

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

Federal Board of Revenue
 Versus
 Mr. Muhammad Sher Khan, Swat

REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE AGAINST FINDINGS
/ RECOMMENDATIONS DATED 15.03.2018 PASSED BY THE FTO IN COMPLAINT NO. 0149,
0150, & 0151/PWR/IT/2018

I am directed to refer to your representation No. 4(234)S(TO-I)/2018, dated 11.04.2018 on the above subject and to say that **the President has been pleased to pass the following order:**

2. This Representation dated 11.04.2018 has been filed by the Agency-FBR against the findings of the FTO dated 15.03.2018 whereby it has been held:

“FBR to direct:-

- (i) Direct the Commissioner-IR Mardan to process and settle refund for Tax Years 2011 to 2013, as per law; and
 (ii) Report compliance within 45 days.”

3. Brief facts of the case are that these identical complaints have been filed under Section 10(1) of the Federal Tax Ombudsman Ordinance, 2000 against Regional Tax Office (RTO), Peshawar on account of failure of settle refund for Tax Years 2011 to 2013. All these complaints having identical issues are disposed of through single consolidated findings.

4. The Complainant, an individual, derives income from franchise of M/s Telenor Pakistan (Pvt) Ltd located at Timargarah which falls in the Provincially Administered Tribal Areas (PATA). According to the AR, the PATA is exempt from tax under the provisions of Article 247 of the Constitution of Islamic Republic of Pakistan, 1973. However, as the tax was deducted under Section 336 of the Income Tax Ordinance, 2001 (the Ordinance), the Complainant filed returns for Tax Years 2011, 2012 and 2013 under Section 114(1) of the Income Tax Ordinance, 2001 and claimed amounting to Rs.3.133 million, Rs. 3.350 million and Rs. 4.659 as refund. He contended that refund applications were not required to be filed as held by this Forum in the cases cited as 2014 PTD 1554=110 TAX 15 and 2006 PTD 1580=91 TAX 305. Notwithstanding above, the Complainant also e-filed separate applications for refund for Tax Years 2011, 2012 and 2013 alongwith required copies of tax deduction certificates but the Department has failed to issue due refund.

5. The complaints were forwarded to the Secretary, Revenue Division, Islamabad for departmental reply/ comments in terms of Section 10(4) of the FTO Ordinance, 2000 read with Section 9(1) of the Federal Ombudsmen Institutional Reforms Act No. XIV of 2013. In response thereto, the Chief Commissioner-IR, RTO, Peshawar submitted parawise comments vide letters C.No.537 dated 19.02.2018. It was contended that refund for Tax Years 2011 to 2013 could not be processed as refund applications and evidence of tax deduction had not been provided by the Complainant. It was averred that on production/ perusal of relevant documents, refund due for Tax Years 2011, 2012 and 2013 would be issued, as per law.

6. During hearing, the DR contended that as the Mardan Zone has recently been created, the case record of the Complainant has not yet been received properly. The AR reiterated that inability of the Department for handing over the record to Zone was not a fault of the Complainant for which unlawful delay of settling refund could be justified. Moreover, though filing of refund applications was not mandatory under the statute as held in the case laws cited above, yet the Complainant submitted refund applications and repeatedly sent reminders for issuance of refund, but in vain. In order to facilitate the Department, the AR handed over returns for Tax Years 2011 to 2013, a set of CPRs and copies of the refund applications to the DR with the assurance that more documents, if required, would also be provided within couple of days. The DR assured that after verification process is completed, orders for Tax Years 2011 to 2013 under Section 170(4) of the Ordinance would be passed and refund due issued, as per law. Both the parties have been heard and available record perused. Thus, FTO has issued aforementioned findings.

7. Hearing of the case was held on 30.05.2018. Mr. Muhammad Alam Deputy Commissioner-IR has represented the FBR. On the other hand, Mr. Gawhar Ayub Authorized Representative for the complainant has appeared for the hearing on the particular issue.

8. The instant Representation has been made by the FBR. The Agency has taken ground that the FTO has got no jurisdiction over the case of the Complainant/ Respondent as the FTO Ordinance, 2000 has not been extended to non-taxable area of FATA & PATA within the meaning of Article 247 of the Constitution of Islamic Republic of Pakistan.

9. The Agency has pointed out that claim of the Respondent is erroneous as income/ commission earned by the taxpayer, has been generated outside PATA i.e. in the taxable territory of Pakistan. Thus, receiving payment on

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account of commissioner under Section 233 read with Section 169(1)(b) is Pakistan-source income in view of Section 101(14) of the Income Tax Ordinance, 2001.

10. The Agency has contended that the august Supreme Court of Pakistan vide Civil Appeals No. 1950 to 1963 of 2013 dated 24.12.2013 on the similar issue in the case of Chief Commissioner IR Versus Umar Zada Filling Station & Others has already granted leave to appeal to the Revenue Department and has suspended the order of Peshawar High Court, Peshawar with the following findings:-

“After hearing the learned counsel for the petitioner, leave to appeal is granted, inter-alia to consider whether the principle laid down in C.I.T Gul Cooking Oil & Vegetable Ghee Pvt Limited (2008 97 Tax 125) relied upon by the High Court is applicable to the facts of the present case as the said case related to levy of sale tax on import of raw material consumed in Tribal Area, whereas here the tax deducted at source was on the concession/ discount given to the respondents within the taxable territory, namely, Karachi under Section 156A of the Income Tax Ordinance, 2001 which reads:

156A. Petroleum Product:- (1) Every person selling petroleum products to petrol pump operator shall deduct tax from the amount of commission or discount allowed to the operator at the rate specified in Division via of Part M of the First Schedule.

Subject to the notice the impugned order is suspended”.

11. The Agency has pleaded that the office of President Secretariat (Public) vide No. 189/FTO/2016 dated 01.02.2017 regarding representation preferred by FBR against findings/ recommendations dated 03.11.2016 passed by the FTO in Complaint No. FTO-PSH/0000525/2016 in the case of FBR versus Mr. Muhammad Ibrar, Swat has categorically explained that issues involving assessment of tax and interpretation of law could not be interfered with by the FTO where proper remedy of appeal in terms of Commissioner (Appeals), Income Tax Tribunal, High Court and Supreme Court of Pakistan is available to the Complainant. If the departmental stance is not accepted, although similar issue is pending before the Supreme Court of Pakistan, it will open a gate prematurely for all taxpayers earning commission to claim billion amounts of refunds on account of their commission earned in the taxable territories of Pakistan which are otherwise properly taxable and covered by the Presumptive Tax Regime (PTR) under the Income Tax Ordinance, 2001.

12. The Agency has prayed that findings/ recommendations of the FTO may graciously be vacated and departmental stance on this legal issue, being pending in the apex Court is implored to be confirmed.

13. On the other hand, the complainant has filed his comments on 3.5.2018 through Counsel, Maglev Consulting Pvt. Ltd against the instant representation of FBR and supported the impugned recommendations/findings of learned FTO. The Authorized Representative of the Complainant has prayed that maladministration against the officials of FBR has been established as they failed to follow their duties in its essence and taxpayer has suffered economic damaged due to their negligence, hence the representation of the Agency may be rejected by upholding the recommendations/findings of FTO.

Analysis/Conclusion

14. After perusal of record, examination of all documents, and detailed hearing, it has been noted that 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.**

15. 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.

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. It is pointed out that the particular issue involves factual controversies, which can be settled after recording of essential evidence where both parties have an equitable chance for examination in Chief, cross examination and re-examination. Undoubtedly the scrupulous issue has factual controversies including question of fact, question of law and mixed question of fact and law, which can be settled only by the court/forum of competent jurisdiction after recording of evidence. The learned FTO has decided the issue in hasty manner. The Hon'able Supreme Court of

Pakistan in case of Bank of Credits and Commerce Vs Asrar Hassan (2007 SCMR 852) has already held that "this may be noted that the question of fact or a mixed question of law and fact cannot be effectively decided without recording the evidence and learned counsel for the petitioners has not been able to satisfy us that in the facts of the present case, the question relating to the jurisdiction of Courts in Pakistan to entertain the suit and adjudicate the claim of respondent against the petitioners is patently a question of law."

18. It is relevant to draw attention towards essentiality of evidence recording as such cases cannot be decided without a competent forum without recording of essential evidence. It is noted that in case of Nasir Hameed Vs Rais Muhammad Akram (2011 MLD 587) High Court Quetta has held that "in instant case the trial court through framed issues of law and also decided the same without going into factual controversy through judgment dated 10.04.2010, though there is no legal defect in the same to said extent. As under order XIV Rule 2, C.P.C. it is requirement of law that issue of law have to be determined at first instance, where after, settlement of issues of fact are to be made. But it is required to be seen by the court, wherein suit has been instituted and under trial, that whether the issue of law can be decided without procuring of the evidence or otherwise, if so, it can decide the same by only hearing the arguments made by the parties. But in case the matter is otherwise the matter in issue though of law, but interrelated with facts of the case, it cannot be decided without recording of evidence, thus in such case only arguing the matter by the parties will not serve the purpose, rather recording of evidence would be essential before giving decision on the same.

19. In view of the aforementioned circumstances, the particular issue involves the question of fact, question of law and mixed question of fact and law which can be settled after recording of evidence by a competent court/forum of law. The impugned order of learned FTO is based on surmises and conjectures. There was no unimpeachable evidence to prove the particular case of the complainant. In the light of oral assertion, it was a fit case for decision of the court/forum of competent jurisdiction. Rather, it was a case, which is based on factual controversies which can only be resolved/settled after recording evidence, which is prime function of the court/forum of competent jurisdiction, where both parties have an equitable opportunity for examination, reexamination and cross-examination. The factual controversies can only be resolved by the competent forum under the law. Thus, the impugned order of learned FTO is required to be set aside by the appellate forum. The representation of the Agency is required to be accepted. The impugned findings/recommendations being exceptional in nature is neither maintainable nor sustainable in the eyes of law and required to be set aside by the appellant forum. In the circumstances, the findings of FTO are required to be set aside and the representation of the Agency is required to be accepted by the appellant forum.

20. 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, if so desired.

21. Accordingly, the President has been pleased to accept the instant Representation of FBR-Agency and to set aside the impugned findings/recommendations of learned FTO.

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

The Chairman,
Federal Board of Revenue,
Islamabad.

No. 17/FTO/2018 dated 13.06.2018

Copy for information to:

1. Mr. Muhammad Sher Khan, TELENOR Franchise, Makan Bagh, Airport Road, Mingora, Swat.
2. Mr. Faisal, Maglev Consulting Pvt. Ltd, Office: 14, Mezzanine Floor, 80- West, Malik Complex Jinnah Avenue, Blue Area, Islamabad.
3. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
4. The Chief (Legal-I), Federal Board of Revenue, Islamabad.
5. Director to Secretary to the President.
6. Master file.

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)