with regard to terms and conditions thereof, the matter at the first instance shall be filed before the arbitrator; the petition is not supported by valid Board Resolution and Articles of Association; adequate alternate remedies are available to the petitioner for redressal of its grievances; show cause notice is not an adverse order; this Court cannot sit in appeal over the impugned notice; the matter is purely contractual in nature; the instant petition is not maintainable; clause 52.1 of the contract

makes the petitioner liable to pay the impugned tax; the petitioner is trying to mislead this Court.

6. Heard. Record perused.

7. The petitioner has invoked the constitutional jurisdiction of this Court against the impugned notice, mainly on the ground of jurisdiction. The impugned notice has been issued by Officer Inland Revenue for non-levy/short levy of the tax due. It is the case of the petitioner, that the Federal Board of Revenue vide Notification, dated 18.09.2017 ("**Notification**"), had delegated the powers to the Commissioners Inland Revenue as specified in Column (2) to exercise powers and functions specified in Column (3) of the Table of the Notification and since the Officer Inland Revenue does not figure anywhere in the said Notification, therefore, such powers can only be exercised by the Commissioner Inland Revenue and not by the Officer Inland Revenue. Furthermore, any assignment of functions mentioned in the Notification by the Commissioner Inland Revenue to the Officer Inland Revenue would amount to sub-delegation of powers, not warranted under the law and in disregard to the principles and law laid down in the case titled "*Zaver Petroleum Corporation Limited v. Federation of Pakistan, etc.*" [2016 PTD 2332].

8. The judgment relied upon by the petitioner i.e. Zaver Petroleum's case supra, has been examined by the Hon'ble Supreme Court in the case titled "*The Commissioner Inland Revenue, Zone-III, RTO-II, Lahore v. Messrs Hamza Nasir Wire and others*" [2020 SCMR 1822]. The relevant portions are reproduced below.-

“Accordingly, the scheme of the Act is that only FBR is competent to appoint OIRs in a graded hierarchy of eleven different posts and to fix their jurisdictional parameters. Similarly, under the concurrent power [Section 30(3)], the CIRs have the authority to fix the jurisdictional parameters of OIRs who are subordinate to them in rank. However, the powers and duties of such OIRs are, pursuant to section 31 *ibid*, specified and fixed by the Act and include the powers and duties of their subordinate officers.”

“It may be noticed that, while the Act confers multiple powers on OIRs, the provisions of section 11 *ibid* vests powers on such officers specifically in two respects, namely, the assessment and recovery of tax. Thus all OIRs of different grades appointed under section 30(1) of the Act possess the power to issue show cause notices under section 11 *ibid*. Consequently, the impugned show cause notices were issued by the OIRs competently under section 11(3) *ibid* in aid of proceedings commenced for recovery of tax.”

“It may be observed that while both High Courts have arrived at the same conclusion, they have done so for reasons that are not entirely consistent. The judgment passed by the Lahore High Court held that the presence of Notification-I in the field created a bar against the issuance of Notification-II by the CIR. This is because in Column (3) of Notification-I the FBR delegated its powers and functions to CIRs, therefore, these functions and powers could not be sub-delegated by the CIR to his subordinate OIRs. However, it was observed by the learned High Court that if Notification-I had not been in force, then the CIR had the authority under section 30(3) of the Act to issue Notification-II prescribing functions of his subordinate OIRs subject to the limits of territorial and personal jurisdiction.

14. In our considered view, the said finding is flawed. It has wrongly been assumed that simply because the FBR in exercise of its authority under section 30(1) of the Act has assigned territorial and personal jurisdiction to CIRs for the exercise of their functions and powers under the Act, the latter were prevented from exercising their statutory power under section 30(3) of the Act. The impugned judgment does not give any reasons for such a reading of section 30(1) and (3) of the Act. In fact, on a perusal of section 30(3) it becomes clear that the said

provision operates independently of section 30(1) of the Act. Nowhere does section 30(3) restrain the CIRs from delineating the territorial and personal jurisdiction of their subordinate OIRs. The conferment of power under section 30(3) on the CIRs is meant to efficiently organise the team of officers subordinate to them. In the present case this includes the fixing of territorial and personal limits of each of the twelve subordinate OIRs in Zone-III.

15. By disallowing distribution of functions by the CIR, the impugned judgment expects all such functions to be performed by the CIR himself. Apart from rendering the subordinate OIRs redundant, the other immediate consequence of the impugned finding is that the CIR is disabled from exercising his administrative and supervisory functions under the Act. For instance under section 45A(4) of the Act, the CIR can call for and examine the record of any proceedings under the Act or Rules pending before his subordinate OIRs to examine its legality or propriety. However, if the CIR is personally performing all the functions under section 11 of the Act (as would be the case if the interpretation of the impugned judgment is adopted), then he will be prevented from exercising his supervisory power under section 45A(4) of the Act. This is because the CIR cannot possibly supervise himself. Similarly under section 25(2) of the Act, the CIR can authorise an OIR to conduct an audit. However, if the view of the learned High Court is accepted then there is no competent statutory authority specified in the Act to authorise the conduct of an audit under section 25(2) *ibid*. The same analysis applies to section 47 of the Act which provides for a reference to be filed by a subordinate OIR before the High Court on the authorization of the CIR. Upon a careful evaluation, the finding of the learned High Court for the CIR to perform all functions of the OIRs under the Act is erroneous.”

“17. In so far as the impugned judgment has quoted from the Islamabad High Court in the Zaver Petroleum case (*supra*), we may briefly consider that view. It is apparent from the quoted excerpt that the said decision treats the performance of a function of an office to be different from the exercise of a power and duty vested in such office. Therefore, it has been deemed necessary that conferment of power and jurisdiction upon a statutory authority must precede the assignment of functions to such an authority. The

learned Judge has relied to a great extent on this distinction between functions and powers to quash the disputed show cause notices. There is no cavil with the proposition that to exercise the functions of an office a statutory functionary must possess the relevant powers. However, what was perhaps not highlighted to the learned Court was that the exercise of powers forms part of the performance of the functions of an office. Therefore, when functions of an office are allocated by a competent instrument, the powers appurtenant thereto under the law stand vested in the appointee for exercise thereof."

9. The question whether the Officer Inland Revenue has lawfully assumed jurisdiction and issued the impugned notice has been dealt with and answered in the afore-referred judgment of the Hon'ble Supreme Court. The assumption of jurisdiction is, therefore, not in contravention of section 30 and 31 of the Act of 1990 or the provisions of the Ordinance of 2001. The second challenge to the impugned notice is on the ground that since the CAA is an organ of the Federal Government, therefore, the services provided by the petitioner to CAA are exempt from tax in terms of clause 5 of the Schedule to the Ordinance of 2001. This ground taken by the petitioner is misconceived as (i) the petitioner is an independent third party contractor i.e. a joint venture (ii) the tax is charged on the "services provided" by the petitioner pursuant to contract, and (ii) the CAA being government entity is not the "provider of services" in the case in hand.

10. The petition has been filed assailing show cause notice, which admittedly, is not an adverse order. The impugned show cause notice provides an opportunity to the petitioner to explain as to why the tax as mentioned therein should not be imposed. The grounds raised before this Court can be taken and agitated by the petitioner before the respondent Department. The august Supreme Court in the case titled "*Commissioner Inland Revenue and others v. Jahangir*



*Khan Tareen and others*" [2002 SCMR 92] has held and observed that.-

*"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 within reasonable timeframe. Even in case of an adverse order, the remedies are provided under the tax laws with different hierarchy or chain of command. The court may take up writs to challenge the show cause notice if it is found to be barred by law or abuse of process of the court. The Abuse of process is the use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive. 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. 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. In the case of Indus Trading and Contracting company v. Collector of Customs (Preventive) Karachi and others (2016 SCMR 842), this court held that 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. 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 available under any law. Where adequate forum is fully functional, the High Court 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."*

11. The jurisdiction of this Court in matters assailing a show cause notice is, therefore, limited to the inquiry where the show cause notice is issued (i) without jurisdiction, (ii) patently illegal, (iii) with

premeditation without application of mind for extraneous reasons (iv) it violate fundamental rights (v) where interpretation of law is required and (vi) where there is no adequate and efficacious remedy available to the aggrieved person. Reliance is placed on the judgment of this Court reported as "*Messrs Pakistan Oilfields Limited through General Manager v. Federation of Pakistan through Ministry of Finance and 4 others*" [2020 PTD 110]. In the case in hand, the question of jurisdiction and exercise of authority by the Inland Revenue Officer, being legal questions, have already been settled and answered by the Hon'ble Supreme Court in *Messrs Hamza Nasir's* case, supra. The prayer clause to the extent of prospective application of the amendment made through the Finance Act, 2015 in the Schedule to the Ordinance of 2001, has not been pressed by the petitioner.

12. As noted above, the petitioner is at liberty to agitate all the grounds raised in the petition in hand before the Department. The applicable law provides various remedies to the petitioner in case an adverse order is passed. In absence of any jurisdictional defect, the remedies available to the petitioner under the applicable law in respect of the grievances are adequate and efficacious.

13. For what has been discussed above, the instant petition is without merit and is, therefore, accordingly **dismissed**.

(ARBAB MUHAMMAD TAHIR)  
JUDGE

Announced in the open Court on 11.04.2023.

JUDGE