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

Federal Board of Revenue
Versus

M's Overseas Pakistani Foundation, Islamabad

**REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE AGAINST FINDINGS
/ RECOMMENDATIONS DATED 24.09.2018 PASSED BY THE FTO IN COMPLAINT NO.
717/ISB/IT/2018**

I am directed to refer to your representation No. 4(717)S(TO-1)2018 dated 23.10.2018 on the above subject and to say that **the President has been pleased to pass the following order:**

2. This Representation dated 23.10.2018 has been filed by the Agency-FBR against the findings of the FTO dated 24.09.2018 whereby it has been held:

"FBR to direct-

- i. The Commissioner-IR concerned to allow appeal effect to the ATIR's order dated 24.09.2014 for tax years 2004, 2007, 2008, 2009 and 2011 and issue refund for tax years 2005 and 2006, as per law;
- ii. Report compliance within 45 days."

3. Brief facts of the case are that the complaint has been filed under Section 10(1) of FTO Ordinance, 2000 against delay in issuing refund for tax years 2004, 2005, 2006, 2007, 2008, 2009 and 2011. The complainant, a public limited company derives income from profit on welfare fund, interest, sale and purchase of immovable properties, and consultancy fee received from person going abroad. According to AR, the Department amended assessments for tax years 2004 to 2009 and 2011 under Section 122(5A) of the Income Tax Ordinance, 2001 (ITO, 2001 the Ordinance) and created huge demand against the complainant. The Commissioner-IR (Appeals-II) Islamabad vide orders dated 02.11.2010, 03.01.2011, 28.01.2011, 17.07.2011, 08.02.2012 and 12.04.2012 allowed partial relief to the complainant. The complainant as well as the department filed cross appeals before the Appellate Tribunal Inland Revenue (ATIR), Islamabad. The ATIR, Islamabad vide order dated 08.11.2011 remanded back the case to the department for fresh proceedings. The complainant filed reference against this treatment. Which the Islamabad High Court decided vide order dated 30.04.2014 with the following directions:

"Since, after impugned order of the ATIR, the law had been changed and the SRO was not before the learned Tribunal, therefore, the Tribunal could not take the same into consideration. In the circumstances, we find it appropriate that the case be remanded back to the Tribunal to decide the case afresh, afresh providing an opportunity of hearing to both the parties, in accordance with law and rules."

4. Consequent upon orders of the Islamabad High Court, the ATIR after hearing the parties held that after amendment of law with retrospective effect through SRO 819(1)2012 dated 04.07.2012, any income for any tax year commencing from the tax year 2003, derived from Welfare Fund had been exempted. The ATIR thus annulled orders of both the authorities vide order 24.09.2014. According to the AR, the department accepting the above decision, allowed appeal effect for the tax years 2015 and 2006 vide orders dated 30.06.2015 under Section 124 of ITO, 2001 and determined refund amounting to Rs.23.081 million and Rs. 39.111 million respectively. The complainant submitted refund applications dated 20.03.2017 followed by reminders dated 13.10.2017 and 12.12.2017 for the refund of tax year 2005 and 2006 and requested to give appeal effect for tax years 2004, 2007, 2008, 2009 and 2011 as well as compensation for delayed refund. The department, however, failed to issue refund for tax years 2005 and 2006 and also did not allow appeal effect to the ATIR's order dated 24.09.2014 for tax years 2004, 2007, 2008, 2009 and 2011.

5. The complaint was forwarded for comments to the Secretary, Revenue Division in terms of Section 10(4) of the FTO Ordinance read with Section 9(1) of the Federal Ombudsmen Institutional Reforms Act, 2013. In response thereto, the Chief Commissioner LTU, Islamabad submitted comments vide letter dated 06.06.2017 and 17.07.2018. At the outset, preliminary objection of bar of jurisdiction was raised in terms of Section 9(2)(a) of FTO Ordinance on the ground that Writ Petition No. 3669/2012 filed by the complainant on 25.10.2012 reputing the some matter was pending before the Islamabad High Court. On merits, it was contended that appeal effect for the tax years 2005 and 2006 had been given under Section 124 of the Ordinance which resulted in refund in the subject years. However, refund had not yet been determined under Section 170(4) of the Ordinance. It was averred that as Writ Petition No. 3669/2012 was pending before the Islamabad High Court, hence the matter regarding refund as well as appeal effect for remaining years would be finally disposed of in the light of final decision of Islamabad High Court.

6. The AR reiterated that the department has already allowed affect to ATIR's order dated 24.09.2014 under Section 124 of the Ordinance for tax years 2005 and 2006 vide orders dated 30.06.2015. He contended that as the matter has finally been adjudicated favorably, the complainant has submitted formal application for withdrawal of

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Writ Petition No. 3669/2012 before the Islamabad High Court. The Islamabad High Court vide order dated 25.04.2018 has adjourned the matter with the direction to the complainant to produce copies of the above orders dated 30.06.2015 passed by the department. The averments of the parties considered and available record perused by the FTO. Thus, FTO issued aforementioned findings.

7. The instant representation has been filed by the Agency. The Agency has contended that the complainant derives income from profit on welfare fund, interest income contribution, purchase and sale of immovable properties and consultancy fee received from person going abroad. Proceedings under Section 122(1) read with Section 122(5) for the tax year 2005 dated 30.07.2010 and proceedings under Section 122(4) read with Section 122(5) for the tax year 2006 were finalized dated 30.06.2012. Similarly, proceedings under Section 122(5A) for the tax year(s) 2004, 2007, 2008, 2009 and 2011 were completed. Being aggrieved the taxpayer filed appeal before CIR (Appeal-I) who partially upheld the departmental stance. The taxpayer preferred appeal before ATIR, Islamabad. The ATIR vide Order ITA No. 187/IB/2011, 188, 189/IB/2011 and ITA No. 79/IB/2011, 305, 306 & 307/IB/2011 dated 08.10.2011 set aside the cases and remanded back to the Inland Revenue Officer.

8. The Agency has pointed out that feeling aggrieved the taxpayer preferred references before Islamabad High Court who after considering the facts vide its order dated 30.04.2014 in ITR No. 23/2012 remanded the case to ATIR, Islamabad. The ATIR in consequent upon the Order of Islamabad High Court annulled orders of both the authorities vide Order ITA No. 187/IB/2011 188, 189, 572, 282, 436/IB/2012; ITA No. 79/IB/2011 and ITA No. 305-307/IB/2011 dated 24.09.2014. In pursuance of the Order of ATIR, the department allowed appeal effect under Section 124 of ITO, 2001 for the tax years 2005 and 2006 vide order dated 30.06.2015 and created refund of Rs. 23.081 million and Rs. 39.111 million respectively. The complainants filed Writ Petition No. 3669/2012 dated 24.10.2012 before Islamabad High Court for the subject tax years whereof, *inter alia*, the following prayer was taken:

“Not to raise illegal demand of income tax and other allied issue in the light of SRO 819(1)/2012 dated 04.07.2012.”

9. The Agency has mentioned that welfare fund receipt which is being the property of Government of Pakistan shall not be subject to levy of income tax. The taxpayer filed a complaint before FTO dated 11.05.2018 on the ground that the respondent department amended the assessment order of the complainant for tax years 2004, 2005, 2006, 2007, 2008, 2009 and 2011 and created a huge demand. These orders were challenged in appeals before the ATIR, Islamabad. The ATIR vide Order ITA No. 187/IB/2011 188, 189, 572, 282, 436/IB/2012; ITA No. 79/IB/2011 and ITA No. 305-307/IB/2011 dated 24.09.2014 vacated the orders of authorities below and the department had partially given the appeal effect under Section 124 of the ITO, 2001 for the tax years 2005 & 2006 vide Order No. 03/51 & 05/55 dated 30.06.2015 resultantly refund was determined amounting to Rs. 23.081 millions and Rs.39,111 millions for the tax years 2005 & 2006.

10. The Agency has taken ground that in terms of Section 9(2)(ii) of the FTO Ordinance, 2000, the FTO does not have jurisdiction to inquire into matters which relate to the assessment of income or wealth, determination of liability or tax duty, interpretation of law etc. The taxpayer has filed Writ Petition No.3669/2012 dated 24.10.2012 before Islamabad High Court for the subject tax years which is still pending. Whereas the taxpayer already filed Writ Petition before Islamabad High Court against the same years and challenged the same on the following grounds:

- i. Not to raise illegal demand of income tax and other allied issue in the light of SRO No. 819(1)/2012 dated 04.07.2012;
- ii. Welfare fund receipt which is being the property of Government of Pakistan shall not be subject to levy of income tax.

The department has also filed parawise comments on the direction of the Court. The instant Writ Petition was fixed for hearing on 05.07.2018 which was left over. Hence, the matter is *subjudice* before the Islamabad High Court.

11. The Agency has expressed that the FTO has erred to direct the Commissioner to allow appeal effect to ATIR's order dated 24.09.2014 for tax years 2004, 2007, 2008, 2009 and 2011. It clearly proves that the FTO has gone beyond his jurisdiction as provided in Section 9(2)(b) of FTO Ordinance, 2000 as the matter explicitly pertains to assessment of taxes.

12. The Agency has prayed that the impugned decision/ findings of FTO in Complaint No. 0717/ISB/IT/2018 dated 11.05.2018 with consequent recommendation may be vacated by declaring it in excess of jurisdiction and being *ultra vires*.

13. On the other hand, the Complainant has filed his written comments on 09.11.2018 against the instant representation of FBR and supported the impugned recommendations/ findings of learned FTO with the request that the instant representation of the Agency may be rejected by the appellant forum.

Analysis/Conclusion

14. After perusal of record, examination of all documents and detailed hearing, it has been noted that the date of complaint filed before the FTO was 10.5.2018. Whereas date of writ petition No.3669/2012 before Islamabad High Court was 24.10.2012. It is relevant to point out 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

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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 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.

18. In such circumstances, where remedy of appeal was available FTO could not interfere with the matter of assessment of tax and interpretation of law as well as issue subjudice in the court 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.

19. The office of the Consultant Legal Affairs (CLA) proposed that the Honourable President may therefore, be pleased to (a) accept the Representation of FBR-Agency and to (b) set aside the impugned findings/recommendations of FTO.

20. After perusal of the case as above, the Honourable President has, however, been pleased to pass following orders:-

"The FTO's recommendation must be implemented but subsequent to the withdrawal by the complainant of its writ petition 3669/2012. If the Islamabad High Court passes any other order with reference to said petition that shall be followed".

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

The Chairman,
Federal Board of Revenue,
Islamabad.

No. 51/FTO/2018 dated 09.01.2019

Copy for information to:

1. M/s Overseas Pakistani Foundation, C/o Mr. Hassan Wali, AD (Finance), OPF House, Shahrah-e-Jamhuriat, Islamabad.
2. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
3. ✓ The Chief (Legal-I), Federal Board of Revenue, Islamabad.
4. Master file.

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)