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

Federal Board of Revenue
Versus
Mr. Muhammad Ashraf FaisalabadREPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE, ISLAMABAD
AGAINST FINDINGS/ RECOMMENDATIONS DATED 18.08.2016 PASSED BY THE FTO IN
COMPLAINT NO. FTO-FSD/0000568/2016

I am directed to refer to constitutional petition referred by the Honourable Lahore High Court vide their order dated 11.01.2018 on the above mentioned subject and to say that the President of Pakistan in pursuance of the orders of the High Court dated 11.01.2018 has been pleased to pass the following order:

2. The Hon'ble Lahore High Court Lahore vide order dated 11.01.2018 in the Intra Court Appeal (ICA) No. 123088/2017 has been pleased to hold that:

"Through this ICA, the Appellant has impugned order dated 25.09.2017 passed by the learned Single Judge in WP No. 5513/2017.

At the very outset learned counsel for the Appellant was confronted with the fact that the impugned order dated 25.09.2017 passed by the learned Single Judge simply remand the matter to the President's Secretariat for deciding the matter afresh and that the issue of limitation should be taken up and decided before other issues. Under the circumstances, we are of the opinion that no right of the Appellant is infringed through the impugned order. It is simply a remand order where the Appellant can also be heard. No illegality is made out in the impugned order.

In view of the aforesaid, the instant appeal is dismissed and impugned order dated 25.09.2017 passed by the learned Single Judge in WP No. 5513/2017 is maintained".

Lahore High Court, Lahore vide their order dated 25.09.2017 has been pleased to hold that:-

"The fact that a representation was filed beyond time has also been conceded to by the FBR which has filed an application for delay of one day to be condoned. This application was too not decided by the officer deciding the representation on behalf of the President. This has caused miscarriage of justice and the impugned order is liable to be set aside on this ground.

In view of the above, this petition is allowed and the impugned order dated 21.11.2016 is hereby set aside. The matter is remanded to the President's Secretariat, Aiwan-e-Sadr, Islamabad for deciding the issue afresh and in this regard, the issue of limitation shall be taken up and decided ahead of all other issues and the objections regarding the period of limitation and the powers to condone that delay in filing the representation shall be decided afresh."

3. This Representation dated 19.08.2016 has been filed by the Agency-FBR against the orders dated 18.08.2016 of the Federal Tax Ombudsman, whereby it has been held:

"FBR to-

- i. Direct the Commissioner to dispose of refund claim within 21 days; and
- ii. Report compliance within 07 days".

4. The brief facts of the case are that this complaint is filed against non issuance of refund of Rs. 3.174 million for the Tax Year 2014. According to the Complainant, return was filed on 05.12.2014 and refund application was e-filed on 04.04.2016 supported by documentary evidence, but the claim was not settled.

5. The complaint was sent for comments to the Secretary, Revenue Division, Islamabad in terms of Section 10(4) of the FTO Ordinance. In response, FBR vide letter C.No.4(568)/TO-I/2016 dated 30.06.2016 forwarded comments of the Commissioner, IR dated 23.06.2016. the Department raised preliminary objection that the matter relates to the determination of tax liability and assessment of income and as such, office of FTO had no jurisdiction to investigate or inquire into the matter in terms of Section 9(2)(b) of the FTO Ordinance, 2000 as held by the President of Pakistan in Representation in C.No.217/FSD/IT(140)1358/ 2014 and C.No. 173/FSD/IT(134)719/2015. On merits, it was contended that supporting documents were not available on record and so the genuineness of refund could not be ascertained. Further, the Additional Commissioner IR (Audit) had examined the return and found it erroneous and prejudicial to the interest of revenue. He, therefore, initiated proceedings under Section 122(5A) of the Income Tax Ordinance by issuing notice No.486 dated 23.04.2015. The Complainant contested the proceedings before the FTO vide C.No.193/FSD/IT (148)/827/2015, but the same was rejected vide order dated 26.11.2015. Review

Petition No.02/2016 filed against the rejection of complaint was also rejected on 13.05.2016. However, the refund, if due, would be issued after completion of the proceedings under Section 122(5A) of the Ordinance.

6. The Office of the FTO is looking into non-issuance of refund due to inattention, neglect, inefficiency and ineptitude in the discharge of duties and responsibilities, therefore, objection with regard to the jurisdiction is misconceived. There is no provision in law for withholding refund on the pretext of anticipated proceedings/creation of tax liability.

7. The Department's neglect, inattention and ineptitude in the discharge of duties for processing of refund is tantamount to maladministration in terms of Section 2(2)(ii) of FTO Ordinance, 2000. Both parties have been heard by FTO. Thus FTO has issued aforementioned findings.

8. Hearing of the case was held on 14.02.2018. Mr. Asif Rasheed, Additional Commissioner-IR has represented the FBR. On the other hand, the Complainant has not attended the hearing despite issuance of notice on 29.01.2018.

9. Section 15 of Federal Ombudsmen Institutional Reform Act 2013, provides that "Personal hearing.-It shall not be necessary for the President or the Ombudsmen to give personal hearing to the parties and the matter may be decided on the basis of available record and written comments filed by the Agency." The President of Pakistan in Case No.F.267-WMS/2002 dated 30.7.2002 has already held that "the complainant has contended that he was not heard by the Mohtasib. Perhaps he intends to say that he was not heard orally. To afford hearing is an established principle of natural justice but hearing does not mean only to hear orally. Hearing includes hearing through papers, and in this case the complainant and the Agency have been heard through papers. This point fails."

Supreme Court of Pakistan (2006 SCMR 382) [*Federation of Pakistan through Secretary Education, Islamabad Vs Professor Dr. Anwar and 2 others*] has held that "it is to be seen that the opportunity of hearing is not confined to the personal hearing rather it may also be in the form of written reply and thus as per scheme of law in a representation to the President against the order of Ombudsman it is not possible for the President to provide personal hearing to the parties in such representation therefore, inviting the comments/written arguments in reply to the representation by the concerned quarters would be considered sufficient compliance of the law..."

10. The instant Representation has been filed by the Agency. The Agency has taken ground that proceedings for amendment of assessment under Section 122(1/122(5A) were challenged before the FTO vide C.No.193/FSD/85(148)/827/2015 but the same was rejected vide order dated 26.11.2015. Review Petition No.02/2016 filed against the rejection of complaint was also rejected on 13.05.2016.

11. The Agency has pleaded that no original documents were provided with the application for refund from which verification of bills/ expenses claimed cannot be made. Hence, the application has been found incomplete. The documents were provided on 03.08.2016 during pendency of complaint.

12. The Agency has contended that the complaint was filed before the FTO on 08.06.2016 and findings/recommendations have been passed on 18.08.2016. As per provisions of Section 11(1) of the FTO, 2000, the complaints filed by the taxpayer are to be decided within 60 days; therefore, the recommendations are hit by limitation under Section 11(1) of the FTO Ordinance, 2000 which reads as under:

"Recommendations for implementation:- if the Federal Tax Ombudsman is of opinion that the matter considered amounts to maladministration, he shall communicate his findings with a recommendation to the Revenue Division within a period of sixty days from the date of receipt of complaint, reference or motion, as the case may be".

13. The Agency has pointed out that as per Section 170(5) of the Income Tax Ordinance, 2001 the taxpayer can file an appeal before the Commissioner IR (A) for the failure of the Commissioner to pass an order under subsection (4) of Section 170 of the Income Tax Ordinance, 2001 within time specified. The taxpayer did not file any appeal before the Commissioner IR (A).

14. The Agency has prayed that the recommendations/findings of the FTO are barred by limitation and no maladministration has been proved against the petitioner. It is, therefore, prayed that by accepting this Representation, the impugned recommendations/findings may be set aside.

15. On the other hand, the Complainant has filed his comments on 27.9.2016 through Mian Zafar Iqbal, Advocate High Court against the instant representation of FBR and supported the impugned recommendations of learned FTO.

Analysis/Conclusion

16. After perusal of record, examination of all documents, and detailed hearing, it has been observed that the superior judiciary has been pleased to hold on the subject of limitation that **where appeal was filed after lapse of time against void order, the appeal could be decided on merits by appellate authority as the limitation did not run against the void order.**

- (1) The Hon'able Supreme Court of Pakistan, 2014 SCMR 1189 Supreme Court [*Province of Sindh Vs Ghulam Fareed*] has been pleased to hold that:
"Appeal against termination order filed before Sindh Service Tribunal --- limitation --- termination order passed by an officer not competent in law to pass such an order---effect---such termination order would be void and without lawful authority---consequently neither bar of limitation would be

- attracted nor period of limitation would run against such order --- appeal was dismissed accordingly."
- (2) Lahore High Court, Lahore, 2002 PLC (CS) 606 LHC [*Muhammad Zia Vs Administrator, Punjab Agricultural Development and Supplies Corporation (Defunct)*] has been pleased to hold that:
"---limitation---where appeal was filed after lapse of time against void order, the appeal could be decided on merits by appellate authority as the limitation did not run against the void order."
 - (3) The Hon'able Lahore High Court, Lahore, 2016 YLR 2575 LHC [*Abdul Rasheed Khan Vs Safdar Ali*] has already held that:
"Impugned mutation was result of fraud, forgery, impersonation and without consideration and was void---**limitation did not run against a void order**---present suit was within time---impugned judgment and decree passed by the appellate court were set aside and those of trial court were restored---revision was allowed circumstances."
 - (4) The Hon'able Lahore High Court, Lahore, 2012 PLC (CS) 1496 LHC [*Johnson Bernard Vs Lahore High Court, Lahore*] has held that:
"**High Court declared that note put up by registrar was without lawful authority and as such all orders passed on the basis of proposal of registrar were nullity in the eyes of law**--- order of chief justice of high court remained in field without any attack on the part of competent authority---petition was allowed in circumstances."
 - (5) Lahore High Court, Lahore, 1986 PLD 184 LHC [*Ahmad Khan Vs Zahur Ahmad Khan Tareen*] has held that:
"---after consideration of relevant material had condoned delay, unless such exercise of discretion found to be fanciful, perverse or arbitrary, would not be correctable in constitutional jurisdiction---sale transaction being altogether void, would not create any legal consequences---despite delay in challenging such transaction same would remain void and with passage of time could not be blessed with sanctity."

As far as the merits of the case are concerned, the representative of the FBR has pointed out that the Complainant namely Mr. Muhammad Ashraf has been informed that the assessment of the tax has been made by the Agency in line with Section 122(5A) (order to amend original assessment prejudicial to Revenue vide Reg No.3310042532951 dated 29th Sept 2017 which is as follows:

Description	Code	Amount
Total income	9000	81,558,966
Taxable income	9100	81,558,966
Tax chargeable	9200	27,843,938
Demanded income tax	9204	23,768,506

In addition to these fixed assets, the taxpayer was declared closing stock at Rs.96,750,872/- and refund for tax year 2012 of Rs.3,103,987/- refund for tax year 2013 of Rs.9,606,726/- and refund for tax year 2014 of Rs.3,174,637/- and sales tax carry forward amount of Rs.19,825,571/- as on 30.6.2014; meaning thereby that the taxpayer found to be the owner of money of Rs.85,972,792/- + Rs.96,750,872/- + Rs.3,103,987/- + Rs.9,606,726/- + 3,174,637/- + 19,825,571/- = Rs.218,434,585/- as on 30.6.2014 against capital employed in the business at Rs.140,157,086/-. Resultantly, an amount over and above the capital declared which is Rs.78,277,499/- is not explainable from the complainant known sources invested in the business and is required to be added in the taxable income under section 111(1)(b) of the Income Tax Ordinance, 2001 as income from other sources.

In due course of time the taxpayer filed a C.No.193/FSD/17(148)/827/2015 dated 2.7.2015 challenging the Show Cause Notice u/s 122(5A) dated 23.4.2015. The complaint so filed has been dismissed by the FTO vide order dated 26.11.2015. The taxpayer filed a review petition before the FTO vide No.02/2016 dated 16.12.2015 which was also rejected by the FTO vide order dated 13.5.2016. A reminder was issued to the taxpayer regarding dismissal of his review petition and filing of his reply to the Show Cause on 06.06.2016. Taxpayer filed his contention dated 6.6.2016 which was rebutted vide this office letter dated 19.9.2017 as under:-

With reference to your reply dated 6.6.2016 in response to notice dated 23.4.2015 on the subject cited above. The complainant referred to the findings of the FTO in the C.No.97-FSD/IT(66)/826/2014 stating that the same has attained finality and proceedings initiated for Tax Year 2014 u/s 122(5A) be kept pending till the implementation of these finding. Further the complainant has also referred to Section 18 and 24 of Federal Ombudsmen Institutional Reform Act, 2013 indicating that the same impose bar on the assuming of jurisdiction.

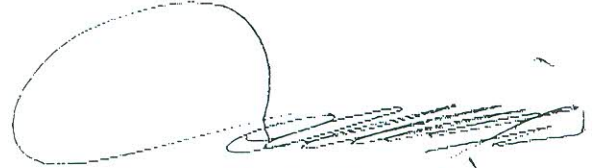
It is informed that the referred findings in C.No.97-FSD/IT(66)/826/2014 pertained to Tax Year 2013 which is distinct from Tax Year 2014 for which proceedings u/s 122(5A) are underway. Therefore your contention in this regard is not tenable. The complaint filed by the complainant against the notice u/s 122(5A) for Tax Year 2014 has already been decided by the FTO in favor of the department. Moreover complainant's review regarding Tax Year 2014 in C.No.193-FSD/IT(148)/827/2015 dated 26.11.2015 have also been rejected by the FTO. While deciding his review Petition No.02/2016 the FTO has in un-equivocal terms have also observed that there is not bar to proceed in the

Tax Year for which no finding/decision have been given by the FTO as per FBR Circular No.1(337)S(T-II)/2013 dated 23.1.2014.

The representative of FBR has intimated that the findings/recommendations of FTO have been implemented in letter and spirit as all essential adjustments have been made and the complainant has already been informed accordingly on 29th Sept 2017. A copy of the same has been provided to this Secretariat which has been placed in the record file. In the circumstances, the representation of the Agency is required to be disposed off by the appellant forum in the aforementioned terms.

In view of the foregoing, when the recommendations/findings of learned FTO have already been implemented in letter and spirit as per contention of the representative of the Agency, the instant Representation has become infructuous and required to be disposed off by the appellant forum.

17. Accordingly, the President has been pleased to dispose off the Representation of the FBR-Agency in the above terms.



(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

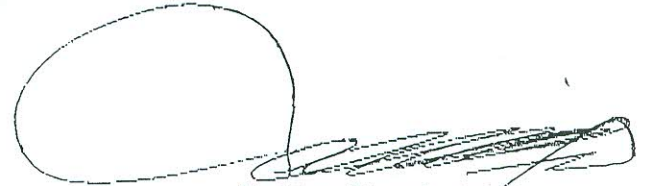
The Chairman,
Federal Board of Revenue,
Islamabad.

o/c

No. 06/FTO/2018 dated 13.03.2018

Copy for information to:

1. Mr. Muhammad Ashraf, Prop: M/s Shahzadi Polypropylene Industries, P-142 Purani Lakkar Mandi, Karkhana Bazar, Faisalabad.
2. Mian Zafar Iqbal, Advocate High Court, Zafar Law Associates, 23 Grain Market, Gojra, Toba Tek Singh.
3. The Registrar, Lahore High Court, Lahore.
4. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
5. The Chief (Legal-I), Federal Board of Revenue, Islamabad.
6. Director to Secretary to the President.
7. Master file.



(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

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