

FEDERAL TAX OMBUDSMAN
REGIONAL OFFICE
LAHORE

COMPLAINT No. 490/LHR/IT(411)874/2010

Dated: 30.6.2010*

**Punjab Privatization Board
1st Floor National Tower
28-Egerton Road
Lahore**

... Complainant

Versus

**The Secretary
Revenue Division
Islamabad**

... Respondent

FINDINGS / RECOMMENDATIONS

Dealing Office : Muhammad Munir Qureshi
Advisor
Authorized Representative : Tipu Sultan, ITP
Departmental Representative : Khurram Ali Qadri, DCIR

This complaint by a corporate entity is against illegal charge of advance tax on sale of property under Section 236A of the Income Tax Ordinance, 2001.

2. The Respondent Department raised tax demand amounting to Rs.52,277,542/- against the Complainant under Section 161 of the Ordinance for failure to withhold tax under Section 236A at the time of

*Date of registration in FTO Sectt.

sale of property. The Complainant contends that the demand of tax is illegal as (a) proper opportunity, as envisaged in law, was not accorded and assessment was finalized on the first default by the Complainant to the show cause notice issued by the Department which was in violation of FBR Circular No.7(2)DT-14/94 dated February 01, 1994, stipulating that atleast three chances be given before drawing an adverse inference, (b) in tax year 2009 Section 236A was applicable on transactions involving sale of confiscated/attached property/goods only whereas the Complainant had not entered into any such transaction in that year, (c) recovery of withholding tax was required to be made from the purchaser of the properties under Section 162 of the Ordinance rather than the Complainant; and (d) the Complainant was, for all intents and purposes, a Punjab Government entity and hence exempt from levy of income tax.

3. When confronted, the Department filed reply contending that the tax demand raised against the Complainant was consistent with statutory stipulation and a Show Cause notice had been issued but the Complainant did not comply.

4. During the hearing, the DR reiterated what was stated in the Departmental reply.

5. Section 236A was added as an amendment to the Income Tax Ordinance, 2001 through the Finance Act, 2009, to provide for tax withholding at the time of sale of immoveable properties/goods. The wording of the enactment is significant in the context of the

Complainant's case and is reproduced hereunder for facility of reference:-

“Advance tax at the time of sale by auction, - (1) **Any person making sale by public auction, of any property or goods confiscated or attached either belonging to or not belonging to the Government**, local Government, any authority, a company, a foreign association declared to be a company under sub-clause (vi) of clause (b) of sub-section (2) of section 80, or a foreign contractor or a consultant or a consortium or Collector of Customs or Commissioner of Income Tax or any other authority, shall collect advance tax, computed on the basis of sale price of such property and at the rate specified in Division VIII of Part IV of the First Schedule, from the person to whom such property or goods are being sold.

(2) The credit for the tax collected under sub-section (1) in that tax year shall, subject to the provisions of section 147, be given in computing the tax payable by the person purchasing such property in the relevant tax year or in the case of a taxpayer to whom section 98B or section 145 applies, the tax year, in which the “said date” as referred to in that section, falls or whichever is later.

Explanation,----- For the purposes of this section, sale of any property includes the awarding of any lease to any person, including a lease of the right to collect tolls, fees or other levies, by whatever name called”.

6. The Complainant contends that a plain reading of the text of the enactment makes it clear that it was the sale of confiscated/attached property that attracted tax withholding in Tax Year 2009 and as the Complainant had not entered into any transaction involving confiscated/attached properties, the charge of tax was bereft of any legal basis and was required to be struck down.

7. Whereas the Department submits that FBR's Circular regarding implementation of the provisions of Section 236A had to be followed by all its functionaries, the Complainant's response is that FBR circular instructions are directory in nature and cannot override the statutory enactment and where the circular instructions are at variance with the statute, the statute must prevail.

8. It may be noted that Section 236A was amended through Finance Act, 2010 as under: -

“Advance tax at the time of sale by auction, - (1) **Any person making sale by public auction, of any property or goods (including property or goods confiscated or attached) either belonging to or not belonging to the Government**, local Government, any authority, a company, a foreign association declared to be a company under sub-clause (vi) of clause (b) of sub-section (2) of section 80, or a foreign contractor or a consultant or a consortium or Collector of Customs or Commissioner of Income Tax or any other authority, shall collect advance tax, computed on the basis of sale price of such property and at the rate specified in Division VIII of Part IV of the First Schedule, from the person to whom such property or goods are being sold.

(2) The credit for the tax collected under sub-section (1) in that tax year shall, subject to the provisions of section 147, be given in computing the tax payable by the person purchasing such property in the relevant tax year or in the case of a taxpayer to whom section 98B or section 145 applies, the tax year, in which the “said date” as referred to in that section, falls or whichever is later.

Explanation.---- For the purposes of this section, sale of any property includes the awarding of any lease to any person, including a lease of the right to collect tolls, fees or other levies, by whatever name called”.

9. The Department holds that the Complainant’s contention that the provision was applicable to sale of confiscated/attached properties only was misconceived and the amendment through Finance Act, 2010, amply clarifies the scope of property transactions covered under the law. The Department also contends that the ‘clarification’ in law is applicable with effect from 01.7.2009.

10. The standard rule of interpretation of statutes is to adopt the meaning suggested by a plain reading of the text of the statute. Following this principle, it does appear that Section 236A, as per enactment introduced through Finance Act, 2009, referred to sale of confiscated or attached property or goods. Such a view is fortified by the fact that in the year following its enactment, Section 236A was amended

through Finance Act, 2010 and the change in its wording was adopted as reproduced supra. This change is clearly not a 'clarification' as the Department would have as believe, but recognition of a lacuna in the provision that needed to be remedied. But whatever the reason for the lacuna, the Complainant cannot be denied any benefit that may have accrued to him, as the change in Section 236A through Finance Act 2010 is prospective in its application.

11. As regards the Departmental failure to associate the Complainant in the assessment proceedings, such a lapse is fatal to the assessment made. The dictum 'audi alteram partem' is required to be read into every statute and is fundamental to ensuring procedural transparency. No doubt, the Department issued a Show Cause Notice to which the Complainant did no respond, but to draw an adverse inference on a single default is neither fair nor in conformity with FBR's circular instructions referred to supra that are binding on all FBR functionaries.

12. The Supreme Court of Pakistan has ruled [**PLD 2004 441**], that the principle of 'audi alteram partem' is applicable to judicial as well as non-judicial proceedings and is to be read into every statute as its part even if right of hearing has not been specifically provided therein. Similarly, it has also been held [**PLD 1982 Lahore 1**], that where the statute does not make any mention of giving opportunity of hearing to affected person, the right of hearing nevertheless is to be read into the statute unless specifically prohibited therein. Reliance is also placed on [**PLJ 2008 SC 1088**] where it has been held that the principle of natural justice has to be observed if the proceedings might result in

consequences affecting “the person or property or other right of the parties concerned”.

13. The consequences of non-adherence to the above canon of natural justice have been held to be as follows:

- (i) An adverse order made without affording an opportunity of personal hearing is to be treated as a void order [**2005 SCMR 1841**]; and
- (ii) It’s violation is always considered enough to vitiate even the most solemn proceedings (**2005 SCMR 678**).

Findings:

14. The demand of Advance Tax under Section 236A in Tax Year 2009 is neither in accordance with the statutory stipulation, nor has it been raised by the Department in a manner that conforms to requirements of “due process”. It therefore tantamounts to maladministration as defined in Section 2(3)(i)(a) of the FTO Ordinance.

Recommendations:

15. FBR to direct the Chief Commissioner to -

- (i) take up the matter in exercise of his revisionary jurisdiction under Section 122B of the Ordinance and issue a fresh order, after affording proper opportunity of hearing to the Complainant; and
- (ii) report compliance within 30 days.

Dated: 15-9-2010

(Dr. Muhammad Shoaib Suddle)
Federal Tax Ombudsman

CORRIGENDUM

In order dated 15.9.2010 in captioned complaint case, in paragraph-15 (Recommendations), page-6, the following corrections are made:

- a. The words: "FBR to direct the Chief Commissioner to-" be read as : "FBR to direct the Commissioner concerned to-".
- b. In sub-para (i) of paragraph-15, the words "Section 122B" be read as "Section 122A"

(Dr. Muhammad Shoaib Suddle)

Dated: 30-9-2010

Federal Tax Ombudsman