

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE IJAZ UL AHSAN

SUO MOTU CASE NO.2 OF 2018 AND
CONSTITUTION PETITION NO.72 OF 2011

S.M.C.2/2018: Suo motu action regarding maintaining of Foreign Currency Accounts by Pakistani Citizens without disclosing the same/paying taxes

Const.P.72/2011: Senator Muhammad Ali Durrani Vs. Government of Pakistan and others

In attendance: Syed Nayyar Abbas Rizvi, Addl. A.G.P.

Mr. Muhammad Ali Durrani, petitioner
(In Const.P.72/2011)

Mr. Tariq Mehmood Bajwa, Governor, State Bank of Pakistan

Mr. Tariq Mehmood Pasha, Chairman FBR

Mr. Arif Ahmed Khan, Federal Secretary Finance

Mr. Bashir Ahmed Memon, D.G. FIA

Dr. M. Rizwan, Director Immigration FIA

Dr. Usman Anwar, Director FIA

Mr. Ali Sher Jakhrani, Director Law FIA

Mr. Imran Ahmed Khan, Sr. Joint Secy. M/o Finance

Mr. Fazal Mehmood, Director, State Bank of Pakistan

Mr. Sanaullah Gondal, Deputy Legal Advisor,

Mr. Zahid Khokhar, Member Customs, FBR,

Dr. Iftikhar Ahmed, Director Law, FBR,

Mr. Mehmood Mandviwala, ASC,

Syed Shabbar Zaidi, Sr. Partner, A.F. Ferguson & Co.,

On Court's Call: Ch. Aitzaz Ahsan, Sr. ASC
Mr. Hamid Khan, Sr. ASC

Date of hearing: 12.6.2018

ORDER

By order of the Court dated 26.03.2018, a Committee of 12 Experts ("**Committee**") having insight into the process of accumulation of undeclared foreign movable and immovable assets by Pakistani citizens was appointed by this Court. They were tasked with deliberating and recommending legislative and executive measures for tracing and retrieving such assets held abroad. The members of the Committee are named below:

1. Mr. Tariq Bajwa, Governor, State Bank of Pakistan.
2. Mr. Arif Ahmed Khan, Secretary, Finance Division.
3. Mr. Tariq Pasha, Chairman, Federal Board of Revenue.
4. Mr. Khalid Anwer, Sr. ASC.
5. Mr. Mehmood Mandviwalla, Barrister at Law, Senior Partner Mandviwalla and Zafar.
6. Dr. Ikramul Haq, ASC and Partner Huzaima and Ikram.
7. Mr. Muhammad Waqar Rana, Additional Attorney General.
8. Syed Shabbar Zaidi, Senior Partner, AF Ferguson and Co.
9. Mr. Bashir Ali Muhammad, Business Leader.
10. Mr. Tariq Paracha, Business Leader.
11. Mr. Atif Bajwa, Senior Banker.
12. Mr. Nisar Muhammad Khan, Former Chairman, FBR.

2. A final report of the Committee was submitted on 13.04.2018 to the Court. During the course of hearing before us today, the Governor State Bank of Pakistan explained the Terms of Reference of the Committee. These primarily revolve around the object expressed in item No.II thereof as follows:

"II. Examine existing legal regime and practices (especially related to foreign exchange and taxation), bilateral treaties and multilateral conventions that can be used to stem the unregulated outflow of foreign exchange from Pakistan, trace undeclared assets held abroad by Pakistani

citizens and retrieve such assets especially the ones generated with proceeds of crime."

3. The Terms of Reference accordingly invite the identification of the administrative actions and amendments in the legislative framework that are necessary for achieving the purpose and object reproduced above. In the first instance, the Committee delineated ten factors that have caused substantial foreign exchange outflows from Pakistan for creating liquid, movable or immovable assets in foreign jurisdictions. Briefly these are:

1. Cash feeding of foreign currency accounts and the immunity of such transactions under the provision of the Protection of Economic Reforms Act, 1992 ("**PERA**") from scrutiny of the source and the movement of funds deposited in foreign currency accounts.
2. Free cash movement of foreign currency of any amount within and out of Pakistan under, PERA without check or scrutiny; thereby assisting its smuggling to foreign jurisdictions.
3. Misuse of retained foreign exchange by exporters. Laxity in the regulatory framework for the retained portion of export proceeds has facilitated its leakage and the accumulation of undeclared assets abroad.
4. Under invoicing and over-invoicing in foreign trade transactions. The weaknesses of the information and regulatory systems for the valuation of goods/services by the FBR and the SBP have fostered unauthorized retention of foreign exchange abroad.
5. Section 111(4)(a) of the Income Tax Ordinance, 2001 provided an opportunity for misuse of the immunity to inward remittances brought through normal banking channels; as such black money stashed abroad could be whitened without payment of tax.
6. The *Hundi* and *Hawala* means of foreign currency transfers have remained available in the market as illegal channels for transfer of ill-gotten or tax evaded funds.
7. Short limitation periods in tax laws for initiating legal action against tax evaders and defaulters have blocked assessment and recovery of tax on global income and wealth of citizen.
8. Scant bilateral tax treaties with other countries for mutual cooperation and exchange of information have hampered detection of foreign assets accumulated by citizen.

9. *Lacunae* in tax laws and regulations have enabled avoidance of tax on technical grounds. These *lacunae* include vague or insufficient definition of key concepts like "resident", "non-resident", "foreign company", "trust", "settlor" and "beneficiary" of a trust.
10. Failure of the present income and wealth tax declaration forms to require disclosure of foreign assets and income of citizen.

4. Recommendations have been made by the Committee to deal with the said deficiencies in foreign exchange regulation and tax collection. The recommendations note the experience of incentive schemes floated in other jurisdictions to encourage voluntary disclosure of foreign assets. These include schemes initiated in the recent past in Italy, India and Indonesia. It is stated that the Tax Amnesty Scheme, 2016 offered in Indonesia was highly successful and the Committee supported its emulation in Pakistan.

5. The Committee's report has highlighted that during the financial year 2016-17 a staggering amount, US\$15.253 billion, was transferred abroad by individual account holders in Pakistan through normal banking channels. It is also suggested that during the said period a substantial amount of transfers took place from Pakistan under unauthorized and undocumented *Hundi* and *Hawala* mechanisms. Clearly, both types of outflows have a huge impact on the stability of the foreign exchange reserves of the country and adversely affect the exchange rates of the Pakistani Rupee. Also as a result, the national economy can become vulnerable to pressure due to foreign currency obligations of the State; can suffer undue and disruptive

inflation and can drain the exchequer of substantial amounts of tax on account of escaped income and wealth.

6. In the above circumstances, the Committee has recommended that a scheme for voluntary disclosure of foreign assets owned by Pakistani citizens be announced by the Federal Government. This would provide such declarants with an opportunity to declare and/or transfer their foreign assets to Pakistan in lieu of payment of tax. In this regard, we were informed that after our order dated 26.03.2018, the Federal Government had promulgated the Foreign Assets (Declaration and Repatriation) Ordinance, 2018. The Committee has impliedly supported its provisions.

7. Before us today, several Committee members have reiterated their support for the voluntary disclosure scheme announced by the Federal Government. This scheme has in May, 2018 been re-enacted as the Foreign Assets (Declaration and Repatriation) Act, 2018. (**"Act, 2018"**). The significant feature of the Act, 2018 is the promised immunity from taxation and penal action in respect of undeclared foreign assets subject to payment of tax at the following rates:

1. Liquid foreign assets that are not repatriated, 5% of the value of the foreign assets.
2. Immovable assets outside Pakistan, 3% of the value of foreign assets.
3. Liquid assets repatriated and invested in Pakistan government securities, 2% of the value of the foreign assets.
4. Liquid assets repatriated to Pakistan, 2% of the value of the foreign assets.

8. It is also informed that the government has made legislative amendments in the relevant laws for curtailing and regulating the cash feeding of foreign currency accounts by restricting that privilege to tax filers only. A regulatory check in cash movement of foreign currency above US\$100,000/- within Pakistan has been imposed. Likewise, immunity from taxation of inward remittances under Section 111(4)(a) of the Income Tax Ordinance, 2001 has been limited to a maximum US\$100,000/- per annum. It is acknowledged by the Governor State Bank and the Members of the Committee present in Court today that these Suo Motu proceedings have encouraged the review by the Federal Government of its policy on the subject leading to the above mentioned legislative and regulatory changes. With respect to the remaining factors identified by the Committee for unauthorized foreign currency outflows from Pakistan, we are informed that no legislative or regulatory provisions have so far been made by the Federal Government.

9. This Court is not an expert in economic, fiscal or financial matters. It was persuaded to initiate these Suo Motu proceedings for the grave public interest concerns: firstly, regarding the declining foreign exchange reserves of the country, the depreciating exchange rate of the Rupee and the corresponding inflationary trend of imported essential commodities; and secondly, by the governmental indifference towards the unhindered outflows of valuable foreign exchange from the economic wealth and resources of the country

encouraged by immunities from scrutiny and from taxation granted to foreign currency transfers abroad that were also depriving the exchequer of vital tax revenue.

10. Accordingly, these proceedings have aimed to draw the attention of the Federal legislative and regulatory bodies toward the key issues pertaining to the aforementioned matters of national priority. The fact that the Federal Government has brought legislation on the subject is a good start to curtail misuse of privileges granted by the law and executive regulation. No challenge to the provisions of the different legislative and regulatory initiatives undertaken in the matter by the government is presently before the Court. Also we are not prescient about subtle technicalities of foreign exchange and balance of payment stabilization nor about fiscal or other economic matters so as to anticipate deficiencies in the Federal Government's actions. Likewise, in the absence of a concrete challenge, the Court is not inclined to unilaterally sit in academic judgment on the legality or propriety of the provisions of the scheme of voluntary disclosure of foreign assets under the Act, 2018.

11. Having said that, it is observed that any measures taken by the Federal Government in the public interest to protect the foreign exchange reserves of the country and to bring the hitherto undeclared foreign assets within the tax net are welcomed by the Court. Nevertheless, there are other deficiencies of the current tax laws and in the regulatory framework for the holding and transfer of foreign exchange

that promote the accumulation of undeclared foreign assets and corresponding income. These have been highlighted by the Committee but remain unaddressed by the Federal Government. They require careful attention and deliberation by the concerned authorities. Let the Federal Government, FBR and the State Bank of Pakistan state their respective positions about these matters pointed out by the Committee and indicate if any reform is proposed to correct or remedy the same.

12. Relist after one month at the Principal seat of this Court.

Chief Justice

Judge

Judge

Lahore
12.06.2018
Naseer