

Commissioners IR have independent audit powers: LHC

A Division Bench of Lahore High Court (LHC) has held that the Commissioners Inland Revenue have independent powers to select cases for audit under section 177 of the Income Tax Ordinance, 2001 in addition to selection by Federal Board of Revenue (FBR) through computer ballot under section 214C . It is learnt that the Division Bench of the LHC has issued a judgement in this regard.

Commissioners Inland Revenue's powers to select cases for audit under section 177 of the Income Tax Ordinance, 2001 have been upheld by a Division Bench of Lahore High Court (LHC). The LHC judgment has decided two sets of appeals filed respectively against two judgments delivered by different learned Single Benches of this Court. Common question of Commissioner's powers to select for audit, after the addition of explanation to section 177 and 214C of the Ordinance, 2001 by Finance Act, 2013.

It is further learnt that Division Bench of the LHC has dismissed appeals filed by the taxpayers and accepted the stance of Federal Board of Revenue by confirming the judgment in Kohinoor Sugar Mills" Case, being in consonance with legislative declaration and clarification under the Explanations inserted in the Ordinance of 2001, through Finance Act 2013, is upheld.

The background facts that earlier a single bench of LHC on writ petition filed by Chenone Store etc against notices issued by the Commissioner selecting their cases for audit under section 177 had held that Commissioner has no independent power to select cases for audit. In judgment notices of selection for audit, issued, after amendments through Finance Act 2010, by Commissioner under Section 177 of the Income Tax Ordinance 2001 ("Ordinance of 2001"); Section 25 of the Sales Tax Act 1990 ("Act of 1990") and Section 46 of the Federal Excise Act 2005 ("Act of 2005"), were declared illegal and without lawful authority, after striking down first proviso to the Section 177 (1).

Whereas another single bench on the petition of Kohinoor Sugar Mill etc had given a contradictory ruling that Commissioner has independent power to select taxpayer's cases for audit by recording reasons for doing so. This judgement had also dealt with validity of notice of selection for audit, issued by Commissioner under Section 177, after amendments through Finance Act 2010. The Explanations inserted, during proceedings, through Finance Act 2013, were treated to have retrospective effect, therefore, the selection by Commissioner was held to be in accordance with law.

Both the judgments of single bench were at variance. Hence both department as well as taxpayers had filed ICA appeal before the Division Bench of LHC who has released its judgement by accepting the departmental version and over ruling the Chenone Store judgement.

The operative of the judgement revealed that nevertheless, we are in agreement with the observation in Chenone Stores" judgment that "Even though the Commissioner may be the best person in the system to identify a tax default, he cannot enjoy unguided discretion". It has already been declared in Media Network"s Case that Commissioner shall give criteria/reason-ns

in the notice for selection. Following the laid down law, first proviso to the Section 177(1) requires that reasons shall be given by the Commissioner before calling the record for audit.

It said that yet in our opinion, his discretion to call for record to conduct audit need to be structured for avoiding its potential misuse. This discretion should not be used to call a taxpayer consecutively to meet budgetary targets of collecting tax. In subsection (7) of the Section 177, though the legislature has authorized audit of a taxpayer in the next and following tax years but only where there are reasonable grounds for doing so. These reasonable grounds need to be confronted, in addition to the reasons for selection required under the first proviso.

Commissioner can call for last six years record for audit, as is deducible from the second proviso, therefore, collective reading would show that the Legislature deprecates, as a rule, selection or calling for record of a taxpayer every year. "

The argument by Mansoor Usman Awan Advocate, that the Explanations shall have retrospective effect till 01.07.2010, is found correct on the face of it because the provisions of law being interpreted, clarified and so declared through the Explanations have attained the current shape after amendment through Finance Act 2010 having effect from the date *ibid*. Yet it does not mean that Commissioner did not have such power before these amendments. The law, as discussed above, had been settled till 30.06.2010 ie, Commissioner's power to select for audit as per the criteria given, under the then Section 177(1), by FBR was different from his power to select independently and conduct audit under the Section 177(4) as these subsections were existing before amendments through Finance Act 2010.

In later part of the judgement the DB has observed that the argument, by Shahbaz Butt Advocate, appearing for taxpayer "side that stereotype reasons are given, in the notices for selection issued to different taxpayers, is not being addressed for the reason that this objection can, at the first instance, be raised in reply to the impugned notices before the Commissioner or Taxation Officer and in case of adverse decision, alternate remedy under Section 7 of the FBR Act, 2007 is available. It has been held in number of judgments, particularly in *Idrees Traders*" Case, *supra*, that constitutional jurisdiction could not be availed without resorting to departmental remedies.

When contacted for comments a tax lawyer observed that during the pendency for years of ICA normal limitation of five years prescribed in section 122 to pass amendment order on the basis of definite information acquired from audit has expired and under section 226(b) only that period is to be excluded in calculating limitation of five years during which there was express stay by the court. He further observed that where stereotype reasons for selection are given by the Commissioner for selection of audit the Court has indicated the remedy of representation to FBR under section 7 of the FBR Act 2007 on adverse decision by the Commissioner on the reply of the taxpayer rebutting reasons of selection for audit, which should be availed by the aggrieved taxpayers to drop the audit selection or to restrict the scope of the audit to the given reasons.