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F.No.71/07-Law (FTO)
Government of Pakistan
Law & Justice Division

Islamabad, the 15th March 2007.

From: Azhar Amin Choudhary,
Section Officer

To: The Secretary (TO-I),
Revenue Division,
Central Board of Revenue,
Islamabad

Subject: REPRESENTATION UNDER SECTION 32 OF THE ORDINANCE XXXV OF 2000 AGAINST FINDINGS OF THE FEDERAL TAX OMBUDSMAN COMPLAINT NO.494/07

Sir,

I am directed to refer to your representation No. C.No.4 (494)TO-I/2007 dated 28.07.2007 on the above subject and to say that the President has been pleased to pass the following orders: -

2. For its project "Access to Justice" the Ministry of Law and Justice has hired the complainant as Consultant. On the query of the project Management the Commissioner of Income Tax vide letter dated 2.4.2007 informed the Management that the complainant's receipts were his salary to be taxed accordingly. The complainant made complaint to the FTO. His case is that his receipts from the Ministry/Management are not salary but remuneration for the services he renders to be taxed finally at the rate of 6% under section 153 of the Income Tax Ordinance 2001. After investigating the complaint the FTO has found that the complainant is not an employee of the Ministry/Management. He is rendering services to the Management attracting the application of the section 153 ibid. Accordingly the FTO has recommended that Secretary Revenue Division should within 30 days of the receipt of these recommendations and in supersession of earlier instructions/clarifications etc ensure issuance of a clarification to Program Director Access to Justice Program that tax be withheld in complainant's case @ 6% of the gross receipts.

3. The Revenue Division has made representation against the FTO's recommendation. The complainant has furnished written comments on the representation.

4. The precise question that arises in this case is: What is the proper head of income of the complainant's receipts from the Ministry of Law/Management? Are they salary from employment or earnings from profession or business? It is obvious that the nature of the work one does is not relevant. An employee medical doctor does the same work which a private medical practitioner does. The earnings of the first are salary and of the latter income from profession/business.

5. For the benefit of the complainant it may be pointed out that the role of the FTO is to identify maladministration and not to provide appeal against the decision of the Revenue Division or a tax employee. Maladministration connotes some misbehaviour such as bias, neglect, inattention, delay, incompetence, ineptitude, and arbitrariness. The FTO is not authorized to question merits of a decision taken without maladministration. There is a clear distinction between a decision tainted by maladministration, which the FTO may question, and unmeritorious decision, reached without maladministration, which he may not [Administrative Law by Sir William Wade 2000 pp. 95-96]. In addition to the above stated general bar there is specific bar [section 9 (2) of the Establishment of the Office of Federal Tax Ombudsman Ordinance 2000] against the FTO to investigate or inquire into matter which relate to determination of tax liability and interpretation of law, rules and regulations relating to such determination in respect of which legal remedies of appeal, review are available under the tax law.

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6. There is no allegation in the complaint that the Revenue Division or the Commissioner entertained any bias, malice etc. against the complainant. If the complainant is of the view that his receipts from the Law Division/Management are earnings from profession taxable under section 153 of the Ordinance he may raise the question before the taxation officer. If the taxation officer would give decision against him he can appeal that decision before the Commissioner, and after the Commissioner's decision either of the parties can go before the Income Tax Appellate Tribunal, the High Court and the Supreme Court.

7. The facts in the complaint, the department's comments and the FTO's findings tend to give the impression that the complainant is the employee of the Law Division and what he is receiving from it is the salary. But since any finding on this point may prejudice either of the parties' case before the tax authorities, Tribunal and Courts no definite opinion ought to be expressed except some comments on the FTO's findings. The FTO says that since the Ministry/Management has hired the complainant under contract therefore he is not a civil servant. The finding is not apt for the point in issue because a person hired on contract may be an employee. The State employs superannuated civil servant on contract and the appointees are employees and their receipts from re-employment are salary. Civil servants are only a category of State employees.


8. The answer to the question: Whether a person has been hired as an employee or to provide services is a mixed question of fact and law, and can appropriately be answered after hearing evidence by the tax employees. The main distinctive features between an employee and a service provider are that the employer makes periodical payments to the employee unrelated to the work he actually does and the service provider bills the employer for the work he does. The office of the employee is located in the employer's premises and is maintained by the employer but service provider maintains his own private office. But all these questions are required to be decided by the tax employees and the courts within the framework of the Income Tax law. The FTO's recommendations cannot be sustained.

9. Accordingly, the President has been pleased to set aside the FTO's recommendations dated 6.6.2007 in complaint No.494/2007.


(AZHAR AMIN CHOUDHARY)
Section Officer

Copy to:

1. The Registrar, FTO, Islamabad
2. SO (Legal), President Secretariat (Public), Islamabad with reference to their NO. 05/FTO/2008, dated 22.01..2008
3. Mr. Muhammad Bashir Jehangiri, Former Chief Justice of Pakistan, 277-E, Street No.11, G-6/2, Islamabad


(AZHAR AMIN CHOUDHARY)
Section Officer