

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

*Federal Board of Revenue  
Versus  
Mr. Tajwali Shah, Buner*

**REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE AGAINST FINDINGS/RECOMMENDATIONS DATED 15.3.2018 PASSED BY THE FTO IN COMPLAINT NO.0152,0153,0154 & 0155/PWR/IT/2018**

I am directed to refer to your representation No. 4(152-153-154&155)(TO-I)/2018 dated 13.04.2017 on the above subject and to say that the President has been pleased to pass the following orders:

2. This Representation dated 13.04.2018 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 2014, as per law; and
- ii. Report compliance within 45 days.”

3. Brief facts of the case are that these four 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 2014. 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, 2013 and 2014 under Section 114(1) of the Income Tax Ordinance, 2001 and claimed amounting to Rs.1.492 million, Rs. 2.472 million, Rs. 2.349 and Rs.1.821 million 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, 2013 and 2014 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 2014 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, 2013 and 2014 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 2014, 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 2014 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.

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Brief.

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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 representative of 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 representative of 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 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 representative of 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 representative of the Agency has illustrated 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 representative of 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.**

