

**FEDERAL TAX OMBUDSMAN SECRETARIAT**  
Islamabad

**Review Application No.26/2013**

Dated:.01-03-2013\*

in

**Complaint No.189/2011**

M/s China International Water &  
Electric Corporation  
Peshawar

... Applicant

**Versus**

The Secretary  
Revenue Division  
Islamabad

... Respondent

Dealing Officer : Sardar Irshad Shaheen, Advisor

On behalf of the Applicant : Mr. Amir Javed, FCA  
Mr. Ejaz Hussain Rathore, FCA

On behalf of the Respondent : Mr. Shahid Husain Asad, Member,  
FBR  
Mr. Muhammad Ashraf Khan,  
Member, FBR  
Dr. Amjad Zubair Tiwana, Chief Tax  
Policy, FBR  
Mr. Muhammad Tariq Chaudhary,  
Chief (Legal), FBR  
Mr. Muhammad Ashfaq Ahmad,  
Chief Int'l Taxes, FBR  
Ms. Reema Masood, Additional  
Commissioner, LTU, Islamabad

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\* Date of registration of Review Application in FTO Sectt.

## **ORDER**

The Applicant has sought Review of the following Recommendations of the FTO, dated 22-10-2011:

“FBR to-

- (i) formulate a uniform policy regarding assessment of income and admissibility of refunds in cases of PEs of foreign companies;
- (ii) direct the Chief Commissioners to decide the cases of PEs of foreign companies fairly and uniformly; and
- (iii) report compliance within 30 days thereafter.”

2. The Review Application has been filed on the following grounds:

- (i) the recommendations did not include the issue of refund claimed by the Complainant;
- (ii) the status of AOP had been assigned by the Taxation Officer while passing order under Section 170(4) of the Income Tax Ordinance 2001 (the Ordinance) which was allegedly illegal, and this was done to deprive the Complainant of lawful refund;
- (iii) the recommendations of the FTO lost sight of the provisions of Double Taxation Treaty read with Section 107 of the Ordinance; and

- (iv) the FBR disregarded the opinion of Law Division on 'Taxability of Joint Ventures/non-resident Companies' while issuing Circulars No.1 & 2 of 2013 and failed to formulate a uniform policy.

3. The issues were discussed by the ARs and DRs during various hearings, and FBR kept on seeking time for devising a uniform policy. Adjournment was allowed on the request of DRs for 23-07-2013.

4. The ARs argued that the FBR had already availed almost six adjournments but nothing concrete was done in that period. They claimed that the Complainant was suffering due to maladministration of the Dept'l officials. They submitted a copy of an order passed on 30-06-2013 under Section 122(5A) of the Ordinance by the Additional Commissioner (Audit), LTU Islamabad, for tax year 2007, despite the fact that proceedings on relevant issues were pending in the FTO Office. The ARs emphasized that the order was passed in violation of provisions of Section 18 of Federal Ombudsmen Institutional Reforms Act 2013 as the issue was pending before this office. It was prayed that the operation of Circulars No. 1 & 2 of 2013 together with consequential action be suspended, as these Circulars were in conflict with the provisions of Income Ordinance 2001.

5. The operation of Circulars 1 & 2 of 2013, issued by FBR, was suspended vide this office earlier order No.26/13 in C. No.189/2011 dated 26-07-2013 till the final decision of the Review Application.

Another adjournment was allowed on the request of DRs for 05-09-2013.

6. However, on the due date the DRs once again sought adjournment on the ground that: (i) due to massive reshuffling in the FBR hierarchy, the issues could not be properly sorted out, and (ii) the issue of revision of Circulars required approval of the Cabinet. They submitted that the issue of taxability of the Complainant (and other identical cases) would be submitted to ECC for approval for which further time was needed. They prayed that sufficient time be allowed to get the issues settled as per provisions of law.

7. The ARs vehemently controverted DRs' contention and argued that Law Division's opinion, sought by the FBR (which took almost two years), was very clear. They contended that legal provisions of Sections 101, 105 and 107 read with Section 88A of the Ordinance required no clarification or interpretation and the Law Division had also endorsed Applicant's view. They averred that the FBR and its field formations were trying to delay the issuance of refund due to the Complainant, by referring the matter to ECC which could not interfere in the legal provisions. They prayed that Deptt be directed to issue the inordinately pending amount of refund with compensation in accordance with the provisions of law and the above mentioned circulars be withdrawn in the light of express legal provisions.

8. The officers of the FBR have been seeking repeated adjournments. After hearing on 05-09-2013, an Interim Order was passed on 18-09-2013, wherein FBR was directed to issue refund to

the Respondent in the light of CIR (Appeals)'decision without delay. Hearing was fixed for 29-10-2013, with the direction that operation of Circulars No.1 & 2 of 2013 would remain suspended till then. However, on 29-10-2013 the DRs submitted that decision on the Summary for approval of ECC was still pending and some more time was requested for final decision of the issue. The case was adjourned allowing FBR further time to settle the issue. Hearing was fixed for 26-02-2014 on which date proper response was not made and hearing was re-fixed for 03-03-2014. On the due date, the DRs again repeated the earlier stance that issue of taxability of a Joint Venture (JV) (in which one partner was non-resident) was still pending with the Finance Minister for submission to ECC.

9. The ARs vehemently disputed the plea of the DRs and emphasized that the FBR was deliberately confusing the issue just to arbitrarily block the refund of the Applicant company. They contended that legal provisions were very clear and after receiving Law Division's opinion, there was no ambiguity in the issue nor was there any requirement to seek guidance from ECC. It was contended that in case the FBR was not willing to follow the relevant provisions of law in the instant case, amendment in law could have been proposed for approval of the legislature. The ARs contended that FBR was intentionally using delaying tactics in violation of legal provisions and good practices which amounted to gross maladministration. They deposed that earlier Recommendations dated 22-10-2011 be revised, Circulars No. 1 & 2 of 2013 be held null and void for a uniform treatment of the cases in which provisions of Double Taxation Treaty

are applicable and the Deptt be directed to issue full amount of refund without further delay.

10. Both the parties have been heard and record perused.

11. Frequent adjournments have been sought by the FBR to settle the issue in the instant case, but no decision has been taken even after lapse of more than two years. The FBR admitted that its officials had different views on the relevant provisions of law. The former Chairman FBR, Mr. Ansar Javed, had submitted a letter on 13-05-2013, requesting adjournment for three weeks, admitting that issue of taxation of Joint Ventures, in which one member was a non-resident person, required examination and Circulars No.1 & 2 of 2013 also needed reconsideration. The committee of experts comprising three retired senior FBR officers was assigned the task, which submitted its report in May 2013, but the issue could not be settled by the FBR and repeated adjournments were sought and ultimately a Summary has been sent to the Finance Minister seeking guidance of the ECC. Despite lapse of considerable time, no progress has been made. In the Summary submitted to the Finance Minister, by the FBR, vide letter C.No.3(58)IR-Int.Taxes/2013 dated 03-09-2013, it has been admitted that” there is lack of consensus among different authorities within FBR....” this clearly shows that despite the inordinate considerable delay, the FBR has failed to formulate a uniform policy on the issue as directed by this office.

12. The FBR had sought opinion of Law Division on the “Taxability of a Joint Venture in which one partner is a Non-Resident Company.”

Law Division's views were also submitted to this office on 25-10-2012 wherein it has been clearly stated that:

“Ratio that the Double Taxation Treaty would have an overriding effect is applicable in this case (M/s China International Water & Electric Corporation ---the instant case) as well.”

In the concluding para of the report, it has been stated that:

“Section 107 of the Ordinance will have an overriding effect and supervene the other provisions.”

13. The HRM Wing, FBR-GIZ, in its DTA Case Study of the instant case, had clearly stated in para-2 that: “Tax authorities appear to have touched only the tax provisions in a manner as if the DTA between Pakistan and the country of residence of China International does not exist.” The FBR itself had clarified to the Chief Commissioner, RTO Peshawar and to the Complainant's AR that in the Complainant's case FTR did not apply (vide C.No.4(71)ITP/2008, dated 09-09-2011 and dated 22-09-2011). It is, therefore, obvious that Complainant's refund has been withheld arbitrarily.

14. The FBR vide C.No.4(71) ITP/2011 dated 06-01-2012, had itself directed the Chief Commissioner RTO, Peshawar to issue exemption certificate to the Applicant/Complainant, accepting Complainant's plea. The treatment of the FBR and RTO Peshawar has not only been contradictory but also discriminatory as in other identical cases, no such exercise was carried out. In an order passed by the Chief Commissioner RTO, Peshawar under Section 122B of

the Income Tax Ordinance 2001, he reproduced Clause 3 of Article 7 of the Avoidance of Double Taxation Treaty with China (in para 17) which provided that:

“there shall be allowed as deduction expenses which are allowed under the provisions of domestic law of the contracting state in which permanent established is situated.”

However, a contrary conclusion was drawn arbitrarily by the concerned officer.

15. The Hon'ble Supreme Court in judgments cited as 1993 SCMR 1232 and 2010 PTR 1 (S C Pak), has held that any SRO or Circular issued by FBR in conflict with provisions of statute/law is null and void:

“Any interpretation placed by the CBR on statutory provisions can not be treated as a pronouncement by a forum competent to adjudicate upon such a question judicially or quasi-judicially.”

16. It is evident from the foregoing discussion that despite clear provisions of law, the FBR has been confusing the issue for delaying issuance of refund amount claimed by the Applicant. In case the Deptt doubted the declared results by the Applicant/Complainant in the returns of income, legal course was to select the case for audit to carry out thorough scrutiny and investigation of accounted version under normal law instead of trying to place the taxpayer arbitrarily under FTR. Such an exercise required professional skill/competence

and efficiency as it would be a challenge for the Deptt'l officers to cover up substantial amount of loss declared at more than Rs.3 billion in the return of income for tax year 2010. To cover professional deficiencies and incompetence, the concerned officers of the FBR and the RTO resorted to arbitrary and unlawful tactics which are tantamount to maladministration.

17. Representation filed by FBR against Interim order dated 22-10-2011 made by this office for issuance of refund was rejected by Hon'ble President vide order No. 607/FTO/2013, dated 06-12-2013, directing the FBR to issue refund. Full amount of refund has not been issued for which separate action under contempt proceedings have been initiated.

18. From the above discussion it is obvious that important points relevant to the issues raised by the Complainant were not fully appreciated at the time of earlier Recommendations which required revision as under:

FBR to-

- (i) withdraw Circulars No.1 & 2 of 2013 being in conflict with provisions of Section 107 of Income Tax Ordinance 2001;
- (ii) issue guidelines to the field formations for adopting uniform and transparent policy in the matter regarding taxation of a joint venture in which one partner/member is a non-resident;

- (iii) direct the Chief Commissioner concerned to issue refund in the instant case, as per law; and
- (iv) report compliance within 04 weeks.

**(Abdur Rauf Chaudhry)**  
Federal Tax Ombudsman

Dated: -2014  
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