

FEDERAL TAX OMBUDSMAN
REGIONAL OFFICE
LAHORE

Complaint No. 652-L- /2009

Dated: 9-10-2009

M/s M Sarfaraz Traders,
1/32, Misri shah, Lahore. ... Complainant

Versus

The Secretary,
Revenue Division, Islamabad. ... Respondent

FINDINGS / RECOMMENDATIONS

Dealing Officer: Muhammad Munir Qureshi
Advisor
Authorized Representative : Mr M Waseem Chaudhry
Advocate
Departmental Representative: Dr M. Shehryar, Addl C.I.T
Mr Azmat E Ghuman, DCIT

The facts in this case are that the complainant alleges arbitrary and perverse action by the Deptt in ignoring alleged defects in the Income Tax Assessment made for Tax Year 2008 insofar as there has been no "discovery" of alleged unexplained investment amounting to Rs 253,575,000/-. Rather, it is stated that the Complainant made no purchase at all in the Tax Year 2008. In Tax Year 2006, SMLR, HMLR was purchased for an amount of Rs 410,499,926/- from Pakistan

Steel Mill, Karachi and payment made entirely through Pay Orders. The total purchases so made included purchases amounting to Rs 253,575,000/- in the year 2005 and Rs 218,500,000/- in 2006. These are disclosed in the Income Tax Return for Tax Year 2006 and also in the Sales Tax Returns. The stock was sold in the Tax Years 2006, 2007 and 2008 and some of it was lying with the Complainant in 2009. That being so, it is averred that there was no "discovery" of "unexplained investment" relating to the stock of converted slag aggregating Rs 253,575,000/- in Tax Year 2008 and this amount was part of the stock available with the Complainant in Tax Year 2006. Thus it is argued that the Deptt has totally misconstrued the factual position and has made huge additions to declared income based on a false premise of discovery of unexplained investment.

2. The Complainant brought the matter to the notice of the Deptt through an application for "rectification" of the order of assessment but the same was dismissed summarily without giving the Complainant opportunity of being heard, as envisaged in law. Failure to associate the Complainant when the rectification application was taken up for disposal is a denial of the right of being heard and the unilateral decision in this regard was therefore not tenable in law.

3. The Supreme Court of Pakistan has ruled [PLD 2004 441], that the principle of audi alter partem is applicable to judicial as well as non-judicial proceedings and is read in every

statute. Similarly, in PLD 1982 Lahore 1, it has been held 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". Importantly, however, in the Income Tax Ordinance 2001 it is expressly provided in Section 221 (rectification of mistakes) that no order in disposal of an application for rectification that is seen as 'adverse' by the applicant may be passed without first hearing the applicant.

4. 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 1814]; and
- (ii) It's violation is always considered enough to vitiate even the most solemn proceedings [2005 SCMR 678]

5. Thus when the Complainant filed an application for rectification of the amendment made in the assessment order for TY 2008 the Deptt was under an obligation to associate the Complainant in the proceedings and to evaluate any evidence

produced by the Complainant in his defence. The record shows that this was not done and the applications were dismissed unilaterally without summoning the Complainant.

6. It is also a fact that the Complainant requested for rectification because the amount held by the Deptt to be a 'discovery' of unexplained investment made in Tax Year 2008 was included in the purchases made in TY 2006 and duly disclosed in the computation of income for that year appended with the Return of Income. Sources of investment were also claimed to have been identified to the Deptt (overdraft facilities from banks etc). Thus as the transaction in question had been disclosed in TY 2006 it could not have been 'discovered' in TY 2008 and if the transaction was held to be unexplained as to source of investment then the addition for unexplained investment should have been made in TY 2006 and not TY 2008. Addition could have been made in TY 2008 only if the said transaction had not been declared prior to TY 2008. Evidently, this is not so in the Complainant's case.

7. As held by judicial authorities, in Income Tax proceedings the scope of rectification is vast and not narrow and includes all sorts of mistakes including mistakes of law:

PTCLR 304 in ITA No.234-LB- of 1993-94 Decided on 13.3.1997 by Division Bench of ITAT	[Power of rectification is very wide under section 156 of the Income Tax Ordinance, 1979. Rectification may end in cancellation of an order and sometimes the whole order may fall to the ground].
--	--

1969-283-ITR- Blue Star Eng. Co. Bombay High Court on 18-12-1968 (Pages 283 & 300 refer)	[As a result of rectification order the whole order can be eliminated].
1983-48-Tax-56(H.C) In the case of Khalid Adamjee Vs. Commissioner of Income Tax (West) Karachi decided by Division Bench of the Sind High Court on 25-04-1983 (Pages 56 & 57 refer)	[Power of rectification u/s 156 of the Income Tax Ordinance, 1979 (formerly section 35 of the Repealed Act, 1922) are much wider in the scope of than the powers available to a Civil Court].

8. The Deptt maintains that the Complainant's version has been rightly rejected as the same could not be substantiated in the absence of proper books of account that were not produced by the Complainant during the course of assessment proceedings. As regards the rectification application moved by the Complainant, it is the Deptt's contention that the same was properly disposed of by the competent authority, in accordance with law and that the grounds taken for rectification were misconceived and therefore not tenable in law.

9. In written reply dated 2-12-2009 the Deptt has also challenged the jurisdiction of the FTO to hear a complaint that relates to assessment of income or wealth and determination of liability of tax.

10. Prima facie, the Departmental contention of "discovery" of alleged unexplained investment of Rs 253,575,000/- in Tax Year 2008 appears to be suspect considering that this amount is included in the total purchases of Rs 410,499,926/- duly declared in Complainant's Income Tax Return for 2006 and

which have been paid for entirely through bank drafts. The Deptt has not been able to contradict the Complainant's contention that he made no purchases at all in Tax Year 2008.

11. The failure of the Deptt to associate the Complainant in the disposal of his rectification application and the hurried, unilateral disposal of the rectification application casts enough doubt on the fairness of the income tax assessment made by the Deptt.

12. As for the Departmental challenge to the FTO's jurisdiction, the same is clearly misconceived as the Complaint has been accepted not because it involves matters relating to assessment of income, which fall outside the FTO's jurisdiction, but because of arbitrarily deciding the rectification application without giving the Complainant the opportunity of hearing.

13. To redress the grievance of the Complainant, the Commissioner should have called for the record u/s 122A of the Ordinance, and passed an appropriate speaking order, considering all facts and circumstances of the case, after providing the Complainant proper opportunity of being heard. Such an action has also been endorsed by the Honourable President of Pakistan in an identical situation vide order No.127/08-Law(FTO) dated 16-11-2009 in Complaint No.1102/2008.

14. **Findings:**

In view of the discussion above, maladministration as defined in Section 2(3)(i)(a) of the Establishment of the Office of the Federal Tax Ombudsman 2000 is established.

Recommendations:

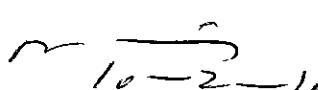
15. The FBR to -

- (i) direct the Commissioner to consider the case u/s 122A, and pass a speaking order after providing the Complainant proper opportunity of being heard;
- (ii) call for the explanation of the official(s) concerned for rejecting the rectification application of the Complainant summarily, violating rules of natural justice; and
- (iii) report compliance within 30 days.

(DR MUHAMMAD SHOAIB SUDDLE)
FEDERAL TAX OMBUDSMAN

Dated: 08-02-2010

MQ/M.I.


Mirza Rafi-uz-Zaman
(R) District & Sessions Judge
Advisor (Implementation & Monitoring)
Federal Tax Ombudsman Secretariat
Islamabad