

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

Federal Board of Revenue
Versus
M/s Phoenix Armour (Pvt) Ltd

REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE AGAINST FINDINGS/RECOMMENDATIONS PASSED BY THE FTO IN COMPLAINT NO. 701-K/2003-H/C OF SINDH ORDER DATED 11.04.2017 IN CP NO. D-171/2004, D-640/2004, D-1202/2004 D-517/2005 AND D-1446/2005

I am directed to refer to constitutional petition referred by the Honourable High Court of Sindh vide their order dated 11.04.2017 on the above mentioned subject and to say that the President of Pakistan in pursuance of the orders of the High Court dated 11.04.2017 has been pleased to pass the following order:

2. The High Court of Sindh vide their order dated 11.04.2017 has communicated in C.P.Nos. D-171 of 2004, D-640 of 2004, D-1202 of 2004, D-517 of 2005 & D-1446 of 2005 as under:

"These are a bunch of the Petitions wherein a common question of law is involved in all the instant Petitions. The Petitioners have agitated that the President of Pakistan, while passing the impugned orders on the Representations decided by the Federal Tax Ombudsman in favour of the Respondent Department, has not given opportunity of hearing to the respective Petitioners. Learned counsel for the Petitioners, in this behalf, have placed reliance on the decision given in the case of Messrs. Siddiqsons Weaving Mills (Pvt.) Limited through Director vs. Federation of Pakistan through Secretary Law, Justice and Human Rights, Islamabad (PLD 2005 Karachi 656) and have stated that since the Petitioners were not given an opportunity of hearing, which is violation of the principle of "audi alterum partum", therefore, the order passed by the President of Pakistan is not in accordance with law and needs to be vacated. It is further contended that the issue involved in these Petitions has since been laid down at rest in the above-referred decision, therefore, the instant Petitions may be disposed of in the light of the above-referred decision.

Learned counsel for the Respondents have conceded that no opportunity of hearing was provided to the Petitioners by the President of Pakistan, while passing the impugned orders. They have, however, stated that this is not a fatal defect and the same can be cured if the matters are remanded back to the President of Pakistan to pass a fresh order after providing an opportunity of hearing to the Petitioners in accordance with law.

We, after hearing the learned counsel for the parties at some length, decide the instant Petitions with their consent as under:-

1. *That the matters of the Petitioners may be heard afresh by the President of Pakistan in accordance with law after providing opportunity of hearing to them.*
2. *That the issue with regard to the limitation or other issues would also be considered and decided by the President of Pakistan in accordance with law while deciding the Representations.*

The instant Petitions stand disposed of in the above terms."

3. The particular Representation dated 12.11.2003 was filed by the Federal Board of Revenue (FBR) against the findings of the FTO dated 09.09.2003, whereby it was held that:

- (i) C.B.R re-open Order-in-Original No.019/2003 dated 28.02.2003 under Section 45A of the Sales Tax Act, 1990 and cancel the same.
- (ii) Compliance be reported within 30 days of the receipt of this Order.

4. The President of Pakistan was pleased to pass on 17th September 2004 the following order:-

"Section 9(2) of 2000 Ordinance provides that the Federal Tax Ombudsman shall not have jurisdiction to investigate or inquire into matters which relate to assessment of income or wealth, determination of liability of tax or duty, classification or valuation of goods, interpretation of law, rules and regulations relating to such assessment, determination, classification or valuation in respect of which legal remedies of appeal, review or revision are available under the Relevant Legislation. The role of the FTO is to identify mal administration and not to provide appeal on merits against an unfavorable decision of tax employee. Mal administration connotes some misbehavior such as inattention or corrupt motives. Neither there is any such allegation in the complaint nor has the FTO so found. The only question debated before the FTO and attended to by him in his findings relates to taxability of certain supplies made by the complainant, and

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such a question relates to assessment of tax referred to in Section 9(2) *ibid*. The FTO's findings have all the earmarks of an appellate order. The Ombudsman's order plainly is without jurisdiction. And, the question of limitation does not arise where an order is without jurisdiction. Further, the recommendation of the FTO is not binding judgment. It becomes binding only when it is affirmed by the President [Shafaatullah Qureshi v Federation of Pakistan PLD 2001 SC 142]. The President may, at his discretion, direct implementation of the recommendation or refuse implementation.

Accordingly, the President has been pleased to direct that the Ombudsman's recommendation shall not be implemented."

5. The Brief facts of the case are that all this complaint has been filed by a Company alleging "maladministration" and harassment by way of levy of Sales Tax by mis-interpreting the word "Services" understood in common parlance.

6. The complainant provides Secured Cash Transportation Service, which is not liable to Sales Tax. They have been filing returns, as required by Section 26 of the Sales Tax Act, since their 'registration' under the Sales Tax Act in July, 1998. The complainants were then known as Brinks Pakistan (Pvt.) Ltd. For the period July, 1998 to September, 2001 the Collector of Sales Tax (Adj.) Karachi has vide his Order-in-Original No.019/03 dated 28.02.2003, held them liable to Sales Tax for:

(a) Sales of Plastic, Scales and Bags (consumed in providing secured Transmission Service).	= Rs.50,141,899
(b) Sales of Containers Seals of Transportation	-- Rs.40,502,450
(c) Sale of Scrap	- Rs.145,675
(d) Sale of Fixed Assets	Rs.24,538,630

7. Thus on aggregated Sales of Rs.115,388,654, Sales Tax liability of Rs.17,468,715 and Additional Tax liability at Rs.12,559,965 has been created which is the cause of grievance.

8. The Respondents have forwarded parawise comments by Collector of Custom, Sales Tax and Central Excise (Adjudication), Karachi-III which deny "mal-administration". The levy has been justified contending that:

- Complainant is not the "end user" of taxable goods liked Seals/ Bags which were supplied to the clients by adding the value of these items in the Bills.
- Complainant violated Section 26 of Sales Tax by not reflecting all sales in the Monthly Returns.

9. It is stressed the huge amount of tax should "not be allowed to go down the drain just for the sake of entertaining the flimsy grounds put forth by the complainants in his appeal / complaint."

10. Mr. Aminuddin Ansari (Advocate) appearing for the Complainant explained that controversy concerns levy of Sales Tax on (i) alleged sale of Seals and Bags, (ii) Sale of scraps, and (iii) disposal of discarded assets. Of these, according to learned Counsel, the principal issue relates to the first item of Seals and Bags. The learned Counsel admitted that Complainant's own financial auditors, for purpose of accounting, though it prudent to mention on the Invoices (issued to the customers) the break-up of items consumed in the process of providing the Service for Transportation of Cash from the point of dispatch to the point of delivery. This according to the AR, may have been either a mistake of procedure as respects recording the consumption of consumable stores, but it is clearly was not the Complainant's intention (or practice) to make sales of consumable store to the clients. Therefore, the 'tax functionaries' labouring with undue enthusiasm treated the consumption of Seals and Bags as transactions of sale. The Counsel was at pains to explain that when delivery is taken from the dispatch point, a memo is prepared recording denominations and value of currency, which are then placed in a Bag to be sealed in the presence of the Cashier who notes down on the Memo the engraved serial number of the Seal. At the delivery point the receiving Cashier checks that the Seal of the same number is secured and properly locked. The seal is then broken to open the bag and contents tallied with the details on the Memo. The "seal" thus becomes waste but the lock and the Bag is retained by the Complainant. The bags and locks are repeatedly used till these become worn out. Thus for the Seals/ Bags / Locks the complaint is the "end user" and hence these were not liable to Sales Tax especially when undeniably the service provided by the Complainant is not a taxable activity. As respects the sale of Scrap, the standby the learned Counsel was that levy was uncalled for as sale of Scrap was not the principal source of business hence not liable to Sales Tax. Similar position was adopted with respect to the sale of discarded Assets. For these assertions, the learned Counsel relied on decisions reported as 1999-PTD-1982 and 2000-PTD-976.

11. Mr. Saeed Khan Jadoon (DC, Sales Tax) submitted that there was no 'mal-administration' and hence the complaint is not competent for admission. He explained that the complainant admits that their own Auditors (by

mistake or otherwise) separately mentioned the price charged for Seals from the clients. Therefore, a genuine doubt arose about the complainant being an "end-user" of these items. The Auditor of the Sales Tax Department then conveyed a Contravention Report to the Collector (Adjudication) who, in sequence, issued a show-cause notice to the Complainant extending opportunity of hearing where after he passed a speaking order hence the matter purely relates to assessment and interpretation of law as per Sections 3, and 36 of the Sales Tax. The DR insisted that law provides that the order by the Collector contested in appeal. Therefore, there being no "maladministration, an appeal should have been preferred more so when Section 9(2)(b) of Federal Tax Ombudsman Ordinance stands in the way of entertaining the Complaint.

12. The objection by the Department as respects the bar on jurisdiction as per Section 9(2) of the FTO Ordinance has been so frequently and so inappropriately taken that consistent and authoritative decisions overruling it have been rendered the objection obsolete mere so, because whether "maladministration" had (or had not) occurred can only be discovered on investigation. Thus the FTO has issued aforementioned findings.

13. 1st hearing of the case was held on 4.10.2017. Mr. Zulfiqar Ali Memon, Additional Commissioner IR has represented the FBR. On the other hand, Mr. Zahid Baig, Manager Sales has appeared for the hearing on behalf of (the Complainant) M/s Pheonix Armour (Pvt) Ltd on the particular issue. However, he has requested that owing to non availability of the Counsel of the complainant, another opportunity of hearing may be provided to them in the next week. 2nd hearing of the case was held on 11.10.2017. Mr. Zulfiqar Ali Memon, Additional Commissioner IR has represented the FBR. On the other hand, Mr. Zahid Baig, Manager Sales has appeared for the hearing on behalf of (the Complainant) M/s Pheonix Armour (Pvt) Ltd on the particular issue, who has filed written arguments.

14. The representative of the Agency has taken ground that the R/P's records were properly scrutinized by the Audit Team and the valid contravention report was prepared and submitted to the Adjudication Collectorate for further necessary action at their end. It is an established fact that the R/P has failed to pay the Sales Tax on above mentioned goods. Definition of "Goods" which is incorporated in the Sales Tax Act, 1990 is reproduced here as under:

Section 2(12), "Goods" includes every kind of movable property other than actionable claims, money, stocks, shares and securities.

Furthermore, the definition regarding "Taxable Goods" as defined in section 2(39) is also given here as under:

"Taxable Goods" means all goods other than those which have been exempted under section 13."

15. The representative of the Agency has pleaded that the above named respondent has also submitted this fact that the supply of taxable goods are liable to charge Sales Tax in terms of provisions of section 3 of the Sales Tax Act, 1990, already mentioned above was made by him to his customer/clients. The definition of supply u/s 2(33) is also given below:

"Supply" includes sales, lease excluding financial or operating lease or other disposition of goods in furtherance of business carried out for consideration and also includes:

- a) Putting to private, business or non-business use of goods acquired, produced or manufactured in the course of business.
- b) Auction or disposal of goods to satisfy a debt owed by a person.
- c) Possession of taxable goods held immediately before a person ceases to be a Registered Person; and
- d) Such other transaction as the Federal Government may by notification in the Official Gazette specify;

16. The representative of the Agency has underscored that the respondent has also been recognized/ admitted in the financial statements that they made supply of Plastic Bags & Seals and Container's seals. That the time of hearing, Mr. Saeed Khan Jadoon, Deputy Collector Sales Tax, contended that the passed a speaking order hence the matter purely relates to assessment and interpretation of law as per section 3, and 36 of the Sales Tax Act. He further submitted that Law provides that the orders by Collector be contested in Appeal. Therefore, there being no "maladministration", an appeal should have been preferred more so when Sec 9(2)(b) of Federal Tax Ombudsman Ordinance stands in the way of entertaining the complaint.

17. The representative of the Agency has considered that despite the bar u/s 9(2)(b) of FTO Ordinance, 2000, the recommendations/ findings were passed in the instant case. The extract of section 9(2)(b) are given here as under: "relate to assessment of income or wealth, determination of liability of tax or duty, classification or valuation of goods, interpretation of law, rules and regulations relating to such assessment, determination, classification or valuation in respect of which legal remedies of appeal, review or revision are available under the Relevant Legislation". But the aforesaid request has not been considered. It is pertinent to mention that His Excellency

President of Islamic Republic of Pakistan has passed/ given has valued verdict in the matter of M/s Adam Fabrics (Pvt) Ltd. vs, Revenue Division against the findings of FTO Complaint No.429/2001, "that no act of maladministration on the part of the Agency was discernable. The complainant's grievance relates to determination of duty and no maladministration. If the complainant was dissatisfied with the customs authorities' decision, the proper course of him was to prefer statutory appeal under the Customs Act 1969 and not to make a complaint before the FTO, because his jurisdiction is confined to identify mal-administration by the Agency and not to make any findings which would effect the determination of any tax or duty, and the impugned findings do not effect the determination of duty". "A decision of any agency based on established practice does not amount to mal-administration even the established practice if examined judicially is not found strictly to be in accord with law. Also, a decision which is bona fide or is based on valid reasons does not amount to mal-administration. A decision is bona fide if it is not mala fide. Also, it appears the criteria on the basis of which the value of the complainant's goods was determined as quite relevant for the purpose of determining "normal price" mentioned in section 25 of the Customs Act. The recommendation of the Ministry of Law, Justice and Human Rights proposing acceptance of the Agency's representation is quite apt". Moreover, the decisions/ recommendations of Honorable FTO in complaint No.1277-K/2001 filed by MST Shahida Maqsood vs. Revenue Division have also been set aside on reasons/ grounds narrated herein above.

18. The representative of the Agency has prayed that impugned recommendations/ decision passed in the instant FTO complaint may be set aside in the best interest of justice, Equity and Law.

19. On the other hand, the Representative of the Complainant has filed written arguments and stated that the respondent is engaged in providing security services. All guards are under its employment. Salary, overtime, leave compensation, injury payment, life insurance, retirement benefits, EOBI etc. are responsible by the respondent. Its income fall under the head "services" and not "contract" as interpreted by the FBR.

20. The Representative of the Complainant has mentioned that the case of the respondent is manifestly a service oriented organization rendering services on behalf of the respondent. The income fall under normal taxation and it is out of ambit of Section 80C of the repealed Income Tax Ordinance, 1979.

21. The Representative of the Complainant has underscored that without prejudice to the above the Inspecting Additional Commissioner, converted normal assessment into FTR assessment but before the Appellate Tribunal (Azad Jammu Kashmir Counsel), the case reversed in its original position.

22. The Representative of the Complainant has mentioned that Income Tax Ordinance, 2001 also endorsed above view point in Section 153(C) which is reproduced as:

"(C) on the execution of a contract, including contract signed by a sportsperson but not including a contract for the sale of goods or the rendering of or providing services."

23. The representative of the Complainant has emphasized that in the light of the above every case has its own different aspects and cannot come under the ambit of presumptive tax regime. The case of the appellant is crystal clear like the day light and does not warrant any inference.

24. The representative of the Complainant has prayed that the case of the respondent should be excluded from general scrutiny.

Analysis/Conclusion

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

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.

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 (IT), 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.

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.

26. Accordingly, the President has been pleased to (a) accept the instant representation of FBR-Agency (b) to set aside the impugned recommendations/findings of learned FTO and (c) to endorse early decision of the President of Pakistan communicated to all stakeholders by Law, Justice and Human Rights Division on 17.9.2004

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

The Chairman,
Federal Board of Revenue,
Islamabad.

No. 155/FTO/2017 dated 20.11.2017

Copy for information to:

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2. The Registrar, High Court of Sindh, Karachi.
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)