

FEDERAL TAX OMBUDSMAN SECRETARIAT
Islamabad

Review Application No.49/2013

Dated:.02-09-2013*

in

Complaint No.42/2010

M/s Ghazi Barotha Contractors,
P.O Box No.02,
Attock.

... Applicant

Versus

The Secretary
Revenue Division
Islamabad

... Respondent

Dealing Officer : Sardar Irshad Shaheen, Advisor
On behalf of the Applicant : Mr. Noman Rafiq, FCA
Mr. Babar Gulzar, Legal Advisor
Mr. Anzar Hussain, Director WAPDA
On behalf of the Respondent : Mrs. Reema Masood, A.C, LTU
Mr. Muhammad Tariq, CIR

ORDER

This Review Application has been filed by a Joint Venture (JV) comprising two non-resident contractors and two resident Pakistani companies.

* Date of Registration of Review Application in FTO Sectt.

2. The complaint was filed by the Applicant vide complaint No.39/ISD/IT(35)/42/2010 which was decided vide Findings/Recommendations dated 31-05-2010 with the following Recommendations:

“FBR to direct the Chief Commissioner to-

- (i) issue refund/compensation due, as per law, within 30 days;
- (ii) take measures to avoid unnecessary litigation; and
- (iii) report compliance within 45 days.”

A Representation was filed against this order by the FBR which was decided vide No.87/2010-Law(FTO), dated 18-07-2011. The Hon’ble President had endorsed the Findings/Recommendations of the FTO and rejected the Deptt’s Representation.

3. However, during the pendency of Representation, the Deptt raised huge demand of Rs. 3.7 billion by treating the Complainant as an assessee-in-default for non deducting and depositing tax on interest paid to the non-resident banks. After the decision of the Representation by the President of Pakistan, no refund was issued but instead the Deptt started recovery proceedings after adjusting the refund amount and after rejection of appeal by the CIR(appeals). The Complainant claimed through a letter dated 25-09-2011 that the Deptt had not implemented the Recommendations of FTO for which action was required to be initiated against the concerned officers. The ARs also submitted a copy of the order of Peshawar High Court against any adjustment of tax to be made on account of demand of Rs. 3.7 billion

raised by the Deptt. They had further submitted that due to the *status quo* order of the court, the amount of refund could not be adjusted and the Deptt be directed to implement the earlier Recommendations of FTO for issuance of refund. The FTO vide Order dated 22-10-2011 issued the following directions:

“the Chief Commissioner, LTU, Islamabad, shall allow the admissible refund along with compensation due, after verification of deposit/deduction of tax from the Federal Treasury Officer, Peshawar and WAPDA, Lahore, and on furnishing a post-dated cheque(s) along with an undertaking by the Complainant, duly indemnified by M/s WAPDA, Lahore, and an attested copy of permanent injunction/status quo order by the Hon’ble Peshawar High Court, Abbottabad Bench, against the recovery of already assessed amount of Rs. 3.7 billion.”

4. Against this Order, the Applicant/Complainant filed the present Review Application praying that the condition of “furnishing a post-dated cheque” be waived as the demand of Rs.3.7 billion has been deleted by the Appellate Tribunal vide judgment dated 08-01-2013 and the Deptt be directed to issue refund with compensation immediately.

5. During the hearing, the ARs vehemently claimed that the Applicant has been made to suffer for such a long time and the Deptt has continued to involve the Applicant in unnecessary litigation three times by raising arbitrary income tax and sales tax demands. They further contended that every time the higher appellate authorities rejected the Deptt’l action which clearly indicated that Deptt’l officers

wanted to deprive the Complainant of its legal right of receiving refund. They forcefully contended that the action of the concerned officers was not only unlawful but arbitrary, oppressive, unreasonable and *mala fide* as they were bent upon rejecting refund claim to discourage foreign investment by such unlawful actions. This is obvious from the fact that not only unlawful and arbitrary demands were created three times with prolonged three cycles of litigation but record of the Applicant/Complainant was transferred five times--- from RTO Peshawar to RTO Abbottabad to LTU Islamabad to RTO Rawalpindi to RTO Peshawar and again back to LTU Islamabad. The ARs deposed that the concerned officers of the Deptt as well as FBR be taken to task for such highhandedness and gross maladministration. They prayed that the Order dated 20-10-2011 be revised and the LTU, Islamabad be directed to issue refund with compensation without delay as there was no tax demand in the field against the Applicant and the Deptt has been guilty of withholding the refund amount for the last 10 to 14 years.

6. The DRs claimed that a reference has been filed before the Hon'ble Islamabad High Court against the judgment of the Appellate Tribunal wherein tax demand of Rs.3.7 billion was deleted. They submitted that Islamabad High Court has suspended the operation of Tribunal's order and, therefore, the tax demand of Rs. 3.7 billion deleted by the Tribunal, would still be treated as outstanding against the Applicant. They further claimed that another amount of sales tax demand of Rs.263,256,941/- was also recoverable which was deleted by the Appellate Tribunal, but Tribunal's order was remanded back by

Lahore High Court to decide the issue afresh, which is pending adjudication.

7. The DRs deposed that while deciding contempt case in Writ Petition dated 22-05-2012, Hon'ble Peshawar High Court had directed that M/s A.F Ferguson & Co., Chartered Accountants, Islamabad would be paid legal charges/fees by both the parties and they would conduct verification of tax payment challans for all the relevant years to arrive at correct figure of refund amount to be paid to the Complainant. They submitted that out of total challans of Rs.754,260,035/-, challans of Rs.603,322,589/- were verified which belonged to the case of two foreign companies (the Applicant). In the written submissions of the Commissioner concerned, it was further claimed that a Writ Petition was also pending against the order passed under Section 161/205 of the Income Tax Ordinance 2001 for assessment years 1996-97 to 2001-2002. The DRs prayed that as Appellate Tribunal's orders deleting demand of Rs. 3.7 billion was suspended by the Islamabad High Court, the condition of furnishing post-dated cheque of Rs.3.7 billion for issuance of refund be maintained as per implementation Order dated 22-10-2011 earlier passed by the FTO.

8. The ARs controverting the claim of Deptt'l officers, asserted that firstly, no Writ Petition was pending adjudication either before Peshawar High Court (Abbottabad bench) or Lahore High Court. No demand of sales tax or income tax was at present outstanding. They contended that stay granted by the Hon'ble Islamabad High Court against the order of Appellate Tribunal dated 28-03-2013 has expired

automatically after a period of 6 months under Article 199(4A) of the Constitution of Pakistan. And secondly, there was no order in the field which would authorize the Deptt to recover the tax demand. They also referred to the “Doctrine of Merger” of appellate and original orders by citing PLD 1999 SC 395 to prove that suspension of an order was not only temporary, the original order would get merged with the appellate decision as if the new outcome would prevail in the field.

9. After detailed examination of record together with oral and written arguments of both the parties, it is evident that the Recommendations of the FTO in the original complaint have been merged with the order of the President. Merger has been defined “as the absorption of a thing of lesser importance by a greater, whereby the lesser cases cease to exist.” The basic ruling on the point is 1992 PTD 932 (Supreme Court of Pakistan). This is the doctrine of merger and is settled law. Likewise, the original orders of assessing officers ceased to exist and have merged in the orders of the Appellate Tribunals.

10. the Deptt'l officers not only raised arbitrary and unlawful tax demand three times involving the taxpayers in three prolonged and unnecessary litigation, but transferred the case five times from one RTO/LTU to the other without any lawful justification, just to deprive the taxpayer of its lawful amount of refund. The Deptt'l officers have resorted to these tactics right under the supervision of FBR without any fear of accountability. Such acts of omission and commission smack of highhandedness and injustice; more so in cases of foreign

investors who not only completed the Ghazi Barotha Project but also have the credit of building Tarbela Dam.

11. The Hon'ble Islamabad High Court and Lahore High Court have not empowered the Deptt to recover or adjust the tax demand already deleted by the Appellate Tribunals which would enable the Deptt to block refund in the instant case. In a case cited 2005 PTD 1825, Lahore High Court has held:

“mere fact of pendency of proceedings against the order of refund would not suffice to suspend the obligation to refund..with the clarification that amount refunded shall be subject to decision in the reference filed on behalf of the Deptt in respect of order by the Appellate Tribunal.”

The Deptt'l pretext to withhold refund is, therefore, arbitrary, *malafide* oppressive, unjust and unlawful being violative of Article 24(1) of the Constitution as held Hon'ble Supreme Court in PLD 1998 SC 64.

11. In view of the foregoing discussion, the Recommendations are revised as follows:

FBR to:

- (i) direct the Commissioner concerned to issue refund/compensation due, as per law, within four weeks;
- (ii) identify the officers responsible for withholding refund by resorting to unlawful methods of transferring jurisdiction and involving the Complainant in

unlawful/unjust prolonged litigation, and take disciplinary action against them;

- (iii) report compliance on no.(i) within 45 days and no.(ii) in tow months time.

(Abdur Rauf Chaudhry)
Federal Tax Ombudsman

Dated: -2013
AH