

**FEDERAL TAX OMBUDSMAN SECRETARIAT**  
Regional Office, Lahore

**Review Application No.05/2014**

Dated: 04.03.2014\*

in

**Complaint No.405/LHR/IT(279)/705/2013**

Abacus- ELS (Pvt) Ltd,  
Abacus House, 4-Noon Avenue,  
New Muslim Town,  
Lahore.

... Applicant

**Versus**

The Secretary,  
Revenue Division,  
Islamabad.

... Respondent

Dealing Officer	:	Muhammad Munir Qureshi, Advisor
Authorized Representative	:	Naveed Farid, ITP
Departmental Representative	:	Umer Zaib Khan, ACIR
<b>Amicus Curiae</b>	:	Waheed Shahzad Butt, Advocate

**ORDER**

This Review Application by a Pvt Ltd Co deriving income as a **service provider** contests the Federal Tax Ombudsman's recommendation in his order dated 28-10-2013 that FBR direct the Commissioner (Appeals) to take **cognizance** u/s 221 of the Income Tax Ordinance, 2001 (the Ordinance) and rectify his order No.17 & 18 dated 16-7-2013 disposing of complainant's appeal against order passed by the Additional Commissioner IR so as to make it consistent with FTO's earlier recommendations in complaints disposed of by him on the issue of Minimum Taxation of services sector receipts after amendment in Section 153 of the Ordinance through Finance Act 2009. The Complainant is of the view that the

\*Date of registration in FTO Sectt.

FBR could not issue any such instructions to the Commissioner (Appeals) in view of the bar laid down in Section 214 of the Income Tax Ordinance 2001 (the Ordinance). Additionally the complainant contends that refund claims for Tax Years 2009, 2010 and 2012 have been ignored by the FTO. He contends that the complaint was filed merely to bring to the notice of the FTO the fact that even after lapse of statutory time allowed under the Ordinance, the deptt had taken no action to dispose of the claims.

2. Briefly stated, the facts in this case are that assessments were made on 10.06.2013 u/s 122(5A) of the Ordinance by the Addl-CIR for Tax Years 2010 and 2011 and the original assessments have been revised and amended to charge Minimum Tax charged u/s 153(1)(b) of the Ordinance as per enactment made through Finance Act 2009.

3. The taxpayer challenged the dept'l action before the CIR(Appeals) on the ground that corporate service providers were, in the complainant's view, not subject to levy of Minimum Tax u/s 153(1)(b) of the Ordinance. This was statedly, due to issuance by FBR of Circular 06 of 2009 and SRO 1003 of 2011 taking corporate service sector receipts out of the purview of Minimum Tax envisaged in Section 153(1)(b) of the Ordinance. In this context a Judgment of the Appellate Tribunal Inland Revenue (ATIR) in the case of **M/s Techlogix Pakistan Pvt Ltd**, Lahore, a corporate service provider [(ITA No.1377/LB/2012 dated 06.03.2013] was also relied on by the complainant.

4. CIR(Appeals) accepted the taxpayers appeal and as a result of his decision refund of tax deducted at source u/s 153(1)(b) of the Ordinance became due to the taxpayer. However the deptt delayed

issuance of refund to the taxpayer. The complainant requested that the deptt be directed to give appeal effect and issue refund.

5. The FTO decided the complaint on 28.10.2013 and recommended that in view of the FTO's earlier decision in **C.No.577 of 2011** (Waheed Shahzad Butt Vs FBR) [**PTD 2012 554 = 2013 108 TAX 155**] in which he had upheld levy of Minimum Tax u/s 153(1)(b) on corporate service providers, the CIR(Appeals) was statutorily barred from recording a contrary decision in the adjudication made by him. The FTO then recommended that FBR ask the CIR(Appeals) to take remedial action by invoking the provisions of section 221 of the Ordinance and rectify his earlier order so as to make it consistent with the FTO's decision in **C No.577 of 2011 [PTD 2012 554 = 2013 108 TAX 155]**.

6. Before the FBR could issue any directions to the CIR (Appeals), he took suo motu cognizance of FTO's recommendations in complaint No.577/2011 [PTD 2012 554 = 2013 108 TAX 155] and rectified / vacated his earlier order and upheld the dept'l recourse to the provisions of section 122(5A) of the Ordinance, thereby reinstating the orders passed u/s 122(5A) of the Ordinance, wherein demand of Minimum Tax leviable u/s 153(1)(b) of the Ordinance was created.

7. The deptt was confronted with the review application filed by complainant and filed a reply in which the Commissioner (Appeals) contended that implementation of the FTO's Recommendation dated 28.10.2013 disposing of complaint No.705/2013 was in order as the FTO being a higher forum, it was, in his view, constitutionally binding on the Commissioner (Appeals) to take cognizance of Federal Tax Ombudsman's recommendations recorded in complaint

No.577/2011 dated 16.12.2011 on a matter pertaining to levy of minimum tax under section 153(1)(b) Ordinance as placed on the statute through Finance Act 2009. It is evident from the Commissioner (Appeals') reply that he took direct cognizance of the FTO's recommendations in C No.705/2013 to invoke the provisions of section 221 of the Ordinance and there was no direction from FBR in this regard. The FBR has separately also vide letter C. No.4(705)TO-1.2013 dated 28.03.2014, confirmed that **"CIR (Appeals) independently applied his mind"**.

8. In view of the facts narrated supra it is established that there has been no violation of the provisions of section 214 of the Ordinance and there is no defect in this regard in the appellate order dated 25.11.2013, passed by the Commissioner (Appeals) under section 221 of the Ordinance rectifying / reversing his earlier decision dated 16.07.2013 in the said case.

9. In the order passed by the FTO dated 28.10.2013 disposing of complaint No.705/2013 it was held that the Additional Commissioner's orders under section 122(5A) of the Ordinance for Tax Years 2010 and 2011 in complainant's case were consistent with FTO's recommendations in C.No.577/2011 dated 16.12.2011 read with dept'l review application No.12/2012 dated 10.07.2013. However, the FTO stated that contrarily, the Commissioner (Appeals)'s findings recorded in his order dated 16.07.2013, disposing of complainant's appeal against Addl Commissioner's orders under section 122(5A) of the Ordinance for Tax Years 2010 and 2011 were legally untenable since the order dated 16.07.2013 of the Commissioner (Appeals) statedly contradicted the FTO's findings/recommendation in the matter of levy of minimum tax under

section 153(1)(b) of the Ordinance, as recorded by the FTO in Complaint No.577/2011, dated 16.12.2011 and confirmed in Review Application No.12/2012 dated 10.07.2013.

10. According to the AR, the issue of levy of minimum tax under section 153(1)(b) of the Ordinance did not arise during the complaint proceedings. He said that there was no mention of the same in reply filed by the deptt on the complaint and the complainant was not confronted with the FTO's intention to recommend levy of Minimum Tax u/s 153(1)(b) of the Ordinance on complainant. He said that the complainant had simply complained to the FTO that due refund for Tax Years 2008 to 2012 had not been paid to him by the deptt within the stipulated time allowed under the statute and the complainant had expected a direction to the deptt in this regard. Instead, the complainant had found himself needlessly embroiled in a controversy regarding levy of Minimum Tax u/s 153(1)(b) of the Ordinance.

11. The Dept'l Representative pointed out that section 170(3) of the Income Tax Ordinance 2001 mandated compulsory adjustment of any tax demand outstanding against refund claimed by a taxpayer. He opined that in the complainant's case the Commissioner (Appeals) having rectified his earlier appellate order dated 16.07.2013, the orders passed u/s 122(5A) by the Addl CIR dated stood re-instated and so did the resultant Minimum Tax demand for Tax Years 2010 and 2011 that was final demand and no refund was thus due to the complainant any more for these years. The DR further deposed that the rectification carried out by the CIR (Appeals) was consistent with statutory stipulation and no objection could be taken to the same.

12. The Amicus Curiae appointed in the case, advised that this was not a simple case of non-payment of due refund by the deptt as was being made out by the complainant. Rather, he said that this was a case in which it was patent that the complainant had deliberately misled regular appellate fora as well as the FTO. He said that the ambient circumstances in this case clearly showed that the complainant had kept multiple fora in the dark in order to wrongly obtain benefit for himself at the expense of the exchequer and his concealment of facts pertinent to the case was tantamount to maladministration under section 2(3) of the FTO Ordinance 2000.

13. The Amicus Curiae said that in the Tax Years in which minimum tax under section 153(1)(b) was to be levied the question of refund did not arise at all as the tax deducted at source u/s 153(1)(b) of the Ordinance was minimum discharge of liability and no refund thereof was possible under the law. He said that the deptt nowhere stated that refund claim would be issued to the complainant. He said that even if it was so written in the reply filed by the deptt the disbursement/refund of minimum tax charged under section 153(1)(b) was not possible.

14. The Amicus Curiae went on to say that the FTO did not direct the FBR to order the Commissioner (Appeals) to rectify his order dated 16.07.2013. Rather, he said that the FTO asked the FBR “**to take cognizance**” of the earlier decision of the FTO and then take necessary actions as warranted under the law that may include the recourse to the provision of section 221 of the Ordinance. He said that the legal meaning of the phrase “to take cognizance” was “**the taking of Judicial or authoritative notice**”. He explained in the current context this only meant that the deptt’s officer concerned

was required to apply his mind and take such action as was necessary under the law.

15. He said that so far as issuance of refund in the Tax Years in which minimum tax levy was not involved there was no dispute between the complainant and the deptt which required FTO's intervention.

16. The Amicus Curiae deposed that complainant's contention that he was never confronted with FTO's stance regarding levy of minimum tax under section 153(1)(b) of the Ordinance was not acceptable. He said that the complainant was well aware that in reported decisions in **C.No.577 of 2011** (Waheed Shahzad Butt Vs FBR) [**PTD 2012 554 = 2013 108 TAX 155**] and [**2013 PTD 2159=2013 108 Tax 164**] FTO's stance in C.No.577/2011 and R.A 12/2012 was explained at length. That being so, the complainant was deemed to be aware of the fact that the FTO having held in the cited cases that dept'l recourse to circular No.6/2009 and SRO 1003 of 2011 was illegal, an exception could not possibly be made in complainant's case. Furthermore, as per section 29 of the FTO Ordinance 2000 and section 18 of Federal Ombudsmen Institutional Reforms Act, 2013 (**FOIRA**), no forum was competent to take up adjudication in a matter where any ombudsman had assumed jurisdiction. Section 18 & 24 of FOIRA being non-obstante provisions prevailed over all conflicting laws for the time being in force. These provisions were equally applicable in the matter involving levy of minimum tax on corporate service providers in Tax Years 2010 and 2011 after disposal of Complaint No.577/2011 and RA No.12/2012 by the FTO on 16.12.2011 and 10.07.2013, respectively. He emphasized that the said decisions had attained

finality as after rejection of dept'l R.A.12/2012 the matter was not contested by the deptt further before any other competent forum except for two re-review applications filed by FBR and a former Member FBR & ATIR that were also rejected.

17. Notwithstanding the legal position explained above, the complainant approached the CIR(Appeals) for relief in the case of orders dated 10.06.2013 passed under section 122(5A) of the Ordinance by the Addl. CIR for Tax Years 2010 and 2011. The findings recorded in the order passed under section 122(5A) of the Ordinance regarding levy of minimum tax on companies service receipts were consistent with FTO's recommendations in C.No.577/2011 order dated 16.12.2011. As pointed out above, section 29 of FTO Ordinance 2000 and section 18 of FOIRA, 2013 decisively oust the jurisdiction of all appellate fora both when the FTO has taken up an issue for investigation under the FTO Ordinance, 2000 and after he has passed order and made recommendations. Section 18 of FOIRA further stops all fora from adjudications of a matter which the FTO has disposed of.

18. In this context the Amicus Curiae referred to a judgment of the Karachi High Court cited as **(2007 YLR 585 Karachi High Court)** and **[2005 CLD 314 Lahore High Court]** that fully supports the viewpoint expressed supra. Relevant extracts from the judgment is reproduced hereunder:

**“Establishment of Office of Wafaqi Mohtasib (Ombudsman) Order (1 of 1983)----**

-----Arts. 9 & 29---Proceedings before Wafaqi Mohtasib--  
-Jurisdiction of High Court---Order of Ombudsman had attained finality after rejection of appeal by the President of Pakistan---**Article 29 of Establishment of Office of Wafaqi Mohtasib (Ombudsman) Order, 1983 having barred jurisdiction of the Court, High Court had no**

**jurisdiction to embark upon again for adjudication of an issue, which had already been decided by the ombudsman**---Suit being barred under S.29 of Establishment of Office of Wafaqi Mohtasib (Ombudsman) Order, 1983, plaintiff had no cause of action.”

**---Art. 29---Order passed by Wafaqi Mohtasib---Validity--Such order, under the provisions of Art. 29 of Establishment of Office of Wafaqi Mohtasib (Ombudsman) Order, 1983, cannot be called in question and determined by any Court including Banking Court**

19. When the Commissioner (Appeals) became aware of the FTO's recommendations in C.No.577/2011, dated 16.12.2011 and R.A 12/2012, dated 10.07.2013, he sought, on his own volition, to implement the FTO's recommendations and rectify his order dated 16.7.2013 and issued show cause notice to the complainant to explain why such action may not be taken. The complainant appeared before the Commissioner (Appeals) on 25.11.2013 and requested him to stay the proceedings on the ground that he had filed a review application before the FTO against his recommendations in C.No.705/2013. However, he could not produce any evidence before the Commissioner (Appeals), in time, in this regard. Earlier, the complainant had appeared before the Commissioner (Appeals) on 20.11.2013 and sought adjournment that was allowed till 25.11.2013. After securing the adjournment from the CIR-(Appeals) on 20.11.2013 he appeared before the ATIR and argued the dept'l appeal against CIR(Appeals) order dated 16.07.2013. He did not inform the ATIR that the CIR(Appeals) had already initiated action to rectify/reverse his order dated 16.07.2013 (which was subjudice before ATIR on 20.11.2013) and he had

secured adjournment from CIR(Appeals) against the proposed action of reversal of his earlier order. Having succeeded in keeping ATIR in the dark the complainant obtained decision in his favor in the pending dep'l appeal that was against the CIR(Appeals) order dated 16.07.2013 disposed of by the ATIR on 20.11.2013- on the very date that the complainant had moved application for adjournment of hearing before CIR (Appeals).

20. The complainant then filed review application before the FTO on 25.11.2013 and made no mention of the fact that the Commissioner (Appeals) had not only initiated action to rectify his order dated 16.7.2013 but had actually carried out the proposed action as per show cause notice served on complainant earlier and had passed order on 25.11.2013, rectifying/reversing his findings/decision recorded in his order dated 16.7.2013 and thereby reinstated orders passed under section 122(5A) of the Ordinance for Tax Years 2010 and 2011 to levy minimum tax u/s 153(1)(b) of the Ordinance on corporate service receipts. The Complainant after concealing pertinent facts obtained a favorable decision from the ATIR in the dept'l appeal filed against Commissioner (Appeals) order dated 16.07.2013 and succeeded in his objective when a favorable decision was announced by the ATIR as per order dated 20.11.2013. **By doing so, the complainant thought that he had also succeeded in pre-empting the Commissioner (Appeals) from proceeding with the proposed rectification of his order dated 16.07.2013. However, he did not succeed as the Commissioner (Appeals) became aware of the overriding, comprehensive statutory embargo on him from taking up an appeal for disposal in a matter involving levy of minimum tax on corporate service receipts in Tax Years 2010 and 2011 after**

enactment of FOIRA in March 2013 and he took a firm decision to correct that lapse. **No intimation regarding order announced/passed by the ATIR dated 20.11.2013 (which was also date of hearing before CIR-Appeals i.e., 20.11.2013) was made by the complainant before the CIR(Appeals) before he passed order u/s 221 of the Ordinance dated 25.11.2013 and reversed his earlier order.**

21. After hearing both sides and the deposition made by the Amicus Curiae, it is evident that the complainant has not only concealed pertinent facts from the Commissioner (Appeals), the Appellate Tribunal Inland Revenue (ATIR) and the Federal Tax Ombudsman, as detailed above but has also tried to abuse the process of law.

22. Complainant's contention that FTO's decision in C.No.705/2013 went beyond the pleadings of the parties involved is wholly misconceived. The FTO having recorded firm findings/recommendations in **C.No.577 of 2011** (Waheed Shahzad Butt Vs FBR) [**2012 PTD 554 = 2013 108 TAX 155**] to uphold levy of minimum tax under section 153(1)(b) of the Ordinance on corporate service receipts in Tax Years 2010 and 2011, could not subsequently record a contrary decision in complainant's case. It is to be noted that the deptt did not agree with the order passed by the Commissioner (Appeals) dated 16.07.2013 and filed second appeal against that order before the ATIR. It is thus not at all evident that deptt was ready to issue refund to the complainant for Tax Years 2010 and 2011. The dept'l reply on complainant's review application is not an endorsement of the complainant's viewpoint with regard to levy of minimum tax on corporate service receipts.

23. **As the complainant has deliberately concealed his knowledge regarding Commissioner (Appeals) recourse to the provisions of section 221 of the Ordinance when he filed review application dated 25.11.2013 in C.No.705/2013 before the FTO, the review application is not bonafide and therefore not competent as complainant has not approached the FTO with clean hands. In fact he has tried to abuse the process of law through concealment before CIR (Appeals), ATIR and Hon'ble FTO. Complainant has sought to obtain relief by concealing facts and misrepresenting his case. Had the complainant apprised the FTO clearly that the Commissioner (Appeals) had started proceedings to rectify / reverse his findings recorded in his earlier order dated 16.07.2013 and had then gone on to actually rectify his earlier order on 25.11.2013, the FTO would have straight away rejected the review application, in limine.**

24. **In view of what has been stated supra, the complainant's review application is rejected for Tax Years 2010 and 2011 being incompetent as explained above.** For Tax Years 2008, 2009 and 2012, the deptt will proceed strictly as per statutory stipulation and applicable case law including Findings/Recommendations of the FTO on the issue of Minimum Taxation on corporate service receipts that may be applicable in these years and will issue refund due on adjustable deductions in these years, if any, found to be properly due to the complainant.

25. (i) Separate proceedings shall be initiated against the Complainant u/s 16 of the FTO Ordinance, 2000 for distortion and concealment of facts and willful misstatements before the

FTO, ATIR and CIR(A), prejudicing and obstructing the process of law.

(ii) A copy of this order shall be endorsed to the Registrar ATIR to bring it to the notice of Hon'ble Members of the Tribunal for appropriate action under the law to reverse / modify orders passed by the ATIR in ITA No.2014-2015/LB/2013, dated 20.11.2013 and ITA Nos.2398/LB/2013, issued on 10.06.2014, as the said orders are rendered *per incuriam* having been passed (unintentionally) in violation of the mandatory and overriding provisions of Section 29 of the FTO Ordinance 2000 read with Section 18 & 24 of Federal Ombudsmen Institutional Reforms Act 2013, as the FTO had already disposed of the relevant issue on 28.10.2013 (in complaint No.705/2013) in the instant case involving matter pertaining to charge of minimum tax under Section 153(1)(b) of the Ordinance.

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

Dated:  
mmq/my