

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

M/s Emirates Supply Chain Services (Pvt) Ltd, Lahore
Versus
Federal Board of Revenue

SUB: REPRESENTATION PREFERRED BY M/S EMIRATES SUPPLY CHAIN SERVICES (PVT) LTD, LAHORE AGAINST FINDINGS/ RECOMMENDATIONS DATED 03.02.2017 PASSED BY THE FTO IN REVIEW PETITION IN COMPLAINT NO. 242/LHR/IT(172)/731/2015

I am directed to refer to your representation dated 01.03.2017 on the above subject and to say that the President has been pleased to pass the following orders:

2. This Representation dated 01.03.2017 has been filed by the Complainant – M/s Emirates Supply Chain Services (Pvt) Ltd Lahore against the revised findings of the FTO dated 6.4.2016, whereby it has been held that:

“With reference to review petition received at Regional Office, Lahore on 18.3.2016, it is informed that the first R.P was rejected in limine being barred by limitation and information was conveyed vide letter dated 25.2.2016. There is no provision in the FTO Ordinance 2000 or Federal Ombudsman Institutional Reforms Act, 2013 for a second review therefore the Federal Tax Ombudsman has rejected the second review petition at limine stage.”

Original findings dated 20.10.2015 of FTO provides as follows:

“A number of Complaints/Review Petitions pertaining to residents, corporate service providers, claiming refund in Tax years 2009 to 2012 due to excess deduction of income tax u/s 153(1)(b) of the ordinance have been disposed of by the Federal Tax Ombudsman holding that following amendment made in Section 153 of the Ordinance through Finance Act 2009, tax deducted at source u/s 153(1)(b) of the Ordinance constituted Minimum Tax and was therefore, not adjustable. FBR's attempt to take corporate service provider's out of the Minimum Tax regime by issuing Circular No. 6 of 2009 was held by the FTO to be illegal as legislation placed on the statute by Parliament could not be amended by FBR through a Circular. This view was eventually accepted by FBR and Circular No. 6 was withdrawn. Finance Act 2011 rationalized the statutory arrangement so as to make it more user friendly, but made no change in the taxation regime. Finance Act 2015 has deleted Clause-79, arbitrarily inserted by FBR in the Second Schedule to the Ordinance through SRO.1003 of 2011, taking corporate service providers out of the purview of minimum taxations regime. This deletion is in accordance with statutory provisions to charge minimum tax u/s 153(1)(b) of the Ordinance in the case of corporate service providers, except that the tax deduction rate now stand at 8% of gross receipts, as against 6% earlier.

In view of what is stated supra the Deptt's contention that no refund arises for the relevant period after amendment in Section 153(1)(b) of the Ordinance through Finance Act 2009 is found to be correct.”

3. The brief facts of the case are that this is a complaint by a resident corporate service providers filed under Section 10(1) of the Establishment of the Federal Tax Ombudsman Ordinance, 2000 (FTO Ordinance) against non-issuance of income tax refund.

4. The complainant claims refunds as under:

S.No.	Amount	Tax Year	Refund Application Dated
1.	173,016	2008	18.05.2012
2.	466,197	2009	-do-
3.	1,756,084	2010	-do-
4.	9,598,762	2011	-do-
5.	13,000,268	2012	-do-
Total	24,994,327/-		

Refunds statedly arise due to excess deduction of income tax at source u/s 153(1)(b) of the Income Tax Ordinance, 2001 (the Ordinance).

5. When confronted in terms of provision of Section 10(4) of the FTO Ordinance, the Deptt filed a reply to intimate that tax deduction u/s 153(1)(b) of the Ordinance in the tax years 2009 to 2012 was minimum tax and was not adjustable. Hence no refund was due to these years.

6. The complainant contends that, being a corporate entity, as per applicable law, the tax deductions were adjustable against demand and excess amount, if any, was refundable to the taxpayer. The complainant has filed a rejoinder on the reply filed by Deptt. He has reviewed the statutory position pertaining to deductions U/S 153(1)(b) of the Ordinance and reiterates his contention that in the case of a corporate service provider the tax deduction U/S

153(1)(b) of the Ordinance did not constitute Minimum Tax and that the deductions were adjustable. Both sides heard and available record examined by FTO. Thus FTO has issued aforementioned findings.

7. Hearing of the case was held on 2.5.2017. Mr. Muhammad Adnan, Deputy Commissioner has represented the FBR. On the other hand, Mr. M.S. Babar, Advocate, Supreme Court of Pakistan has represented the Emirates Supply Chain Services (Pvt) Ltd on the particular issue.

8. The instant Representation has been filed by Complainant. The Counsel of the Complainant has informed that the Petitioner/Complainant (Petitioner), a private limited company incorporated under the laws of Pakistan, having its office at 46 KM, Multan Road, Nathay Khalsa, Manga Mandi, Lahore, is engaged in the business of providing services in category of Third Party Logistics. The present Representation is being instituted and filed by the petitioner through its Country Manger Mr. Tariq Mahmood, who is fully conversant with the facts of the case and can depose in this behalf.

9. The Counsel of the complainant has stated that the payments made to the petitioner by the prescribed persons are liable to deduction of withholding tax u/s 153 of the Income Tax Ordinance, 2001, that the tax deducted from the payments made to the petitioner by the prescribed persons falls out of the purview of Final Tax and Minimum Tax Regimes in terms of the proviso to section 153(6) read with section 113 and the Circular No. 6 of 2009 dated 18.08.2009 issued by the respondents u/s 206 of the Income Tax Ordinance, 2001. Accordingly the petitioner was obliged to file its Income Tax Returns instead of statement under Final Tax Regime.

10. The Counsel of the complainant has mentioned that as the respondents were not issuing refund to the petitioner in respect of Tax Years 2008 to 2012, the petitioner lodged the Complaint No. 224/LHR/IT(172)/173/2015, to the FTO praying for directing the respondents to issue the refund claimed, that the FTO going beyond the scope of his functions under the garb of maladministration misdirected himself in indulging in the interpretation of Law and passed the order patently erring in holding that the tax deducted u/s 153 of the Income Tax Ordinance, 2001 was to be treated as Minimum Tax in the case of petitioner and consequently the petitioner was ousted from the benefit of refund vide Order dated 28.10.2015. It is very pertinent to mention that the Honourable President, amongst others, in a similar case titled as M/s Techno Might Solution (Pvt) Limited held such order without jurisdiction and a nullity. The feeling aggrieved of the said order the petitioner filed the Review Petition,

which was dismissed in limini by the FTO treating that to be time barred in a summary manner without providing any opportunity of being heard to the petitioner vide order dated 25.02.2016.

11. The Counsel of the Complainant has elaborated that the petitioner filed a CM before the FTO, which was treated as second Review Petition and was also rejected in the same manner vide order dated 06.04.2016. Being aggrieved of the orders, this representation is being filed.

12. The Counsel of the Complainant has taken ground that the original order 28.10.2015 being without lawful authority and the superstructure erected thereon being equally without jurisdiction is liable to be annulled. The Honourable President has already declared in a similar case referred supra that the FTO is debarred from interpreting the law and therefore, the order in this case is a nullity. The aforesaid order being a nullity in law, the limitation does not apply in filing of Review Petition or representation.

13. The Counsel of the complainant has prayed that the order of FTO may be annulled, the decisions may be issued for the immediate issuance of refund for the tax years 2008 to 2012 and any other relief as deemed fit may also be granted.

14. On the other hand, the Agency has filed comments against the instant representation of Complainant on 27.3.2017 and supported the impugned recommendations/findings of learned FTO with request that the representation of Complainant may be rejected. The representative of the Agency has stated the tax deducted u/s 153(1)(b) of the ITO 2001 for the Tax Years 2009 to 2012 was minimum tax and was not adjustable under the law. The FTO vide C.No.242/LHR/IT (172)/731/2016 dated 3.6.2015 confirmed the departmental plea that no refund arises for the relevant period after amendment in Section 153(1)(b) of the ITO 2001 through Finance Act, 2009. It is pertinent to mention that as per board's clarification letter C.No.392 Secy (Court Matters)/2016 dated 25.4.2016 clarified that tax deduction u/s 153(1)(b) ibid in the case of company was not adjustable, being minimum tax. The Honorable President vide 01/FTO/2015 dated 30.5.2015 accepted the representation of the Agency/FBR and set aside the impugned recommendations of the learned FTO. According to Section 13(1) of the Federal Ombudsman Institutional Reforms Act, 2013 a review petition can be filed within 30 days of the findings.

15. The representative of the Agency has prayed that the representation of the taxpayer may be rejected, being devoid of merit and recommendation of learned FTO may be sustained.

16. After perusal of record and examination of all documents and detailed hearing, it has been noted that in terms of Section 9(2)(b) of the FTO Ordinance 2000, the FTO has no jurisdiction to investigate or inquire into the matters which relate to the assessment of income, determination of liability of tax, interpretation of law, rules and regulations relating to the said assessment/ determination in respect of which legal remedies of an appeal, review or revision are available under the relevant legislation.

17. It may be mentioned that the FTO vide letter, dated 25.2.2016 has already communicated to the complainant that the subject complaints were issued on 29.10.2015. According to Section 13(1) of the Federal Ombudsmen Institutional Reforms Act 2013 a review petition can be filed within 30 days of the findings, but the subject review petition was received at Regional Office, Lahore on 15.2.2016 i.e. on 105th day. The same has therefore been found to be time barred. The FTO has as such rejected the review petition in limine.

18. Moreover FTO vide another reference dated 6.4.2016 has intimated to the complainant that with reference to review petition received at Regional Office Lahore on 18.3.2016 it is informed that the first R.P was rejected in limine being barred by limitation and information was conveyed vide letter dated 25.2.2016. There is no provision in the FTO Ordinance 2000 or Federal Ombudsmen Institutional Reforms Act 2013 for a second review therefore, the Federal Tax Ombudsman has rejected the second review petition at limine stage.

19. It has been settled by the Islamabad High Court in case of M/s Infotech (Pvt) Ltd Vs Federation of Pakistan in writ petition No.3223 of 2015 reported in 2016 PTD 2039 that "the legislature in its wisdom can classify and the concept of reasonable classification is available as an exception to discrimination under Article 25 of the Constitution of the Islamic Republic of Pakistan 1973. By virtue of 2015 Ordinance the reasonable classification has been made and the case of the petitioners does not fall within Article 25. In view of above case law and the legal position the concept of minimum tax is neither in violation of the Ordinance nor falls outside Item 47 of Schedule IV to the Constitution. Moreover, the deductions to be made from the payment made for rendering services @ 8% (in case of the petitioners) are regarded as minimum tax; the petitioners if feel that the same is expropriatory and confiscatory in any manner can approach the respondents for redressal of their grievance by way of representation as observed by the august Apex Court in the case of Messrs Elahi Cotton Mills supra. The provision impugned in all the petitions are not however, ultra vires the constitution or any other provision. For the foregoing reasons, the instant petition as well as the petitions mentioned hereinabove are without merit and are accordingly dismissed."

20. This representation has been filed by the Complainant repeating the contents of the pleadings already made before the learned FTO. Nothing turns on the same as it fails to answer the reasoning of FTO and not even contain denial of the factual observations for his impugned decision. No grounds stand made out for interference with the decision of the FTO. Undoubtedly FTO decision is based on sound reasoning and supported by the law. Thus, the representation is devoid of any merits and is liable to be rejected. FTO impugned findings do not warrant any interference. Consequently FTO findings are sustainable and unexceptional having no illegality or improbability.

21. 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 remained within the scope and powers, thus the impugned findings are sustainable. Consequently, the Complainant's representation is liable to be rejected. However, the complainant can seek remedy available to him from the relevant forums under the law, if so desired.

22. Accordingly, the President has been pleased to reject the instant representation of Complainant and impugned recommendations/findings of learned FTO are upheld.

(Zulfiqar Hussain Awan)
Director General (Legal)

M/s Emirates Supply Chain Services (Pvt) Ltd,
415, 4th Floor, Siddique Trade Centre,
Gulberg, Lahore.

No.67/FTO/2017 dated 07.08.2017

Copy for information to:

1. The Chairman, Federal Board of Revenue, Islamabad.
2. The Registrar, Federal Tax Ombudsman Secretariat, Islamabad,
- ✓ 3. The Chief (Legal-1), Federal Board of Revenue, Islamabad.
4. Director to Secretary to the President.
5. Master file.

(Zulfiqar Hussain Awan)
Director General (Legal)

(42)

17. It may be mentioned that the FTO vide letter, dated 25.2.2016 has already communicated to the complainant that the subject complaints were issued on 29.10.2015. According to Section 13(1) of the Federal Ombudsmen Institutional Reforms Act 2013 a review petition can be filed within 30 days of the findings, but the subject review petition was received at Regional Office, Lahore on 15.2.2016 i.e. on 105th day. The same has therefore been found to be time barred. The FTO has as such rejected the review petition in limine.

18. Moreover FTO vide another reference dated 6.4.2016 has intimated to the complainant that with reference to review petition received at Regional Office Lahore on 18.3.2016 it is informed that the first R.P was rejected in limine being barred by limitation and information was conveyed vide letter dated 25.2.2016. There is no provision in the FTO Ordinance 2000 or Federal Ombudsmen Institutional Reforms Act 2013 for a second review therefore, the Federal Tax Ombudsman has rejected the second review petition at limine stage.

19. It has been settled by the Islamabad High Court in case of M/s Infotech (Pvt) Ltd Vs Federation of Pakistan in writ petition No.3223 of 2015 reported in 2016 PTD 2039 that "the legislature in its wisdom can classify and the concept of reasonable classification is available as an exception to discrimination under Article 25 of the Constitution of the Islamic Republic of Pakistan 1973. By virtue of 2015 Ordinance the reasonable classification has been made and the case of the petitioners does not fall within Article 25. In view of above case law and the legal position the concept of minimum tax is neither in violation of the Ordinance nor falls outside Item 47 of Schedule IV to the Constitution. Moreover, the deductions to be made from the payment made for rendering services @ 8% (in case of the petitioners) are regarded as minimum tax; the petitioners if feel that the same is ex-proprietary and confiscatory in any manner can approach the respondents for redressal of their grievance by way of representation as observed by the august Apex Court in the case of Messrs Elahi Cotton Mills supra. The provision impugned in all the petitions are not however, ultra vires the constitution or any other provision. For the foregoing reasons, the instant petition as well as the petitions mentioned hereinabove are without merit and are accordingly dismissed."

20. This representation has been filed by the Complainant repeating the contents of the pleadings already made before the learned FTO. Nothing turns on the same as it fails to answer the reasoning of FTO and not even contain denial of the factual observations for his impugned decision. No grounds stand made out for interference with the decision of the FTO. Undoubtedly FTO decision is based on sound reasoning and supported by the law. Thus, the representation is devoid of any merits and is liable to be rejected. FTO impugned findings do not warrant any interference. Consequently FTO findings are sustainable and unexceptional having no illegality or improbability.

21. 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 remained within the scope and powers, thus the impugned findings are sustainable. Consequently, the Complainant's representation is liable to be rejected. However, the complainant can seek remedy available to him from the relevant forums under the law, if so desired.

22. Accordingly, the President has been pleased to reject the instant representation of Complainant and impugned recommendations/findings of learned FTO are upheld.

(Zulfiqar Hussain Awan)
Director General (Legal)

M/s Emirates Supply Chain Services (Pvt) Ltd,
415, 4th Floor, Siddique Trade Centre,
Gulberg, Lahore.

No.67/FTO/2017 dated 07.08.2017

Copy for information to:

1. The Chairman, Federal Board of Revenue, Islamabad.
2. The Registrar, Federal Tax Ombudsman Secretariat, Islamabad,
- ✓ 3. The Chief (Legal-I), Federal Board of Revenue, Islamabad.
4. Director to Secretary to the President.
5. Master file.

(Zulfiqar Hussain Awan)
Director General (Legal)