

[Supreme Court of Pakistan]

Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah, Athar Minallah**and Syed Hasan Azhar Rizvi, JJ****COMMISSIONER INLAND REVENUE---Petitioner****Versus****Messrs RYK MILLS---Respondent**

Civil Petitions Nos. 1842-L and 1843-L of 2022, decided on 11th September, 2022.

(Against the order of Lahore High Court, Lahore dated 31.03.2022, passed in ETRs Nos. 32241 and 32246 of 2021)

(a) Constitution of Pakistan---

---Arts. 4 & 10A---Show cause notice---Significance and purpose of a show cause notice stated.

A show cause notice is a formal communication from an authority, informing the recipient of an alleged violation or non-compliance with a law, and providing them with an opportunity to respond to the said allegations. It embodies the principle of natural justice, which requires that parties to a dispute be given a fair hearing before any decision is made that may affect their rights or interests. The principles of due process and fairness mandate that the recipient of a show cause notice be given adequate time to respond and present their case, that they be given access to relevant evidence and information, and that they be given the opportunity to be heard before any action is taken against them. This ensures that the decision-maker is not biased, that the decision is based on the facts of the case and the relevant law, and that the recipient's rights and interests are protected. Thus, in addition to the fair hearing principle, there are other principles of natural justice that also apply for the purposes of issuance of show cause notices, including the principle of impartiality, which requires that the decision maker be impartial, and the principle of reasons, which requires that the decision-maker provide reasons for their decision. Therefore, a show cause notice is an important tool for enforcing the law, and to ensure that the recipient is given a fair and transparent opportunity to present their case before any adverse order affecting their rights and interests is passed.

Siemens Engineering v. Union of India AIR 1976 SC 1785 and S.N. Mukherjee v. Union of India AIR 1990 SC 1984 ref.

The Constitution provides for the right to be treated in accordance with the law and enshrines the principles of fair trial and due process under Articles 4 and 10A, respectively. Article 4 of the Constitution provides for the right of citizens to enjoy the protection of law and to be treated in accordance with law as an inalienable right of every citizen. It further provides that no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with the law and that no person shall be prevented from or be hindered in doing that which is not prohibited by law. Article 10A provides for the fundamental right to a fair trial and due process. The issuance of a show cause notice is an essential element in ensuring the provision of the said rights, as it provides individuals and organizations with the opportunity to explain their actions and to respond to allegations of violation or non-compliance with any law before any adverse action is taken against them. Hence, it follows that when a specific allegation is not put to the recipient, thereby failing to provide the recipient with the opportunity to respond to the same, any adjudication on the said allegation would be against the right of due process and fair trial and therefore, in contravention to Articles 4 and 10A of the Constitution.

A show cause notice can also be viewed as being akin to alternative dispute resolution ("ADR") as it provides a pre-litigation opportunity for the recipient to present their position and show cause. By doing so, the matter can potentially be resolved before it escalates and requires any adjudication. This not only saves time and resources but also encourages the efficient resolution of disputes, acting as an effective mode of resolving disputes outside of the traditional legal framework. Thus, while acting as a means to ensure due process and fair trial by allowing the recipient to explain their position and respond to the allegations before any legal action is taken, the issuance of a show cause notice also acts as a tool to resolve the issue in the pre-litigation stage, similar to the objective of ADR.

(b) Constitution of Pakistan---

---Arts. 4 & 10A---Fresh/supplementary show cause notice, issuance of---Circumstances in which issuance of a fresh/supplementary show cause notice becomes necessary highlighted.

In certain cases and to uphold the principles and rights enshrined in Articles 4 and 10A of the Constitution, after the issuance of the initial show cause notice, it may be necessary to issue a supplementary or a fresh show cause notice if there has been a significant change in circumstances or if new evidence has come to light. For example, if the recipient has provided a valid response to the initial show cause notice, but new information has surfaced suggesting that the alleged violation or non-compliance did occur, a fresh show cause notice may be required to enable the recipient to respond to the new allegations and provide further clarification. Similarly, where there has been a significant change in the circumstances or situation that led to the issuance of the initial show cause notice, a fresh or supplementary show cause notice may be required to address these changes; where the original notice was defective or incomplete, a fresh or supplementary notice would be required to be issued to provide a more detailed or accurate statement of the issues; and where the original notice does not fully address all of the issues or violations that need to be addressed, a fresh or supplementary notice should be issued to cover any outstanding matters. Ultimately, the decision to issue a fresh show cause notice should be predicated on a thorough and careful evaluation of the facts and circumstances of each case, guaranteeing that the principles of due process and fair trial are upheld.

(c) Tax---

---Show cause notice---Contents---Scope and purpose of a show cause notice stated.

A show cause notice issued to a taxpayer must contain all the necessary facts and must specify the alleged actions or inaction by the taxpayer that violated the law, allowing for a meaningful response from the taxpayer. It is imperative that the taxpayer is confronted with specific allegations, along with the grounds upon which such allegations are based, in order to properly respond to the same and to place relevant material on record that would be necessary for any defence put forth and for any adjudication by the assessing officer in relation thereto. This is also because once a show cause notice is issued, the original adjudication on the said show cause notice can only be based on the grounds and allegations levelled therein. Unless the taxpayer is confronted with the allegations through a show cause notice, no determination can be made by the assessing officer with regards to the said allegations as it is beyond the competence of the department to make out a case which the department had never canvassed and the taxpayer had never been afforded the opportunity to meet. Hence, unless the allegations, and the grounds on which the said allegations are based, are not specifically alleged in the show cause notice issued to the taxpayer, the whole exercise becomes redundant and unsustainable in law.

Commissioner Inland Revenue v. Pakistan Tobacco Company 2022 SCMR 1251; Al-Khair Gadoon v. The Appellate Tribunal 2019 SCMR 2018; Raj Bahadur v. Union of India (1997) 6 SCC 81; New Delhi Television v. Deputy Commissioner of Income Tax AIR 2020 SC 2177; Collector of Central Excise v. H.M.M. Limited 1995 Supp. (3) SCC 322; Collector Central Excise v. Rahm Din 1987 SCMR 1840; SACI Allied Products v. Commissioner of Central Excise (2005) 7 SCC 159; Commissioner of Central Excise v. Ballarpur Industries (2007) 8 SCC 89 and Precision Rubber v. Commissioner of C. Ex. 2016 (334) ELT 577 (SC) ref.

(d) Tax---

---Fresh/supplementary show cause notice, issuance of---Circumstances in which issuance of a fresh/supplementary show cause notice becomes necessary highlighted.

Where in response to a show cause notice, the taxpayer, in defence, raises substantial grounds or puts forth substantial factual aspects that are not covered in the initial show cause notice and, therefore, require further inquiry or verification by the department, then, after conducting such further inquiry or verification, a fresh or supplementary show cause notice should be issued to the taxpayer, if it is then so required. No determination can be made with regards to the same unless the taxpayer is afforded the opportunity to respond to any deficiencies or misrepresentations found in relation thereto by specifically alleging the same in a fresh or supplementary show cause notice. Hence, instead of proceeding under the same show cause notice, it is

necessary that a fresh or supplementary show cause notice is issued to the taxpayer in light of the defence so taken. Failure to do so would not only denote that in light of the grounds or facts raised in the defence put forth by taxpayer in response to the show cause notice, which were not in the knowledge of the tax authorities and therefore, were not part of the show cause notice, no further action is required under the said show cause notice, any adjudication in relation to the same would also be against the law, rendering the whole exercise redundant. Therefore, as a policy, such practice must be adopted by the tax authorities in order to prevent wastage of time and effort, and to curb unnecessary litigation. Not only would this allow a taxpayer to meaningfully respond to the specific allegations asserted against the taxpayer upon which the subsequent original adjudication, if any, will be based, as required under the law, it would also allow many cases to be resolved at the initial stages without the need to proceed any further and needlessly burden the public exchequer.

Warner Hindustan v. Collector of Central Excise (1999) 6 SCC 762; Precision Rubber v. Commissioner of C. Ex. 2016 (334) ELT 577 (SC) and Godrej v. Commissioner of Customs 2002 (143) ELT 16 (SC) ref.

(e) Tax---

----Factual issues---Highest authority for factual determination in tax matters is the Tribunal.

Commissioner Inland Revenue v. Sargodha Spinning Mills 2022 SCMR 1082 and Commissioner Inland Revenue v. MCB Bank Limited 2021 PTD 1367 ref.

Saba Saeed, Advocate Supreme Court for Petitioners (through video-link, Lahore)

Shehbaz Butt, Advocate Supreme Court for Respondent (through video-link, Lahore)

Assisted by: Muhammad Hassan Ali, Law Clerk, Supreme Court of Pakistan.

Date of hearing: 11th November, 2022.

ORDER

SYED MANSOOR ALI SHAH, J.---The petitioner seeks leave to appeal against order dated 31.3.2022 whereby the Excise Tax References ("ETRs") filed by the petitioner department were dismissed by the High Court.

2. The brief background of the case is that the petitioner department issued a show cause notice dated 02.1.2014 to the respondent company with the allegation that the respondent company had to charge Federal Excise Duty ("FED") at the rate of 8% on local supplies of white crystalline sugar but instead it charged 0.5% and as a consequence FED was short levied. The respondent company filed a written reply dated 11.1.2014 controverting the said allegation in the show cause notice. However, through the Order-in-Original dated 27.3.2014 the matter was decided against the respondent company and it was held that the short levied FED along with surcharge is to be recovered from the respondent along with penalty (5% of the amount involved). The respondent filed an appeal before the Commissioner Inland Revenue, Appeal-V, Lahore, which was dismissed vide order dated 23.11.2020 as barred by time. The respondent company then filed a rectification application against the said order, which was also dismissed on 24.12.2020. These orders were then assailed by the respondent through two appeals filed before the Appellate Tribunal Inland Revenue, Lahore ("Tribunal"). Vide order dated 28.1.2021, the appeal against order dated 23.11.2020, whereby the appeal of the respondent had been dismissed by the Commissioner Inland Revenue, was allowed by the Tribunal and resultantly the appeal against order dated 24.12.2020 was deemed to have become infructuous. Against the said order, the petitioner preferred two ETRs before the Lahore High Court under section 34A of the Federal Excise Act, 2005, raising five questions of law. However, at the time of hearing before the High Court, only the following two questions were pressed for determination:

- I. Whether or not learned ATIR granted benefit of SRO 77(I)/2013 [to the] tax payer in violation of pre-conditions of clauses (b) and (d) of the SRO 77(I)/2013?
- II. Whether the order of learned ATIR is justified and legal as the taxpayer [did] not provide documents of export whereas, as per law, registered person under sections 17 and 21(a) of the Federal Excise Act, 2005 read with section 22(1)(e) of the Sales Tax Act, 1990 is bound to provide it for verification as mandated under section 73 of the Sales Tax Act, 1990?

The said ETRs were then decided against the petitioner department by the High Court vide the impugned order dated 31.3.2022, thus, upholding the decision of the Tribunal.

3. We have heard the learned counsel for the parties and have examined the record of the case. At the outset, we have noticed that in the show cause notice dated 02.1.2014 issued by the petitioner department, the case set out against the respondent company was that it had charged 0.5% FED on the value of local supplies whereas it should have charged 8%. No mention was made of SRO No.77(I)/2013 ("SRO"), or any non-compliance thereof, in the said show cause notice. In response to the said show cause notice, the respondent company pointed out that it had charged 0.5% FED on the basis of the SRO and therefore it was not liable to pay 8% FED on local supplies. Under the said SRO relaxation in the rate of FED is extended to the quantity of the local supply of sugar equivalent to the quantity exported by the sugar manufacturer. Despite raising the above new factual ground claiming benefit under the SRO, no fresh or supplementary show cause notice was issued to the respondent company seeking clarification as to the applicability of the SRO or whether the respondent company was entitled to the benefit of the SRO. Instead, the original adjudication by the Deputy Commissioner Inland Revenue proceeded on the basis of the already issued show cause notice and while deciding the same he addressed the issue of the SRO and held that two pre-conditions of the said SRO i.e. clauses (b) and (d) had not been complied with, which provide that the sugar manufacturer has to present proof of the sugar it has exported and that the benefit of the SRO shall not be admissible in respect of exports made through land routes to Afghanistan and the Central Asian Republics. These matters were extraneous to the show cause notice and the case set up by the department against the respondent company.

4. Before delving into the matter at hand, we feel it necessary to first underscore the significance and purpose of a show cause notice. A show cause notice is a formal communication from an authority, informing the recipient of an alleged violation or non-compliance with a law, and providing them with an opportunity to respond to the said allegations. It embodies the principle of natural justice, which requires that parties to a dispute be given a fair hearing before any decision is made that may affect their rights or interests. The principles of due process and fairness mandate that the recipient of a show cause notice be given adequate time to respond and present their case, that they be given access to relevant evidence and information, and that they be given the opportunity to be heard before any action is taken against them. This ensures that the decision-maker is not biased, that the decision is based on the facts of the case and the relevant law, and that the recipient's rights and interests are protected. Thus, in addition to the fair hearing principle, there are other principles of natural justice that also apply for the purposes of issuance of show cause notices, including the principle of impartiality, which requires that the decision-maker be impartial, and the principle of reasons, which requires that the decision-maker provide reasons for their decision.¹ Therefore, a show cause notice is an important tool for enforcing the law, and to ensure that the recipient is given a fair and transparent opportunity to present their case before any adverse order affecting their rights and interests is passed.

5. The Constitution² provides for the right to be treated in accordance with the law and enshrines the principles of fair trial and due process under Articles 4 and 10A, respectively. Article 4 of the Constitution provides for the right of citizens to enjoy the protection of law and to be treated in accordance with law as an inalienable right of every citizen. It further provides that no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with the law and that no person shall be prevented from or be hindered in doing that which is not prohibited by law. Article 10A provides for the fundamental right to a fair trial and due process. The issuance of a show cause notice is an essential element in ensuring the provision of the said rights, as it provides individuals and organizations with the opportunity to explain their actions and to respond to allegations of violation or non-compliance with any law before any adverse action is taken against them. Hence, it follows that when a specific allegation is not put to the recipient, thereby failing to provide the recipient with the opportunity to respond to the same, any adjudication on the said allegation would be against the right of due process and fair trial and therefore, in contravention to Articles 4 and 10A of the Constitution.

6. As such, in certain cases and to uphold the above principles and rights, after the issuance of the initial show cause notice, it may be necessary to issue a supplementary or a fresh show cause notice if there has been

a significant change in circumstances or if new evidence has come to light. For example, if the recipient has provided a valid response to the initial show cause notice, but new information has surfaced suggesting that the alleged violation or non-compliance did occur, a fresh show cause notice may be required to enable the recipient to respond to the new allegations and provide further clarification. Similarly, where there has been a significant change in the circumstances or situation that led to the issuance of the initial show cause notice, a fresh or supplementary show cause notice may be required to address these changes; where the original notice was defective or incomplete, a fresh or supplementary notice would be required to be issued to provide a more detailed or accurate statement of the issues; and where the original notice does not fully address all of the issues or violations that need to be addressed, a fresh or supplementary notice should be issued to cover any outstanding matters. Ultimately, the decision to issue a fresh show cause notice should be predicated on a thorough and careful evaluation of the facts and circumstances of each case, guaranteeing that the principles of due process and fair trial are upheld.

7. A show cause notice can also be viewed as being akin to alternative dispute resolution ("ADR") as it provides a pre-litigation opportunity for the recipient to present their position and show cause. By doing so, the matter can potentially be resolved before it escalates and requires any adjudication. This not only saves time and resources but also encourages the efficient resolution of disputes, acting as an effective mode of resolving disputes outside of the traditional legal framework. Thus, while acting as a means to ensure due process and fair trial by allowing the recipient to explain their position and respond to the allegations before any legal action is taken, the issuance of a show cause notice also acts as a tool to resolve the issue in the pre-litigation stage, similar to the objective of ADR.

8. Coming to the present matter, in our view, non-compliance of the conditions of the SRO by the respondent company was a distinct and separate allegation which was necessarily required to be properly alleged in a show cause notice issued by the department and put to the respondent company.³ A show cause notice issued to a taxpayer must contain all the necessary facts and must specify the alleged actions or inaction by the taxpayer that violated the law, allowing for a meaningful response from the taxpayer.⁴ It is imperative that the taxpayer is confronted with specific allegations, along with the grounds upon which such allegations are based, in order to properly respond to the same and to place relevant material on record that would be necessary for any defence put forth and for any adjudication by the assessing officer in relation thereto. This is also because once a show cause notice is issued, the original adjudication on the said show cause notice can only be based on the grounds and allegations levelled therein, as pointed out above.⁵ Unless the taxpayer is confronted with the allegations through a show cause notice, no determination can be made by the assessing officer with regards to the said allegations as it is beyond the competence of the department to make out a case which the department had never canvassed and the taxpayer had never been afforded the opportunity to meet.⁶ Hence, unless the allegations, and the grounds on which the said allegations are based, are not specifically alleged in the show cause notice issued to the taxpayer, the whole exercise becomes redundant and unsustainable in law.

9. Therefore, where in response to a show cause notice, the taxpayer, in defence, raises substantial grounds or puts forth substantial factual aspects that are not covered in the initial show cause notice and, therefore, require further inquiry or verification by the department, then, after conducting such further inquiry or verification, a fresh or supplementary show cause notice should be issued to the taxpayer, if it is then so required.⁷ No determination can be made with regards to the same unless the taxpayer is afforded the opportunity to respond to any deficiencies or misrepresentations found in relation thereto by specifically alleging the same in a fresh or supplementary show cause notice. Hence, instead of proceeding under the same show cause notice, it is necessary that a fresh or supplementary show cause notice is issued to the taxpayer in light of the defence so taken. Failure to do so would not only denote that in light of the grounds or facts raised in the defence put forth by taxpayer in response to the show cause notice, which were not in the knowledge of the tax authorities and therefore, were not part of the show cause notice, no further action is required under the said show cause notice, any adjudication in relation to the same would also be against the law, rendering the whole exercise redundant. Therefore, we feel that as a policy, such practice must be adopted by the tax

authorities in order to prevent wastage of time and effort, and to curb unnecessary litigation. Not only would this allow a taxpayer to meaningfully respond to the specific allegations asserted against the taxpayer upon which the subsequent original adjudication, if any, will be based, as required under the law, it would also allow many cases to be resolved at the initial stages without the need to proceed any further and needlessly burden the public exchequer.

10. In the instant case, the show cause notice issued to the respondent had no such grounds or allegations regarding the applicability of the SRO or fulfillment of the conditions therein. Even when the respondent asserted in its reply that it had paid the FED by availing the benefit under the SRO, no fresh or supplementary show cause notice was issued to the respondent after inquiry by the department as to whether the conditions of the SRO had been fulfilled by the respondent. The assessing officer, without confronting the respondent as to the non-fulfilment of the conditions of the SRO, without providing the respondent with the opportunity to respond to the same and place relevant material on the record, and hence, without having any material to adjudicate upon this aspect, proceeded to determine that the respondent had not complied with the conditions of the SRO while adjudicating upon the same show cause notice already issued to the respondent. Therefore, the Order-in-Original passed on the matter, being extraneous to the show cause notice, was wholly without jurisdiction and could not have been sustained.

11. However, since the forums below have discussed the applicability of the SRO, therefore, to conclusively decide the case at hand, we also wish to dilate upon that aspect of the matter. It is now settled law that the highest authority for factual determination in tax matters is the Tribunal.⁸ In the instant case, the Tribunal was satisfied that exports were duly made by the respondent company under the SRO and the conditions mentioned therein, including provision of proof of such exports and that such exports should not have been made through land routes to Afghanistan and the Central Asian Republics, were duly complied with by the respondent. The department did not produce any evidence before the Tribunal to dislodge the fact that the petitioners had complied with the said requirements of the SRO. This, even otherwise, could not have been done because it was not the case set out by the department as there was no such allegation in the show cause notice. The learned counsel for the petitioner has been unable to refer to any perversity in the reading of the evidence resulting in the said factual determination made by the Tribunal. Therefore, we see no reason to interfere in the said findings of the Tribunal which have also been upheld by the High Court.

12. As far as the contention of the petitioner department as to the appeal filed by the respondent taxpayer being barred by time is concerned, we have noted that this was also discussed in detail by the Tribunal and decided in favour of the respondent. The question relating to limitation was then raised by the department in the ETRs, however, at the time of arguing the matter before the High Court on 31.3.2022, only two questions were pressed for determination, which even otherwise did not arise from the show cause notice and are highlighted above, and the question of limitation was not pressed. In these circumstances, we are therefore, not inclined to dilate upon the same.⁹ Even otherwise, as held above, the Order-in-Original against which the appeal was filed was not sustainable under the law.

13. In view of the above, we see no reason to interfere in the impugned judgment. Therefore, leave is refused and these petitions are dismissed.