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Federal Board of Revenue
Versus
Peshawar Electric Supply Company, Peshawar

REPRESENTATION PREFERRED BY FBR AGAINST FINDINGS / RECOMMENDATIONS DATED 09.02.2016 PASSED BY THE FTO IN COMPLAINT NO. 34/PWR/ST/(20)/1316/2015

I am directed to refer to your representation No.1 (1316)S(TO-II)/2015 dated 01.03.2016 on the above subject and to say that the President has been pleased to pass the following orders:

2. This representation dated 1.3.2016 has been filed by the Agency/FBR against the findings of FTO dated 9.2.2016 whereby it has been recommended that:

"FBR is to direct the Commissioner to:-

- i. Allow appeal effect to the Tribunal's order and issue consequential refund together with compensation in accordance with the provisions of law, after due verification, with one month, without prejudice to the final outcome of Departmental reference pending in the Peshawar High Court; and
- ii. Report compliance within 07 days thereafter."

3. The brief fact of the case are that the complainant, Peshawar Electric Supply Company (PESCO), contests non issuance of Sales Tax refund for the period of March, 2012 within prescribed limit after the decision of Appellate Tribunal Inland Revenue (ATIR).

According to the Authorized Representative (AR):

- i. PESCO supplies electricity to its customers and unlawful amount of Sales Tax was collected by the Respondent on its receipts and input tax adjustment was not allowed on transmission losses and theft of electricity.
- ii. The complainant filed appeal before the Commissioner-IR (Appeals) [(CIR(A)] who had allowed partial relief to the complainant which resulted in creation of refund, but the complainant's claim was rejected on 13.2.2013.
- iii. Cross appeals were filed both by the complainant and the department before the ATIR. The Tribunal dismissed dept'l appeal and as a consequence of relief allowed to the complainant, refund became due.
- iv. After Tribunal's decision dated 2.6.2014 six applications requesting issuance of refund were submitted to the dept'l officers from 13.6.2014 to 27.8.2015, but to no avail.

5. The Authorized Representative (AR) submitted that due refund was not issued by the department on the ground that reference was filed in Peshawar High Court against the decision of ATIR after framing 'points of law' and not against allowing appeal effect with consequential refund, which cannot be termed as a 'point of law'. He vehemently contended that no stay order was passed by the Court and therefore department was legally obliged to issue refund within prescribed time limit under Section 66 of Sales Tax Act, 1990 together with compensation on delayed payment u/s 67 of the Act. The AR averred that assessment of Sales Tax per se was not involved in the reference and the issue raised in complaint was not pending in the High Court, and so the department was bound to issue refund u/s 66 of the Act within 90 days of the appellate decision. Failure to allow statutory provisions of law tantamounted to maladministration attracting provisions of Section 2(3) of the FTO Ordinance 2000. He prayed that department be directed to issue refund with compensation without further delay.

6. Reiterating Commissioner's comments dated 26.11.2015 the Departmental Representative (DR) contended that reference was filed by the department before Peshawar High Court on points of law, against the decision of ATIR, and so the issue raised by the complainant was sub-judice in the reference. He averred that the issue being sub-judice, the complaint was not entertainable in terms of Section 9(2)(a) of FTO Ordinance, 2000. The DR prayed that the complaint being devoid of merit be dismissed.

7. Both the parties have been heard and record perused by FTO. Thus FTO has issued the aforementioned findings.

P.T.O.

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8. Hearing of the case was held on 14.7.2016. Mr. Hameedur Rehman, Additional Commissioner IR Peshawar and Mr. M. Haroon Khattak Asstt Dir (Audit) have represented FBR(Agency). On the other hand, Mr. Hussain Ahmad Sherazi, Advocate High Court has represented PESCO.

9. Agency Representative has taken ground that the office of FTO was Coram non-judice in the instant case in view of Section 9(2a) of FTO ordinance 2000 as the matter was subjudice before a court of competent jurisdiction.

10. Representative of the Agency has pleaded that the complaint was hit by the provisions of Section 10(3) of Federal Tax Ombudsman, 2000 for not being filed within six months.

11. Agency - Departmental Representative (DR) has argued that there is a clear bar of claiming input tax credit on the goods which have not been used in taxable supplies u/s 8(1)(a) of the Sales Tax Act, 1990. In such circumstances whether the FTO's findings can take overriding effect over the fiscal statutes relating to tax laws i.e. the Sales Tax Act, 1990 in case under reference.

12. DR has contended that the recommendation of Honorable FTO are in conflict with the provisions of the Sales Tax Act, 1990 where there is no provision of appeal effect in the Sales Tax Act, 1990 like Income Tax Ordinance, 2001.

13. DR has taken stance whether the charge of maladministration can be established in the circumstances when complainant has not paid sales tax on supplies and claimed refund on transmission distribution losses pilferage and theft of electricity which is not admissible u/s 8 of the Sales Tax Act, 1990 as the matter is still subjudice before the Peshawar High Court, Peshawar.

14. DR has further contended that whether the order of the FTO is sustainable for compensation of payment to the complainant in the circumstances when issue accrual of refund on transmission and distribution losses is yet to be decided by the Peshawar High Court, Peshawar. Thus DR has prayed that recommendations of learned FTO being devoid of merit and without legal justification may be set aside.

15. On the other hand, the Authorized Representative (AR) of PESCO has argued that the Supreme Court and High Courts have repeatedly held that order of a judicial forum is required to be implemented unless it is specifically stayed. It has also been held that mere filing of an appeal/reference does not operate as a stay to implement the order unless specific injunction is granted. Order XLI, rule 5 of the Code of Civil Procedure, 1908 is reproduced below:-

5. Stay by Appellate Court.- (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree."

Further reliance is placed on:-

- (i) PLD 1966 Supreme Court 983 ... Shah Wali vs. Ghulam Din alias Gaman and another ... It is well settled that the operation of a decree, passed by a Court of first instance is not automatically suspended, on the mere filing of any appeal therefrom. This is also clear from rule 5, Order XLI of the First Schedule to the Code of Civil Procedure.

Thus AR has supported the impugned recommendations of learned FTO and prayed that the findings of FTO may be implemented in letter and spirit.

16. The learned Counsel of PESCO relied on President's decision in Case No.64/FTO/2014 dated 21.01.2016 (FBR Vs M/s BBJ Pipe Industries (Pvt) Ltd) indicating that in absence of any stay having been granted by the Lahore High Court, the impugned order of the FTO holds its grounds. Even otherwise the only direction is to issue

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refund/compensation in accordance with law. Consequently, the impugned order is unexceptional-able. The matter is not identical as in this case the PESCO complaint dated 12.11.2015 was entertained and passed order by the learned FTO when the matter was subjudice in the Peshawar High Court against Section 9(2)(a) of the FTO Ordinance, 2000.

17. Perusal of record indicates that the impugned findings of FTO are not simply sustainable as PESCO's complaint dated 12.11.2015 was admittedly entertained by FTO against the bar provided by Section 9(2)(a) of the FTO Ordinance 2000 showing 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. Consequently, the Agency's representation is liable to be accepted.

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



Zulfiqar Hussain Awan
Director (Legal-II)

The Chairman,
Federal Board of Revenue,
Islamabad.

No.39/FTO/2016 dated 16.08.2016

Copy for information to:

1. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
2. Peshawar Electric Company (PESCO), Mr. Shahid Jan, Advocate, WAPDA House, Shami Road, Peshawar
3. Mr. Hussain Ahmad Sherazi, Advocate High Court, 1112-Eden Heights, Jail road, 6 main Gulberg, Lahore
4. Director to Secretary to the President.
5. Master file

Zulfiqar Hussain Awan
Director (Legal-II)

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