

PRESIDENT'S SECRETARIAT (PUBLIC)  
AIWAN-E-SADR, ISLAMABAD

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Federal Board of Revenue  
Versus  
M/s Ghazi Brotha Contractors, Islamabad

Sub: **REPRESENTATION PREFERRED BY FBR AGAINST REVIEW PETITION FINDINGS/  
RECOMMENDATIONS DATED 21.06.2016 IN COMPLAINT NO. 39/ISD/IT(35)/42/2010**

I am directed to refer to your representation No. 4(42)TO-I/2010 dated July 15, 2016 on the above subject and to say that the President has been pleased to pass the following orders:

2. This representation dated 15.7.2016 has been filed by the Agency/FBR against the review findings of FTO dated 21.6.2016 whereby it has been recommended that:

"As regards request to withdraw the letters dated 18.9.2015, 4.12.2015 and 29.4.2016 issued by the Advisor (I&M) the FTO has observed that letters are neither findings, recommendations decision nor orders. These are mere letters directing the department to implement the findings of the FTO. On this score too, the R.P is not maintainable.

The alternate relief sought for in the review petition (RP) could very safely be attended to by the Advisor (I&M) during the implementation proceedings.

On all the scores, the review petition and the petition for condonation of delay have been found to be without any merit and hence the same have been rejected by the FTO in limine."

3. Original findings of learned FTO dated 12-11-2013 provides as follows:-

"FBR to:

i. Direct the Commissioner concerned to issue refund/compensation due, as per law, within four weeks;

ii. Identify the officers responsible for withholding refund by restoring to unlawful methods of transferring jurisdiction and involving the Complainant in unlawful/unjust prolonged litigation and take disciplinary action against them; and

iii. Report compliance on No. (i) within 45 days and No. (ii) in two months time."

The brief fact of the case are that the complaint was filed by the Applicant vide complaint No. 39/ISD/IT(35)/42/2010 which was decided vide findings/recommendations dated 31.5.2010 with the following recommendations:

"FBR to direct Chief Commissioner to-

- i. Issue refund/compensation due, as per law, within 30 days;
- ii. Take measures to avoid unnecessary litigation; and
- iii. Report compliance within 45 days."

A representation was filed against this order by the FBR which was decided vide No.87/2010-Law (FTO), dated 18.7.2011. The President had endorsed the findings/recommendations of the FTO and rejected the dept's representation.

6. However during the pendency of representation the deptt raised huge demand of Rs.3.7 billion by treating the Complainant as an assessee-in-default for non deducting and depositing tax on interest paid to the nonresident banks. After the decision of the representation by the President no refund was issued but instead the deptt started recovery proceedings after adjusting the refund amount and after rejection of appeal by the CIR(Appeals). The Complainant claimed through a letter dated 25.9.2011 that the deptt had not implemented the recommendations of FTO for which action was required to be initiated against the concerned officers. The AR also submitted a copy of the order of Peshawar High Court against any adjustment of tax to be made on account of demand of Rs.3.7 billion raised by the deptt. They had further submitted that due to the status quo order of the court the amount of refund could not be adjusted and the deptt be directed to implement the earlier recommendations of FTO for issuance of refund. The FTO vide order dated 22.10.2011 issued the following directions:-

"the Chief Commissioner, LTU, Islamabad, shall allow the admissible refund along with compensation due, after verification of deposit/deduction of tax from the Federal Treasury Officer, Peshawar and WAPDA, Lahore, and on furnishing a post-dated cheque(s) along with an undertaking by the Complainant, duly indemnified by M/s WAPDA, Lahore, and an attested copy of permanent injunction/status quo order by the Hon'ble Peshawar High Court, Abbottabad Bench, against the recovery of already assessed amount of Rs. 3.7 billion."

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7. Against this Order, the Applicant/Complainant filed the present Review Application praying that the condition of "furnishing a post-dated cheque" be waived as the demand of Rs. 3.7 billion has been deleted by the Appellate Tribunal vide judgment dated 08-01-2013 and the Deptt be directed to issue refund with compensation immediately.

8. During the hearing, the ARs vehemently claimed that the Applicant has been made to suffer for such a long time and the Deptt has continued to involve the Applicant in unnecessary litigation three times by raising arbitrary Income tax and sales tax demands. They further contended that every time the higher appellate authorities rejected the Deptt's action which clearly indicated that Deptt's officers wanted to deprive the Complainant of its legal right of receiving refund. They forcefully contended that the action of the concerned officers was not only unlawful but arbitrary, oppressive, unreasonable and mala fide as they were bent upon rejecting refund claim to discourage foreign investment by such unlawful actions. This is obvious from the fact that not only unlawful and arbitrary demands were created three times with prolonged three cycles of litigation but record of the Applicant/ Complainant was transferred five times--- from RTO Peshawar to RTO Abbottabad to LTU Islamabad to RTO Rawalpindi to RTO Peshawar and again back to LTU Islamabad. The ARs deposed that the concerned officers of the Deptt as well as FBR be taken to task for such highhandedness and gross maladministration. They prayed that the Order dated 20-10-2011 be revised and the LTU, Islamabad be directed to issue refund with compensation without delay as there was no tax demand in the field against the Applicant and the Deptt has been guilty of withholding the refund amount for the last 10 to 14 years.

9. The DRs claimed that a reference has been filed before the Hon'ble Islamabad High Court against the judgment of the Appellate Tribunal wherein tax demand of Rs.3.7 billion was deleted. They submitted that Islamabad High Court has suspended the operation of Tribunal's order and, therefore, the tax demand of Rs.3.7 billion deleted by the Tribunal, would still be treated as outstanding against the Applicant. They further claimed that another amount of sales tax demand of Rs. 3.7 billion deleted by the Tribunal, would still be treated as outstanding against the Applicant. They further claimed that another amount of sales tax demand of Rs.263,256,941/- was also recoverable which was deleted by the Appellate Tribunal, but Tribunal's order was remanded back by Lahore High Court to decide the issue afresh, which is pending adjudication.

10. The DRs deposed that while deciding contempt case in Writ Petition dated 22-05-2012, Hon'ble Peshawar High Court had directed that M/s A.F. Ferguson & Co., Chartered Accountants, Islamabad would be paid legal charges/fees by both the parties and they would conduct verification of tax payment challian is for all the relevant years to arrive at correct figure of refund amount to be paid to the Complainant. They submitted that out of the total challans of Rs.754,260,035/-, challans of Rs.603,322,589/- were verified which belonged to the case of two foreign companies (the applicant). In the written submissions of the Commissioner concerned, it was further claimed that a Writ Petition was also pending against the order passed under Section 161/205 of the Income Tax Ordinance 2001 for assessment years 1996-97 to 2001-2002. The DRs prayed that as Appellate Tribunal's orders deleting demand of Rs.3.7 billion was suspended by the Islamabad High Court, the condition of furnishing post-dated cheque of Rs.3.7 billion for issuance of refund be maintained as per implementation Order dated 22.10.2011 earlier passed by the FTO.

11. The ARs controverting the claim of Deptt's officers, asserted that firstly, no Writ Petition was pending adjudication either before Peshawar High Court (Abbottabad bench) or Lahore High Court. No. demand of sales tax or income tax was at present outstanding. They contended that stay granted by the Hon'ble Islamabad High Court against the order of Appellate Tribunal dated 28-03-2013 has expired automatically after a period of 6 months under Article 199(4A) of the Constitution of Pakistan. And secondly, there was no order in the field which would authorize the Deptt to recover the tax demand. They also referred to the "Doctrine of Merger" of appellate and original orders by citing PLD 1999 SC 395 to prove that suspension of an order was not only temporary, the original order would get merged with the appellate decision as if the new outcome would prevail in the field.

12. After detailed examination of record together with oral and written arguments of both the parties, it is evident that the Recommendations of the FTO in the original complaint have been merged with the order of the President. Merger has been defined "as the absorption of a thing of lesser importance by a greater, whereby the lesser cases cease to exist." The basic ruling on the point is 1992 PTD 932 (Supreme Court of Pakistan). This is the doctrine of merger and is settled law. Likewise, the original orders of assessing officers ceased to exist and have merged in the orders of the Appellate Tribunals.

13. The Deptt's officers not only raised arbitrary and unlawful tax demand three times involving the taxpayers in three prolonged and unnecessary litigation, but transferred the case five times from one RTO/LTU to the other without any lawful justification, just to deprive the taxpayers of its lawful amount of refund. The Deptt's officers have resorted to these tactics right under the supervision of FBR without any fear of accountability. Such acts of omission and commission smack of highhandedness and injustice, more so in cases of foreign investors who not

only completed the Ghazi Barotha Project but also have the credit of building Tarbela Dam. Thus FTO has issued aforementioned findings.

14. Hearing of the case was held on 19-09-2016. Mr. Kashif Manzoor Malik, Additional Commissioner, IR, Farrukh Amir Sial, Deputy Commissioner, IR and Mr. Nauman Rafiq, Resident Representative (AR), have represented the FBR. On the other hand, Mr. Bilal Rashid, Deputy Director, WAPDA and Mr. Babar Gulzar, Legal Advisor, Ghazi Barotha Contractors appeared for the hearing.

15. The instant Representation has been filed by FBR. The Representative of the Agency has argued that the FTO has not given any opportunity of hearing to the department and rejected the Review Petition which is against the principles of justice. The FTO has not given any reason for rejection of four grounds of Review Petition and merely held that there seems to be no justification of filing the Review Petition at a belated stage despite the fact that the original recommendations of FTO were reviewed twice at belated stage which is discrimination.

16. The Representative of the Agency has contended that the FTO himself in para 3 of the order dated 21-06-2016 has stated that letters issued by Advisor (I&M) are not findings, recommendations, decisions or orders then under what authority the Advisor (I&M) is communicating the department that if compensation is not paid defiance proceedings will be initiated.

17. The Representative of the Agency has pleaded that the FTO on one hand in para 2 of the order dated 21-06-2016 has rejected the departmental representation on the ground that it has no merit and on the other hand in para 4 of the order concluded that alternate relief could be attended to by the Advisor (I&M) during the implementation proceedings. Advisor (I&M) FTO is subordinate functionary of FTO and how he can grant relief to the department when Review Petition has been rejected by the FTO.

18. The Representative of the Agency has argued that M/s Salini Impregilo S.p.A. the present claimant of compensation who is a non-resident company in Italy has not changes in the particulars of Bank Accounts in Pakistan but in tax records it is not on the tax roll of FBR and it cannot be paid any compensation. On the other hand, the Complainant "Impregilo S.p.A." has already lost its legal existence through merger on 01-01-2014.

19. The Representative of the Agency has underscored that the four grounds taken in Review Petition were altogether different grounds which have sprung from the detection of new facts by the department concealed by the Complainant. FTO has not given even a single reason for rejecting four new grounds while giving findings as to why those grounds are not acceptable. The same four grounds taken by the department in Review Petition are made part of grounds for this Representation.

20. The Representative of the Agency has emphasized that the Hon'ble Lahore High Court in Tax Reference No.48 of 2011 titled Commissioner Income Tax Vs M/s Chicago Metal works in its order dated 09-02-2015 has categorically held that as per provisions of Section 171(2)(c) of Income Tax Ordinance a refund becomes due on the date the refund order is made. Refund order in the case of complainant was passed on 31-07-2015 and refund was issued on the same date and therefore no compensation is warranted. The Honorable Lahore High Court, Lahore has also endorsed the viewpoint of department that Explanation added in Section 171 would apply retrospectively by placing reliance on Supreme Court Judgment reported as PLD 2005, S.C. 605. These points were included in ground number 1 of the Review Petition but FTO has rejected the departmental Review Petition without given any reason.

21. The Representative of the Agency has prayed that recommendations of FTO on the issue of compensation may be dismissed. Letters issued by Advisor (I&M) FTO vide letter No.3/42/10-IMP, dated 18-09-2015, 04-12-2015, 2904-2016 may be set-aside in the light of Hon'ble President of Pakistan's Order dated 7<sup>th</sup> July, 2009 in the Complaint No.422-K/07 titled FBR Vs M/s Ihsan Pvt Ltd, wherein on a similar issue where Director (I&M) FTO was issuing letters to FBR for payment of compensation on delayed refunds and on representation filed by the department against those letters, the letters issued by the Director (I&M) FTO were set aside and FTO was advised to file a reference to the President and then the President may in his discretion direct the Revenue Division to comply with the directions of FTO.

22. In response, the Counsel of the Complainant has argued that:-

1. The FTO has rightly rejected the review filed by the FBR. This is a third and absolutely frivolous application to FTO to review order. The review is made when there is a cogent reason. However, FTO rightly rejected the review as there is no cogent reason to review the order. A question arises, if FBR files one million review applications, should there be hearing one million hearing? Certainly no one can agree to this as the same is abuse of due process of law.
2. None of the grounds has earlier been raised and therefore cannot be taken at a belated stage. More so, the alleged grounds are not arising out of any new situation that has arisen after the recommendation of FTO. The review petition which is filled on false allegation and untrue facts is itself a maladministration.

3. The compensation is payable as per original recommendation of FTO dated 31-05-2010, which has never been challenged by the FBR before the FTO and therefore the FTO rightly asked FBR to pay the compensation.
4. The amalgamation of Salini SpA and Impregilo SpA to form Salini-Impregilo SpA in Italy, by no means can make a company non-existent as mentioned by FBR. The company has a perpetual existence, and cannot die unless wound up or liquidated. Impregilo is existing in Pakistan vide same approval of Board of Investment.
5. The FBR has alleged concealment of facts whereas all facts referred from official record submitted with FBR. Rather it is FBR who is negating already admitted facts, and challenging actions of its own functionaries.
6. None of the case law referred by FBR is applicable in the case or help FBR to seek a review of a decided case.

23. The representative of the Complainant has pleaded that there is no known case, where the department has filed a third representation in a same complaint on the same issue of payment of refund and compensation. That is why the FTO has earlier recommended the FBR to "identify the officers responsible for withholding refund by resorting to unlawful methods of transferring jurisdiction and involving the complainants in unlawful and unjust prolonged litigation and take disciplinary action against them".

24. The representative of the Complainant has contended that unlawful behavior of the departmental functionaries has caused the delay in payment of refund, which needs to be compensated as per Law. Reliance is placed on ratio settled by the Lahore High Court in its recent judgment reported as 2015 PTD 915, wherein it was held that "Intention of Legislature behind S. 171 of the Income Tax Ordinance, 2001 was that the State could not be allowed to withhold indefinitely what it admitted to as due to the taxpayer by way of a refund."

25. The representative of the Complainant has requested to reject the representation filed by FBR and FBR to implement the recommendation in letter and spirit.

26. After perusal of record, examination of all documents and lengthy hearing, it has been observed that Peshawar High Court Peshawar, vide their judgment No.42/2000 dated 14.5.2004 already held that the result of the above discussion is that we uphold the findings of the Income Tax Appellate Tribunal. Question Nos.1,2,4 and 5 formulated by the appellant in the appeals are answered in the positive and questions No.3 and 6 in the negative. In writ petition No.249/2002, it has been prayed that WAPDA be directed not to deduct tax from the payments made to the petitioners and that the amounts already deducted be refunded. Further that the respondents, that is, the deptt of Income Tax shall assess the petitioner on net income basis as held by the Income Tax, Appellate Tribunal. In the light of the findings given in the two appeals, the writ petition is allowed in the terms prayed for.

27. Supreme Court of Pakistan in Civil Appeals No.1091-1092/2009 on 17.5.2011 has already held in the particular case that these appeals are remanded to learned Income Tax Appellate Tribunal Islamabad to decide the same afresh after affording proper opportunity of hearing to all concerned and in the light of observations as made herein above.


28. There is no question on the facts that the jurisdiction of the FTO is barred u/s 9(2)(b) to investigate or inquire into the matter which relate to assessment of income or wealth, determination of liability of tax, interpretation of law, rules and regulations relating to such assessment / determination in respect of which legal remedy of appeal or review or revision is available under the relevant legislation. In case the complainant was aggrieved of any action or inaction of the Agency, the complainant has the remedy to file an appeal to the Commissioner Appeals, Income Tax Tribunal, the High Court and the Supreme Court of Pakistan. Hence the matter was not within the jurisdiction of FTO, which is not an appellate forum. In such circumstances, where remedy of appeal was available, FTO could not interfere with and could not pass orders under garb of maladministration. Section 9(2)(a) of the FTO Ordinance 2000 provides that FTO shall not have jurisdiction to investigate or inquire into matters which are subjudice before a court of competent jurisdiction or tribunal or board of authority on the date of the receipt of a complaint, reference or motion by him. It is an admitted position that the matter involves the determination of tax liability and refundable amount on account of tax. Such matters are appealable before the Commissioner (Appeal), Appellate Tribunal (IR), the High Court and the Supreme Court. Where remedy of appeal is provided under the law the FTO has no jurisdiction to investigate the matter in the name of maladministration. In case the complainant was aggrieved of any action or non action on the part of official(s) of the Agency, it has the remedy to file an appeal at appropriate forum under the relevant law.

29. It has been settled by the Supreme Court of Pakistan in case of Mst. Kaniz Fatima reported in 2001 SCMR 1493, that where a particular statute provides self contained machinery for determination of questions arising under the statute and law provides a remedy by appeal or revision to another forum fully competent to give any relief, any indulgence to the contrary by any other forum is bound to produce a sense of distrust in statutory forums and writ petition will not be maintainable without first availing the alternate statutory legal remedy. The FTO has no jurisdiction to set aside the order where the forum of appeal is available to the complainant. Thus the impugned

findings are not sustainable and the representation is liable to be accepted. Perusal of the record further indicates that the recommendations of the FTO are in excess of his jurisdiction. Undoubtedly no adverse remarks can be recorded in PER of Officers i.e. Chief Commissioner, Commissioner and IRAO without following the legal course of action and without giving them an opportunity of hearing. Only the competent authority can initiate proceedings against officers and adverse action can be taken after following a proper legal procedure. As per law, FTO has limited scope to identify maladministration and debarred from interpreting the law as it is function of the courts. Thus FTO has no jurisdiction to intervene in the matters where remedy by filing an appeal as a matter of right is available. Thus FTO has no power to interfere in the service matter and has no authority that any adverse observations be recorded in the PERs including disciplinary proceedings of various officers of rank and file just under the garb of maladministration.

30. It has been established from the record that the refund in the Complainant's case was passed on 31.7.2015 and refund was issued on the same date. Thus no compensation is due and warranted in the instant case. Moreover, FTO has no power to interfere in the service matter and to pass on adverse observations to be recorded in PERs including disciplinary proceeding against various officers under garb of maladministration. In such circumstances, where remedy of appeal was available FTO could not interfere with the matter of assessment of tax and interpretation of law. Thus FTO having gone beyond the scope and powers, the impugned findings are not sustainable. Consequently, the Agency's representation is liable to be accepted and impugned findings/recommendations of FTO are to be set aside by the appellant forum.

31. Accordingly, the President has been pleased to accept Representation of FBR and set aside the impugned recommendations / findings of FTO.




Zulfiqar Hussain Awan  
Director (Legal-II)

The Chairman,  
Federal Board of Revenue,  
Islamabad.

No.115/FTO/2016 dated 01.11.2016

Copy for information to:

1. M/s Ghazi Brotha Contractors, C/o Mr. Nouman Rafique, FCA, House No.2, Street No.2, F-7/2, Islamabad.
2. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
3. Director to Secretary to the President.
4. Master file.



Zulfiqar Hussain Awan  
Director (Legal-II)