

**JUDGMENT SHEET  
IN THE LAHORE HIGH COURT, LAHORE  
JUDICIAL DEPARTMENT**

**Writ Petition No. 33336 of 2015.**

**Ali Haider Khan**

**Versus**

**Province of the Punjab, etc.**

**J U D G M E N T**

Date of hearing: 25.03.2016.  
Petitioner by: Ch. Atif Rasool, Advocate.  
Respondents by: M/s. Akhtar Ali Kureshi, Standing Counsel for Pakistan, Muhammad Ejaz, Assistant Advocate General, Usman Arif, Mushtaq Abbas, Malik Abdullah Raza and Sarfraz Ahmad Cheema, Advocates.

**MUHAMMAD SAJID MEHMOOD SETHI, J.:** Brief facts of the case are that petitioner was declared the successful / highest bidder on account of care taking of footwear of Pilgrims etc. adjacent to Darbar Hazrat Data Gunj Bakhsh, Lahore, in a public auction conducted by respondents No.1 to 3 on 15.06.2015, for the financial year 2015-16 (w.e.f. 01.07.2015 to 30.06.2015) against consideration of Rs.35,060,000/-. After being declared as the successful bidder, petitioner paid 1/3<sup>rd</sup> amount i.e. Rs.11,686,667/- immediately on 15.06.2015 to the Auqaf Department. The possession of the said site / premises was given to petitioner, who regularly paid monthly installments for the months of July and August, 2015. Petitioner is aggrieved of the impugned provisions of Section 236A and Division VIII of Part IV of the First Schedule of the Income Tax Ordinance, 2001 (“**Ordinance**”), in terms of which, the demand of advance income tax is being made from petitioner. Petitioner has sought the following relief from this Court:-

“Under the above said circumstances, it is therefore most respectfully prayed that the writ petition in hand may very kindly

be accepted with costs and declaring that the impugned legislation of Section 236-A and Division VIII of the Income Tax Ordinance, 2001, and demanding the Advance Tax on the sale by auction from the petitioner at this stage in the auction of care taking of footwear of Pilgrims etc adjacent to Darbar Hazrat Data Gunj Buksh, Lahore, is unconstitutional, illegal, unlawful, unwarranted, ultra vires, void ab initio, without any lawful authority and has no legal effect in the eyes of law and also inoperative in the rights of the petitioner. The respondents may kindly be directed to abide by law.

It is further prayed that the respondents may also be restrained from adopting the coercive measures against the petitioner in any way whatsoever.

.....”

2. Learned counsel for petitioner submits that in pith and substance, collection of the impugned tax on auction as advance according to Section 236A and Division VIII of Part IV of the First Schedule of the Ordinance, from the person to whom such property or goods is being sold, is in itself illegal, void ab-initio and unconstitutional. He adds that the impugned demand is against fundamental principle of taxation which has been inserted just to extract money from the taxpayer. He further submits that it confers unchallenged and arbitrary discretion on the part of respondents and is patently violative of the preamble and Articles 4, 8, 9, 18, 24 and 25 of the Constitution of Islamic Republic of Pakistan, 1973 (“**Constitution**”). He further submits that the impugned legislation tantamounts to double taxation. He adds that the impugned legislation is inconsistent with the provisions of Section 2 sub-sections 10, 11-A, 16, 18, 29, 31-A, 36, 40, 42, 61, 63 and 66, Sections 4, 9, 10, 11, 15, 18, 19, 20, 39, Part VII, 80, Part VA, 100C, 113, 153 and other provisions of the Ordinance, therefore, impugned demand is absolutely without jurisdiction. He finally submits that the impugned legislation is discriminatory, thus violates the provisions of Articles 4, 10-A, 18 and 25 of the Constitution. He has placed reliance on Messrs Mehran Associates Limited v. The Commissioner of Income-Tax, Karachi (1993 SCMR 274) and Government of Sindh through Secretary and

Director General, Excise and Taxation and another v. Muhammad Shafi and others (PLD 2015 Supreme Court 380).

3. On the other hand, learned Standing Counsel and Assistant Advocate General along with learned counsel for respondents, defend the impugned provisions and demand, and submit that petitioner has failed to show any illegality or unconstitutionality in the impugned legislation and demand. They add that the impugned provision is absolutely in conformity with the provisions of the Constitution and by any stretch of imagination, it does not amount to double taxation. Petitioner has failed to show as to how he has been discriminated against, as the provision of law is being applied across the board without any distinction to the similarly placed other persons. They add that similar proposition of law has already been decided by the Hon'ble Supreme Court in Bismillah & Co. and others v. Secretary, Ministry of Finance, Government of Pakistan and others (2006 SCMR 652).

4. Arguments heard. Record perused.

5. The impugned provisions of Section 236A of the Ordinance are reproduced as under:-

**“[236A. Advance tax at the time of sale by auction. —** (1) Any person making sale by public auction [or auction by a tender], 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 [Inland Revenue] 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. As per the above provision of law, petitioner is obliged to collect advance tax on auctions at the rates prescribed under First Schedule of the Ordinance. Petitioner is obliged to make payment of tax to the credit of the Government Treasury of the taxes withheld within 07-days from the end of each week ending on every Sunday as required under Rule 43 of the Income Tax Rules, 2002. Admittedly, petitioner is not making compliance with the law of withholding taxes and has impugned the constitutionality of the said provisions of law.

7. The liability under Section 236A of the Ordinance, has the status of advance tax and neither there is any aspect of double taxation nor there is any inconsistency involved. Tax under Section 236A of the Ordinance is payable on auction across the board, thus it cannot be claimed that petitioner is being subjected to discrimination. Petitioner has challenged the wisdom of the legislature but has failed to prove his case as to how the impugned provisions are violative of the Constitution. On the face of it, no fundamental right of petitioner has been infringed. The Hon’ble Apex Court has already settled similar issue in the case of Bismillah & Co. and others supra, the operative part of which reads as under:-

“11. A bare reading of the afore-referred provision would indicate that the law envisages levy of advance income tax on the basis of sale price of the property in question and by virtue of the Explanation added to subsection (7A) of section 50 of the Ordinance, the awarding of any lease to any person, “including a lease of the right to collect octroi duties, tolls, fees or other levies, by whatever named called” have been included in “sale”. This Explanation was inserted by the Finance Ordinance, 1984 through a Presidential Order. It is a deeming provision and it is a settled principle of law that a deeming provision in a taxing statute has the effect of bringing within the mischief of

chargeability on income which may not have actually accrued but by fiction of law is supposed to have accrued. The rationale appears to be that a person who has been awarded a contract would earn income that the advance tax would be a security and would be adjusted when the final liability is determined. ....”

8. The provisions of Section 236A of the Ordinance are *intra vires*. While interpreting the provision of a statute, the Courts presume that legislation was intended to be *intra vires* and reasonable as well. The rule followed is that the enactment is interpreted consistent with the presumption, which imputes to the legislature an intention of limiting the direct operation of its enactment to the extent that is permissible. Statute must be interpreted to advance the cause of statute and not to defeat it. Courts cannot sit in judgment over the wisdom of the legislature, except on two grounds on which the law laid down by the legislature can be struck down by the Court, namely, lack of legislative competence and violation of any of the fundamental rights guaranteed in the Constitution or of any other Constitutional provision. Presumption is always in favour of the constitutionality of law, and a law would not be declared unconstitutional, unless the case was so clear as to be free from doubt and that too on the basis of the said two grounds. No enactment or provision thereof can be struck down simply by saying that it is arbitrary and illegal or that the Court thinks that it is unjustified. Motive of the legislation in passing a statute or its provision thereof, is beyond any scrutiny of Courts nor can the Courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. Propriety, expediency and necessity of a law are to be determined by the legislative authority and not by the Courts. Where validity of a statute or provision thereof, is questioned and there are two interpretations, one which makes the law valid, is to be preferred over the other, which will render it void. The criteria before the Court, for determining the *vires* of a provision of law, is that the Court must be able to hold beyond any iota of doubt that violation

of the Constitutional provisions was so glaring that the legislative provision under challenge could not stand. Without such violation of Constitutional provisions, the law made by the Parliament or a state legislature, cannot be declared bad. Reliance, in this regard, is placed upon State of M.P. v. Rakesh Kohli and another (2013 SCMR 34) and Badshah Gul Wazir v. Government of Khyber Pakhtunkhwa and others (PLD 2014 Peshawar 210).

9. Needless to observe here that while examining a provision of law, enacted through legislative process provided under the Constitution, power of the Court was limited to examine whether the provision of law was repugnant, inconsistent or in conflict with the provisions of the Constitution, whether legislature had legislative competence as envisaged in the Constitution, and whether the legislation violated or abridged fundamental rights guaranteed by the Constitution. Petitioner, in the present case, has failed to raise any ground which could persuade this Court to exercise its jurisdiction, so as to go into the question of vires of Section 236A and Division VIII of Part IV of the First Schedule of the Ordinance. Narrative of petitioner raised questions which essentially relate to wisdom of Parliament in enacting the law, which is outside the scope of judicial review. As long as legislature has competence to legislate, grounds or wisdom of legislation remains its exclusive prerogative. Legislature is not debarred from promulgating said provisions of law under the Constitution. Reliance, in this regard, is placed upon Zaman Cement Company (Pvt.) Ltd. v. Central Board of Revenue and others (2002 SCMR 312), Ardeshir Cowasjee and 11 others v. Sindh Province and others (2004 CLC 1353) and Syed Muhammad Murtaza Zaidi v. Motor Registration Authority and others (2010 CLC 494).

10. The argument of learned counsel for petitioner that petitioner is being subjected to double taxation, is misconceived inasmuch as petitioner has failed to bring his case within the doctrine of double

taxation. It is well-settled that double taxation could be made by legislature through an express enactment. Unless there was any prohibition or restriction on the power of legislation to legislate on the same subject matter, even double taxation could not be declared illegal or void, which is not the moot point in case in hand. Rule of avoidance of double taxation is merely a rule of construction, therefore, it ceased to have application when the legislature expressly enacted a law, which resulted in double taxation of the same income, that is not the case here. Reliance, in this regard, is placed upon Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others (PLD 2010 Lahore 230), Warid Telecom (Pvt.) Ltd. and others v. Federation of Pakistan and others (2014 PTD 752) and Riaz Hanif Rahi v. Federation of Pakistan through Ministry of Law and Justice, Islamabad and 9 others (PLD 2015 Islamabad 7).

11. So far as the argument of learned counsel for petitioner that the impugned legislation is inconsistent with the provisions of Section 2 sub-sections 10, 11-A, 16, 18, 29, 31-A, 36, 40, 42, 61, 63 and 66, Sections 4, 9, 10, 11, 15, 18, 19, 20, 39, Part VII, 80, Part VA, 100C, 113, 153 and other provisions of the Ordinance, suffice it to say that petitioner has failed to give even an iota of reasoning, logic, legal or constitutional rule, justification as to how the impugned legislation is inconsistent with the said provisions of law. Even otherwise, the principle of interpretation of statute is that all provisions of a statute have to be read together and harmonious construction is to be placed on such provisions so that no provision is rendered nugatory. Statute must be read as an organic whole and all its provisions must be harmoniously reconciled instead of picking out inconsistency between different provisions. Redundancy cannot be attributed to any provision of law rather the wisdom of the legislature even in case of any conflict of two provisions, which is not the case here, the rule of harmonious

interpretation is followed. Reliance, in this regard, can be placed upon Abdul Razzaq Khokhar v. Province of Punjab through Secretary to Government of Punjab and others (1990 SCMR 183), Market Committee Khudian through its Administrator v. Town Committee Khudian through its Chairman (1992 SCMR 1403), Qazi Hussain Ahmad, Ameer Jamaat-e-Islami Pakistan and others v. General Pervaiz Musharraf, Chief Executive and others (PLD 2002 Supreme Court 853), Aftab Shahban Mirani and others v. Muhammad Ibrahim and others (PLD 2008 Supreme Court 779) and District Bar Association, Rawalpindi and others v. Federation of Pakistan and others (PLD 2015 Supreme Court 401). In view of the preceding discussion, the argument of learned counsel for petitioner has no force, thus the same is repelled.

12. In view of the above discussion, this petition, being devoid of any merits, is hereby **dismissed**. No order as to costs.

(Muhammad Sajid Mehmood Sethi)  
Judge

**Approved for reporting.**

Judge

\*A.H.S.\*