

86

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

Federal Board of Revenue
VS
Pakistan Mobile Communications Ltd, Islamabad

REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE (FBR)
AGAINST FINDINGS / RECOMMENDATIONS DATED 8.6.2016 IN COMPLAINT
NO.17/ISD/ST(04)/223/2016

I am directed to refer to your representation No. 1(233)S(TO)/2016 dated 4th July, 2016 on the above subject and to say that the President has been pleased to pass the following orders:

2. This representation dated 4.7.2016 has been filed by the Agency/FBR against the findings of FTO dated 8.6.2016 whereby it has been recommended that:

"FBR is to:-

- (i) Consider request of the Complainant as a special case under Section 7(3) and 55 of the Act within 45 days; and
- (ii) Report compliance with 07 days thereafter."

3. The brief fact of the case are that the complaint has been filed under Section 10(1) of the FTO Ordinance 2000 for directing Member IR FBR to allow adjustment/refund of sales tax paid by the complainant on purchase of diesel and petrol used in power generator after purchasing from authorize dealers of the Oil Marketing Companies (OMCs) on monthly basis through banking channel under Section 7(3) and 55 of the Sales Tax Act, 1990.

The complaint was sent for comments to Secretary, Revenue Division in terms of Section 10(4) of the Ordinance. In response FBR sent comments of CCIR LTU Islamabad wherein it was contended that refund claim of the complainant cannot be processed as in absence of valid invoice under Section 23 of the Act adjustment of input tax or refund thereof cannot be granted under Section 7(2)(i) of the Act read with Chapter -V of sales tax rule, 2006 (the rule). It was also informed that Debit/Credit notes under Section 9 of the Act in terms of the Boards clarification C. No. 1(30) STR-99 dated 12.01.2008 cannot be issued due to prescribed time limitation of 180 days. Further that the refund claim filed on 25.06.2008 under Section 66 of the Act was time barred for the period prior to 07/2007. It was also informed that the claimant has requested to invoke Section 7(3) and 55 of the Act which cannot be invoked as the basic requirement of Section 23 of the Act and chapter-V of the Rules have not been fulfilled by the registered person.

5. Careful study of this case show that the FBR had allowed input adjustments on all goods other than those mentioned in SRO No.490(1)/2004 dated 12.6.2004. But taxpayers like this Complainant could not avail input adjustments under this SRO on diesel and petrol purchased by them from dealers of OMCs who being not registered under the act, could not issue tax invoices required for claiming input adjustments. FBR tried to help taxpayers like Complainant to claim input adjustment under SRO 490(1)/2004 dated 12.6.2004 by issuing clarification vide its letter No.1(30)STR/99 dated 12.1.2008 read with its letters No.RTO/ISB/ST/R/PMC/2008/6081 dated 7.2.2009 and No.1(30)/STR/99/61675-R dated 16.4.2010. The request of the Complainant in the instant case for invoking Section 7(3) and 55 of the Act merits consideration by FBR as problems in this case has basically arisen due to FBR's decision of not enforcing registration of dealers of OMCs and instead realizing full sales tax on retail prices of POL products from OMCs.Thus FTO has issued the aforementioned findings.

6. The instant representation has been filed by the Agency-FBR. The Agency has taken ground that the FTO's recommendation to invoke sub Section 3 of Section 7 and Section 55 of the Sales Tax Act cannot be invoked.

The direction of FTO are inconsistent with the provisions of Section 55 of the Sales Tax 1990 is reproduced for ready reference:

"If any difficulty arises in giving effect to the provisions of this act or the rules made or notification is issued there under, the board may through a general order or otherwise, issue instructions or directions, not inconsistent with the provisions of this Act, for such actions to be taken by an officer of IR or any other person as it considers necessary or expedient for purpose of removing the difficulty"

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Since Section 55 allows the deptt to remove the difficulties which in no way be inconsistent with the provisions of the act, therefore issuance of refund on the purchases which have been made without any valid sales tax invoices is against the spirit of law.

7. The Agency has argued that the order of FTO to consider the case as a special case under Section 7(3) and 55 of the Sales Tax Act 1990 regarding adjustment of input tax of RP in the absence of valid invoices is not judicious and will set unlawful precedent.

8. The Agency has prayed that the impugned decision/findings of the FTO in C.No.17/ISD/ST(04)/233/2016 dated 8.6.2016 with consequent recommendations may be cancelled by declaring it in excess of its jurisdiction and against the spirit of law.

9. On the other hand, the Complainant has filed his comments against the instant representation of FBR-Agency on 8.8.2016 through Ayaz Shaukat Advocate High Court and supported the impugned recommendations / findings of learned FTO with prayer to reject the representation of the Agency.

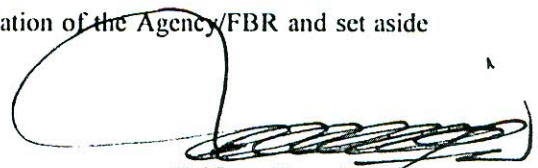
10. In terms of Section 9(2)(b) of the FTO Ordinance 2000, the FTO has no jurisdiction to investigate or inquire into the matters which relate to the assessment of income, determination of liability of tax, interpretation of law, rules and regulations relating to the said assessment/ determination in respect of which legal remedies of an appeal, review or revision are available under the relevant legislation.

11. It has already been held vide order No. 88/FTO/2013 dated 05.06.2013 (corresponding Law Division's Summary No.73/2011-Law(FTO) dated 12.06.2013 in Complaint No. 90/LHR/IT(79)/204/2011), that: "matter pertained to assessment of income and determination of liability of tax as also interpretation of law and there is no dispute that legal remedy of appeal as well as revision was available under the Income Tax Ordinance 2001. Findings and recommendations of FTO are not sustainable." In another case No. 384/FTO/2013 dated 09.09.2013(corresponding Law Division's summary No.50/2012-Law(FTO) dated 24.07.2013 in Complaint No. 181/LHR/IT (128)/ 355/ 2012), it has been held that: "there is no manner of doubt that the matter pertained to determination of liability of tax also involving interpretation of law/ rules relating to such determination and legal remedies of appeal are available under the said Ordinance 2001. . . . Findings do disclose that FTO has assumed unto himself the jurisdiction of appellate authority which is not permissible under the provisions of FTO Ordinance 2000. Findings and recommendations of FTO are therefore not sustainable."

12. 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.

13. 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.

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



Zulfikar Hussain Awan
Director (Legal-II)

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The Chairman,
Federal Board of Revenue,
Islamabad.

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No114./FTO/2016 dated 04.10.2016

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Copy for information to:

1. M/s Pakistan Mobile Communications Ltd, 1-A, IBC Building F-8, Markaz, 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)

(219)