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Federal Board of Revenue  
Versus  
M/s Hamdard Laboratories (Waqf) Pakistan, Karachi

Sub: **REPRESENTATION PREFERRED BY FBR AGAINST FINDINGS / RECOMMENDATIONS DATED 12.05.16 PASSED BY THE FTO REVIEW PETITION NO.04/2016 IN COMPLAINT NO. 326/KHI/ST(152)/1048/2015**

I am directed to refer to your representation No. 1(1048)S(TO-II)/2015 dated 16<sup>th</sup> June, 2016 on the above subject and to say that the President has been pleased to pass the following orders:

2. This representation dated 16.6.2016 has been filed by the Agency/FBR against the findings of FTO dated 12.5.2016 whereby it has been recommended that:

"In view of the foregoing discussion mere disagreement with the findings cannot be made ground for review. No mistake or error apparent on the fact or record has been pointed out by the petitioner and as such no case for review of the order dated 11.12.2015 is made out. The RP is therefore rejected.

Original findings of learned FTO dated 11.12.2015 provides as follows:-

FBR is to:-

- i. Direct the commissioner -IR to cancel the impugned O-in-O No.3/84/2015 dated 15.07.2015 in terms of section 45 A of the Act and delete the illegally created demand;
- ii. Direct the chief commissioner-IR to initiate disciplinary proceeding and record appropriate observation in the PERs of the officer who has failed to appreciate the observation of the appellate tribunal order dated 08.03.2004 and 11.08.2008 and was instrumental in getting the assessment proceeding barred by limitation, and also against the officer who has passed the impugned O-in-O dated 15.07.2015 on the same lines as O-in-O dated 15.01.2003 without considering the fact that such order was set aside twice by the appellate tribunal;
- iii. Direct the senior officer in field formation to exercise regular supervisory oversight of work done by the subordinate assessing officer and take promote cognizance of all whimsical and arbitrary action; and
- iv. Report compliance for No.(i) above within 30 days and Nos. (ii) & (iii) within 45 days.

3. The brief fact of the case are that the complaint was filed against the Commissioner IR (CIR) Audit, Zone-I, LTU Karachi in terms of Section 10(1) of FTO Ordinance 2000 for allegedly creating illegal demand by passing O-in-O No.03 of 2015 dated 15.7.2015.

4. The complaint was referred to the Secretary, Revenue Division for comments in terms of Section 10(4) of the FTO Ordinance. In response the FBR vide letter C.No.1(1048)S(TO-II)/2015 dated 7.9.2015 submitted comments of the CIR, Zone-I, LTU Karachi dated 2.9.2015. It was contended by the deptt that:

- i. The DCIR Audit, Unit-04, Zone-I, LTU Karachi passed the O-in-O No.03/84/2015 dated 15.7.2015 on the basis of judgment passed by Customs, excise and Sales Tax Appellate Tribunal Lahore dated 11.2.2008 in sales tax appeal No.01/LB/2007. The Appellate Tribunal had accepted the appeal and the impugned order were set aside and case was remanded to the adjudicating authority to decide the case afresh in the light of observation in the judgment as well as in an earlier judgment of the tribunal in sales tax appeal no.791/LB/2003 dated 08.03.2004 with in the statutory period of time after providing opportunity of hearing to the parties.
- ii. The contention of the complainant that the show cause notice (SCN) issued under section 11(4) of the sales tax act, 1990 (the act) stood expired in the instant case was not tenable because the adjudicating authority had issued hearing notice and not the SCN. The statutory time limit under Section 11(4) of the Act has been prescribed for the fresh cases and not for the cases remanded by the Appellate Authority. Furthermore, no such time limit was prescribed under the law to adjudicate the case afresh in case the matter was remanded back by the Appellate Tribunal.
- iii. The Honourable appellate tribunal vide its O-in-O dated 11.02.2008 had set aside the impugned orders and not the SCN. Thus there was no need to issue fresh SCN. Moreover, the Complainant had failed to furnish any details or documents and was repeatedly raising the issue of time limitation instead of merits of the case.
- iv. The Honourable High Court of Sindh vide order dated, 04.06.2015 had dismissed the urgent application regarding recovery of demand as no ground of urgency was made out by the complainant.

5. Controverting the above arguments, the AR filed rejoinder dated 2.9.2015 contending that:

a) The O-in-O No.17/2003 dated 8.5.2003 was passed against the Complainant. This order was set aside by the Appellate Tribunal vide Sales Tax Appeal No.791/LB/2003 dated 8.3.2004. The Appellate Tribunal remanded back the case to Collector Customs Sales Tax & Central Excise (Adjudication) Lahore for denovo proceedings, and the relevant portion is reproduced for ready reference:

".....a huge liability of Rs.78,21,086/- was determined against the Complainant on account of non-observance of the provisions of Section 73 of the Act, but neither relevant records were audited nor merits of the issue were discussed in the impugned order. Such an order is not sustainable under law and hence the same is set aside and the case is remanded to Collector of Customs Sales Tax & Central (Adjudication) Lahore for either dealing with the case himself or allocating it to an officer of appropriate

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jurisdiction...” “Needless to say that the Complainant shall be given proper opportunity before passing final order”.

- b) The case came up for trial before Additional Collector (Legal) who vide her Order No.16/2006 dated 31.1.2006 upheld the contentions in SCN. This order was assailed before the Collector (Appeals) by the Complainant who vide his O-in-A No.201/ST/2006 dated 30.10.2006 rejected the appeal of the Complainant.
- c) The Complainant preferred second appeal before Appellate Tribunal Lahore and the same was decided vide Sales Tax Appeal No.01/LB/2007 dated 11.2.2008. The relevant portion of the Appellate order is reproduced for ready reference as under:-

“.....It appears that the Additional Collector (Legal) is ignorant of the fact that it has to give its independent reasoning on each point involved in the matter and has no jurisdiction to uphold the previous decision made by an authority particularly when that decision was set aside by the higher forum. Perhaps, learned Additional Collector (Legal) was of the view that she was hearing an appeal that’s why she proceeded to uphold the judgment of her colleague. The words upholding the previous decision are highly objectionable and show that the Additional Collector has no legal knowledge as well as knowledge of the procedure as to how to decide the matter pending before it learned Additional Collector may also be charged with contempt of this Tribunal because she upheld the decision which was set aside by a higher forum. Similarly the Collector ( Appeals) has also failed to apply his mind to the fact that the Additional Collector had committed illegality in upholding a previous decision which was set aside by the higher forum and instead of sending the case back for retrial dismissed the appeal....” “The learned Appellate Tribunal further held that the judgments of both the lower forums do not fulfill the requirements of law, the decision given by the CBR as well as the guidelines provided by the superiors, therefore are not maintainable in the eyes of law. For the foregoing reasons, the appeal is accepted. The impugned orders are set aside and the case is remanded back to the adjudicating authority to decide the same afresh in the light of observations recorded in this judgment as well as in the judgment of this Tribunal recorded in Sales Tax Appeal No.791/LB/2003 dated 8.3.2004 and the case of Complainant to be decided within the statutory period of time after providing opportunity of hearing to the parties.”

- d) The hearing notices, issued by DCIR unit-04, Zone-I LTU Karachi in pursuance to set aside proceedings on 21.5.2015 and 20.6.2015 do not state under what provision of law such notices were issued. The deptt has admitted in its parawise comments that the adjudicating authority had issued hearing notice and not the SCN. Thus the notice of hearing and O-in-O passed by DCIR is ab inito void and nullity in the eyes of law. The DCIR had no authority to maintain findings in the O-in-O No.16/2006 dated 31.1.2006, as this O-in-O was set aside and remanded back for denovo assessment by the Appellate Tribunal Lahore vide order dated 11.2.2008.
- e) It is clear from O-in-O dated 15.7.2015 that no SCN was issued within 5 years of the receipt of Appellate Tribunal Lahore’s order dated 11.2.2008 thus the time limit for completing assessment as per sub-Section (4) of Section 11 of the act stood expired in 2013. The AR has placed reliance in case of Peshawar Electric Supply Company Vs CIR, RTO Peshawar reported as 2015 PTD (Trib) 1112 and relevant part of the decision is reproduced for ready reference as under:-

“.....We have considered the above submissions from both the sides. Two basic points requiring decision on this issue to our view are as follows:

- (i) Whether the period of limitation entailing creation of tax liability provided in Sections 11 and 36 of the Act is mandatory or directory.
- (ii) Whether such period of limitation can be extended after expiry thereof.

The Tribunal and the High Courts in scores of judgments have decided that period of limitation in Sections 11 and 36 is mandatory. Reference may be made in this regard to 2008 PTR 34(S.C. Pak), 2009 PTD 1978 (H.C), STR No.21/2011 (H.C), 2009 PTD 2004 (H.C), 2013 PTD (Trib.) 4, 2013 PTD (Trib) 379, 2013 PTD (Trib) 639, 2013 PTD (Trib) 834. It is noteworthy that even the FBR vide C.No.1(23) C(Legal) 107 dated 6.2.2007 has circulated the opinion of Law Divisions in this regard whereunder the above mentioned period of limitation has been held to be mandatory. The underlined principle settled by the High Courts is that where issue involved entails creation of liability against a taxpayer, the period of limitation is mandatory....”

- f) Thus the impugned O-in-O dated 15.7.2015 stood barred by limitation and was passed without lawful authority and was nullity in the eyes of law.
- g) The Complainant had challenged the recovery notice dated 24.3.2015 in the High Court of Sindh (SHC) in CP-D 2015 and the court had issued notice to the deptt and stayed recovery in view of Appellate Tribunal order dated 11.2.2008. However the SHC dismissed the urgent application on 2.6.2015 on the ground that no urgency was made out.

¶6. The averments of both the parties have been given due consideration and record perused by FTO. Thus FTO has issued aforementioned findings.

7. The Agency has taken ground that it was not a fresh proceeding case in which show cause u/s 11(2) was required. However it was a denovo proceeding case and show cause level was already completed. The already completed order u/s 11(2) was remanded back by the learned Appellate Tribunal vide order dated 11.2.2008 remanded back the case for denovo

proceedings. The DCIR in the wake of this direction proceeded for denovo proceedings u/s 11 read with 46 of the act wherein issuance fresh show cause notice is not required as the proceedings were consequential to the ATIR's order and its content could go beyond the scope provided in the learned ATIR's order. That the learned Appellate Tribunal directed to finalize the denovo proceedings after providing opportunity of being heard to the registered person, which was provided vide letters dated 21.5.2015 and 10.6.2015.

8. The Agency has argued that the denovo proceedings are conducted u/s 11 read with section 46 of the Sales Tax Act 1990 wherein time limitation for finalization of denovo assessment proceedings has not been specifically prescribed. It is open ended therefore the deptt has been interpreting it liberally.

- i. That the time limitation prescribed in Section 11(5) of the act is for issuance of show cause notice in fresh cases and not for remand back cases. Moreover, the Appellate Tribunal also did not ask for issuance of fresh show cause notice u/s 11(2) of the act.
- ii. That the ITO 2001 under sub Section (1) of Section 124 provides for completion of remand back proceeding.
- iii. That the interpretation of time limitation falls within the ambit of Superior Courts which can decide the matter even against the deptt. Moreover, the deptt in number of cases in income tax and sales tax has challenged the issue of time limitation before the High Courts and Supreme Court of Pakistan i.e. the case of Reckitt Benckiser Pakistan Ltd. Therefore, interpretation of law is beyond the jurisdiction of FTO as per clause (b) of sub Section (2) of Section 9 of FTO Ordinance 2000.
- iv. That the FTO while charging the officers with maladministration has not identified the specific clause of sub Section(3) of Section (2) of the FTO Ordinance 2000.

From plain reading of sub Section(3) of Section (2) it is clear that the passing of assessment order might fall under clause (i) of the said sub Section. However, the assessment proceedings in the case are spread over more than a decade and in this intervening period many officers dealt with the case and final order was passed on 15.7.2015; therefore, the officer cannot have any bias against the Complainant and it was malafide on the part of the Complainant to not produce any record despite several opportunities of hearing.

It is also pertinent to make note of the fact that clause(i) of sub section (3) of Section (2) of the FTO Ordinance 2000 even allows passing of decision which is contrary to law, rules and regulations if it is bona fide. In the instant case, assessment order passed was bonafide.

- v. That the registered person against the recovery notice issued by the Additional Commissioner filed Constitutional Petition before the High Court of Sindh wherein it agitated that the there is no demand outstanding against it and the deptt cannot proceed afresh because of time limitation. It is pertinent to mention that the High Court of Sindh rejected its urgent application for stay but main Constitutional Petition is still pending before the court. Therefore as per the provisions of clause (a) of sub Section (2) of Section 9 of the FTO Ordinance 2001 the FTO did not have jurisdiction to investigate or inquire into any complaint which is subjudice before a court of competent jurisdiction on the date of the receipt of a complaint.

9. The Agency has underscored that the Sales Tax Act 1990 and the rules allow the deptt in denovo proceedings to repeat the predecessor's order, if facts are unchanged and the taxpayer does not produce any defence. In this case, the registered person since original assessment initiated in 2003 upto final order passed in 2015, despite repeated directions by the Appellate Tribunal failed to furnish requisite record/reconciliation, therefore the grounds were not changed hence the original order was also not changed.

10. The Agency has emphasized that the Review Petition order passed by FTO dated 13.5.2016 suffers from glaring mistakes and infirmities. It was alleged at para 6 of the order that the proceedings were allowed to be dragged from 2003 to 2015 which is tantamount to maladministration in terms of Section 2(3) of the Ordinance without appreciating the fact that during the aforesaid period proceedings were pending before various appellate fora and the case was just received in the deptt for denovo proceedings in 2008. Therefore maladministration as explained above is not established u/s Section 2(3) of FTO Ordinance.

11. The Agency has stated that as per provisions of sub Section (2) of Section 51 of the Sales Tax Act 1990 no suit, prosecution or other legal proceedings can be initiated against the Federal Govt or against any public servant in respect of any order passed in good faith. In this case, the assessment order was passed in good faith without any bias or ulterior motive.

12. The Agency has prayed that the President may accept the representation of the Revenue Division/FBR Islamabad and set aside the findings/recommendations of FTO dated 11.12.2015.

13. On the contrary, the complainant has filed essential comments against the instant Representation of FBR on 03.08.2016 and supported the impugned findings of FTO.

14. 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.

15. 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

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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.

16. 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.

17. Perusal of the record 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.

18. 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. However, the complainant can seek remedy available to him from the relevant forums under the law.

19. Accordingly, the President has been pleased to accept the representation of the Agency/FBR and set aside the impugned recommendations/findings of learned FTO.




Zulfikar Hussain Awan  
Director (Legal-II)

The Chairman,  
Federal Board of Revenue,  
Islamabad.

No.108/FTO/2016 dated 17.10.2016

Copy for information to:

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2. Mr. Aminuddin Ansari, Advocate, M/s Amin Ansari Law Associates, 603 Paradise Chamber, Near Passport Office, Saddar, Karachi.
3. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
4. Director to Secretary to the President.
5. Master file.



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