

F.No.53/08-Law (FTO)
Government of Pakistan
Law and Justice Division

Islamabad, the 27th May, 2009.

FEDERAL TAX OMBUDSMAN
CY. No. 1387
30 MAY 2009
ISLAMABAD

From: Mr. Azhar Amin Chaudhary,
Section Officer.

To: Second Secretary (TO),
Federal Board Revenue,
Islamabad.

Sub:- **REPRESENTATION UNDER SECTION 32 OF THE ORDINANCE
XXXV OF 2000 AGAINST FINDINGS OF THE FEDERAL TAX
OMBUDSMAN IN COMPLAINT NO. 12743-K/07 (REVENUES
DIVISION VS M/S S.K. ENTERPRISES)**

I am directed to refer to your representation No. C.No. 4(1274)TO-I/07/08/58182, dated 9.04.08, on the above subject and to say that the President has been pleased to pass the following orders:-

2. During the periods relevant to the tax years 2004 and 2005 the complainants imported certain goods. While clearing the goods the Collector of Customs collected certain amount from the complainants as advance income tax under section 148 of the Income Tax Ordinance 2001. In the complainants' view the Collector had collected the amount in excess of the tax, which was properly chargeable from them. The complainants applied to the taxation officer for the refund of the excess amount. In support of the refund claim the complainants relied on the judgement of the Supreme Court reported 2005 PTD 194 and of the Lahore High Court reported 1994 PTD 848. The taxation officer however rejected the refund application. The complainants appealed the taxation officer's order and the Commissioner (Appeals) relying on the judgements of the Supreme Court and of the Lahore High Court referred to him by the complainants vide his order dated 14.02.2006 accepted the appeal and directed the taxation officer to issue the refund. The department appealed the Commissioner (Appeals)'s order before the Income Tax Appellate Tribunal and the Tribunal vide its order dated 01.08.2007 dismissed the department's appeal. The department did not make refund of the excess amount to the complainants in compliance with the decision/direction of the Commissioner (Appeals) as affirmed by the Tribunal. They made complaint to the FTO. The department resisted the complaint on two grounds. One, the High Court and the Supreme Court wrongly decided the cases, and two, the department has sought review by the Supreme Court of its decision 2005 PTD 194. After considering the matter the FTO recommended that the department should either obtain stay from the Supreme Court or implement the decision of the Tribunal within 60 days of the receipt of his order. The recommendation followed the findings that in the absence of any stay order by the Supreme Court where review application of the department was pending there was no justification in not giving effect to the decision of the Tribunal.

3. The FBR has made representation against the FTO's recommendation. The complainants have furnished written comments on the representation.

4. The order of the Tribunal is based on the decisions of the Supreme Court and the Lahore High Court. An order or decision cannot be ignored on the ground that it is based on wrongly decided precedent. Even if the Supreme Court reverses its decision in 2005 PTD 194 the reversal of the precedent would not automatically reverse or affect the force operation of, the Tribunal's order. It is trite law that the precedents do not

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sic (911)*

operate - retrospectively. Two authorities may be referred to in support of the above view. In Pir "Bux v Chairman Allotment Committee PLD 1987 SC 145 a number of persons including it) A' had filed petitions in the High Court challenging various orders of similar nature. One of them was accepted by the High Court. Against the decision of the High Court 'H' filed an appeal in the Supreme Court. In the meantime A's petition was accepted by the High Court but no appeal was filed against the High Court's decision with the result that the High Court's decision became final. The Supreme Court later accepted H's appeal. The aggrieved person in A's appeal then sought to take advantage of the Supreme Court's decision by filing miscellaneous application in the High Court. It was held that so far as the High Court's decision in A's petition was concerned it had obtained finality and the aggrieved person could not take advantage of the Supreme Court's decision. In ITO v Cement Agencies PLD 1969 SC 322 the Commissioner and Income Tax Appellate Tribunal had taken the view that since the managing agent and the managed company were both residents outside Pakistan, the commission earned by the managing agent in regard to the two cement factories of the managed company in Pakistan was not taxable in Pakistan. The Supreme Court in the case of Octavius Steel and Company v The Commissioner of Income Tax, Dhaka however, took a different view. The income tax authorities on the basis of the decision of the Supreme Court in Octavius Steel attempted to reopen the case. The Supreme Court held: "I don't see how on the basis of the judgement of this Court in Octavius Steel & Company Limited's case past and closed transactions could be reopened. The proceedings in respect of the disputed years were finally disposed of in favour of the respondent until they are set aside in accordance with law no fresh proceedings could be initiated in respect of these years." The Commissioner is not right in not giving effect to the Commissioner (Appeals)'s decision as affirmed by the Tribunal on the plea that it is based on precedents of wrongly decided cases and the department is seeking review of the precedents. The decision of the Commissioner (Appeals) affirmed by the Tribunal is res judicata between the complainants and the Commissioner (department). This view follows the view taken in earlier decisions No.400 and 404/2003-Law-(FTO) in complaints No.1010, 1060, 1061, 1025, 1047, 1062, 1063, 1027 & 1094/2003 dated 03.03.2005, No.120/2002-Law(FTO) in complaint No.788-L/2002 dated 08.08.2004, No.17/2004Law(FTO) in complaint No.1113/2003 dated 05.05.2005, No.91/2004-Law(FTO) in complaint 1448/2002 dated 19.04.2006, No. 101/05-Law(FTO) in complaint No.409-L/2005 dated 09.06.2007.

5. The FBR in its recent communication dated 18.09.2008 has informed that it has filed reference against the Tribunal's decision before the High Court. The FBR however has not clarified that it would have no means to recover the amount from the complainant if the excess amount is refunded to them in pursuance of the order of the Commissioner (Appeals) as affirmed by the Tribunal in case the High Court, on reference reverses the said orders. It is trite law that an appeal or a reference by itself does not operate to suspend the operation of the order appealed from or questioned in reference. The FTO's recommendation must be sustained.

6. Accordingly, the President has been pleased to reject the representation of the CBR in Complaint No. 1274-K/2007 dated 25.02.2008.

(Azhar Amin Choudhary)
Section Officer.

Copy to:

1. The Registrar, Federal Tax Ombudsman, Islamabad.
2. Director (Legal), President Secretariat (Public), Islamabad with reference to their NO.110/FTO/2008, dated 19.03.2009.
3. M/S S.K.Enterprises, c/o M/S Siddiqui, and Company, Office No.9,11th Floor, Sharjah Trade Centre, Shahrah-e-Liaquat, Altaf Hussain Road, New Chilli, Karachi.

(Azhar Amin Chaudhary)
Section Officer.