

FEDERAL TAX OMBUDSMAN SECRETARIAT
Regional Office, Lahore

Review Application No. 24/2013

Dated: 05.04.2013*

in

Complaint No.837/LHR/IT(608)/1473/2012

The Secretary,
Revenue Division,
Islamabad.

... Applicant

Versus

M/s IQ Studio (Pvt) Ltd,
12/1, Block Q, Gulberg,
Lahore.

... Respondent

Dealing Officer	:	Muhammad Munir Qureshi, Advisor
On behalf of the Applicant	:	Liaquat Ali Chaudhry, Advocate
On behalf of the Respondent	:	Nemo

ORDER

This is a dept'l review application against Federal Tax Ombudsman's recommendations dated 04.02.2013 in complaint No. 1473/2012.

2. The depts. contends that the FTO's observations in paragraph-5 of his order dated 4.2.2013 in the above cited complaint with regard to mode of reckoning compensation payment for delayed issuance of tax refund by the depts is not consistent with statutory stipulation and applicable case law. Hence the depts has objected to the same and has requested a review of the order through this application.

*Date of registration in FTO Sectt.

3. In paragraph-5 of the cited FTO Order, the following observation is recorded by the FTO:

“As per law, the compensation amount is to be reckoned from the date of deemed assessment and not from the date of any order for issuance of refund passed belatedly by the deptt.”

4. The Dept'l Representative (DR) submitted that the due refund payable to the complainant for Tax Years 2007 to 2010 had been disbursed by the Deptt. He also acknowledged that there had been a delay in the payment of refund and compensation would, therefore, be payable to the complainant but the same would be payable in Tax Year 2009 only. In the other Tax Years the refund had either been adjusted against demand or issued within time. In Tax Year 2010 no refund arose as Minimum Tax was leviable on services rendered. However, he stated that the express direction given by the FTO to calculate amount of compensation payable to the complainant under section 171 of the Ordinance in Tax Year 2009 was not correct. In this context he drew attention to section 171 of the ordinance and the Explanation added through Finance Act, 2013.

5. For facility of reference section 171 and Explanation thereto are re-produced here under:

171. Additional payment for delayed refunds.— (1) Where a refund due to a taxpayer is not paid within three months of the date on which it becomes due, the Commissioner shall pay to the taxpayer a further amount by way of compensation at the rate of ¹[fifteen percent] per annum of the amount of the refund computed for the period commencing at the end of the three month period and ending on the date on which it was paid ²[:]

³[Provided that where there is reason to believe that a person has claimed the refund which is not admissible to him, the provision regarding the payment of such additional amount shall not apply till the investigation of the claim is

¹ The word “KIBOR” substituted by the Finance Act, 2012.

² Full stop substituted by the Finance Act, 2009.

³ Inserted by the Finance Act, 2009.

completed and the claim is either accepted or rejected.]

(2) For the purposes of this section, a refund shall be treated as having become due —

- (a) in the case of a refund required to be made in consequence of an order on an appeal to the Commissioner (Appeals), an appeal to the Appellate Tribunal, a reference to the High Court or an appeal to the Supreme Court, on the date of receipt of such order by the Commissioner; ⁴[or]
- (b) in the case of a refund required to be made as a consequence of a revision order under section ⁵[122A], on the date the order is made by the Commissioner; or
- (c) in any other case, on the date the refund order is made.

⁶[*Explanation.*— For the removal of doubt, it is clarified that where a refund order is made on an application under subsection (1) of section 170, for the purpose of compensation, the refund becomes due from the date refund order is made and not from the date the assessment of income treated to have been made by the Commissioner under section 120.]

The DR argued that the provisions of section 171(2)(c) were attracted in complainant's case. He deposed that as per law the compensation amount payable under section 171 of the Ordinance was liable to be reckoned from the date the refund order is passed and not from the date of assessment under section 120(1) of the Ordinance. He said that the FTO had mistakenly placed reliance on Appellate Tribunal Inland Revenue (Tribunal) judgment reported as **[(2010)PTD(Trib)(519)]** and such reliance was misplaced for the reason that the Explanation to section 171(2) had, statedly, rendered the cited judgment redundant so far as mode of reckoning of compensation amount payable under section 171 of the Ordinance was concerned. He said that President of Pakistan in his order No.53/2011-Law(FTO) dated 20.5.2013 disposing of deptt representation filed against recommendations made by the FTO in complaint No.135/2011 (M/s Punjab Social security Health Management Co, Lahore Vs FBR) had taken cognizance of the

⁴ Inserted by the Finance Act, 2003.

⁵ Substituted for the figure "135" by the Finance Act, 2003.

⁶ Added by the Finance Act, 2013.

amendment in law brought about as a result of insertion of Explanation to section 171(2) of the Ordinance through Finance Act 2013 and had rightly directed that compensation be reckoned from the date of refund Order. The DR also stated that the Hon'ble Supreme Court of Pakistan in judgment reported as **[2005PTD2139](SCPak)** had explained that the powers of the Tribunal were limited to purely appellate adjudication only and did not include powers of judicial review. He said that the powers of judicial review were only available to the superior judiciary and civil courts. He further said that judgment of the Tribunal was not binding on the deptt and had persuasive value only and in this context he referred to Karachi High Court judgment reported as **[1987 PTD 149] (KHC)**. The DR further stated that the Explanation to section 171(2) of the Ordinance was inserted in the statute to remove alleged ambiguity regarding reckoning of compensation amount payable. In this context he referred to Peshawar High Court judgment reported as **[2011PTD 549] (PHC)**.

6. The DR further argued that the Tribunal in cited judgment had wrongly held that compensation payment under section 171 of the Ordinance was liable to be reckoned from the date of assessment under section 120(1) of the Ordinance and for purposes of calculating compensation amount the provisions of section 171(1) of the Ordinance may be read directly in conjunction with the provisions of section 120(1) of the Ordinance and that there was no need to take into account Clauses (a),(b) and (c) of sub section (2) of section 171 of the Ordinance. He said that as a result of the Tribunal's findings with regard to calculation of compensation amount Clauses (a), (b) and (c) had, in the view of the DR, been rendered redundant which was not permissible in law. According to

the DR this action of the Tribunal amounted to 'judicial review' on its part of the provisions of section 171(2)(a) to (c) for which it had no jurisdiction as already explained earlier. He reiterated that the power of judicial review was available exclusively to the superior judiciary and civil courts in exercise of their plenary / Constitutional jurisdiction. The DR also said that the cited judgment of the Tribunal did not constitute valid precedent in law. He explained that the Tribunal's judgment was only binding between the parties concerned in the particular case before the Tribunal. In other cases the judgment was binding only if the superior judiciary held that the judgment was binding in other similar cases as well.

7. The AR of the complainant did not attend proceedings although notice had been served well in time. After due consideration, the dept'l review application will be decided on the basis of material, including case law, available on record and on merits of the case.

8. The dept'l view that the Tribunal undertook a judicial review of statutory provisions with regard to reckoning of compensation is, strictly speaking, not an accurate description of the judgment reported as **[(2010PTD(Trib)(519)]**. Judicial Review would be involved when a court declares a provision of law or an order passed by a competent authority to be unconstitutional or ultra vires of the constitution. In the cited judgment, **the Tribunal has not declared any provision of the Ordinance to be unconstitutional or ultra vires.** The Tribunal simply explained that in its considered view, under the statute, the date of finalization of assessment under section 120(1) of the Ordinance was the valid reference point for purposes of determining compensation amount payable to a taxpayer for delayed disbursement of refund. This view has been

modified by the Tribunal in a later judgment **ITA No's 1314/LB/2012 to ITA No.1319/LB/2012, order dated 04.07.2013 reported as 2013PTD(Trib.)1083** in which the Tribunal has corrected its earlier judgment and has held that compensation payment was to be reckoned from 90 days *after* finalization of assessment under section 120(1) of the Ordinance and not from the date of deemed assessment. The deptt has not contested this later judgment of the Tribunal and has filed no reference in the High Court against it. The later judgment of the Tribunal supersedes the earlier judgment **[(2010PTD(Trib)519)]** and **the methodology for reckoning compensation amount approved by the Tribunal in this later order was earlier also followed by the President of Pakistan in Order No.60/2007-Law-(FTO) dated 31.03.2008 on a dept'l representation against FTO's recommendations in complaint No. 316-L/2007 (Gul Afshan, Bilal Traders, Sargodha).** Under the given facts and circumstances of the case **the dept'l contention that the Tribunal had resorted to "judicial review" of statutory provisions in the Income Tax Ordinance 2001 is wholly misconceived and is rejected.**

9. The judgment of the Appellate Tribunal is binding on all parties in matters involving a factual determination in the computation of income and calculation of tax / refund / compensation under the Ordinance. It is thus a final fact finding authority and its jurisdiction in this regard is vast and is acknowledged by all courts. So far as legal matters are concerned, it goes without saying that the final word in legal matters is the exclusive domain of the Hon'ble Supreme Court of Pakistan. That does not mean that the adjudication on legal aspects of a case made by subordinate Courts / Tribunals have no relevance. A judgment of the Tribunal holds field

so long as it has not been controverted / superseded amended by a superior court or till such time as a stay of proceedings has not been ordered by a competent authority. In the present case neither judgment of the Tribunal referred to above has been controverted or amended by a judgment of the High Court nor has any stay been allowed. That being so it would be wholly incorrect to say that these judgments of the Tribunal were of no consequence. The deptt is thus required to fully implement the judgments in letter and spirit because these have not been controverted / amended, in whole or in part, by a superior court nor has any stay of proceedings been allowed. Furthermore, the deptt has accepted the Tribunal's judgment **[(2010PTD(Trib)(519)]** and LTU Lahore has allowed payment of compensation under section 171 of the Ordinance to M/s Tetra Pak Limited, **reckoned from the date of deemed assessment to the date of issuance of refund order**, amounting to Rs. 90.03 million on 26.03.2013 after the Company had sought the FTO's intervention. The deptt has also followed the said judgment of the Tribunal and has paid compensation amount in a number of other cases as well in the manner explained in the said order. In one case, **M/s Spel-Fujiya Ltd**, LTU Lahore paid compensation amount in excess of the refund paid to the Company and has followed the mode of reckoning compensation payment u/s 171 of the Ordinance as laid down in the above cited judgment of the Tribunal. The deptt's actual conduct in the matter of compensation payment in a number of cases thus negates the views expressed in the present review application. The deptt cannot blow hot and cold in the same breath. If it truly believes that compensation payment under section 171 of the Ordinance is to be reckoned from the date of refund order (even when that order is passed belatedly long after return of income was filed declaring

income and claiming refund and after assessment was made accepting the declared position as per return filed) then it must follow that methodology in ALL cases. It cannot follow different methodologies of reckoning compensation in different cases when the basic facts pertaining to delay in disbursement of refund are the same.

10. Explanation to section 171(2) of the Ordinance referred to above is clearly not relevant in complainant's case as it is effective from Tax Year 2014 whereas payment of compensation in complainant's case relates to Tax Year 2009. It is to be noted that as per Supreme Court of Pakistan judgment reported as **(1997) 76 TAX 5 (SC.Pak) any executive order / notification that is detrimental to a taxpayer can have no retrospective application.**

11. We may consider here the provisions of section 120(1) of the Ordinance that read as follows:

⁷**[120. Assessments.—** (1) Where a taxpayer has furnished a complete return of income (other than a revised return under sub-section (6) of section 114) for a tax year ending on or after the 1st day of July, 2002,—

- (a) the Commissioner shall be taken to have made an assessment of taxable income for that tax year, and the tax due thereon, equal to those respective amounts specified in the return; and
- (b) the return shall be taken **for all purposes of this Ordinance** to be an assessment order issued to the taxpayer by the Commissioner on the day the return was furnished. **(emphasis supplied).**

Prima Facie, it is evident from the above provision of law that a assessment once finalized under section 120(1) of the Ordinance is

⁷ Section 120 substituted by the Finance Act, 2003. The substituted section 120 read as follows:

"120. Assessments.- Where a taxpayer has furnished a return of income (other than a revised return under sub-section (6) of section 114) for a tax year ending on or after the 1st day of July, 2002, —

- (a) the Commissioner shall be taken to have made an assessment of the taxable income of the taxpayer for the year and the tax due thereon, equal to those respective amounts specified in the return; and
- (b) the taxpayer's return shall be taken for all purposes of this Ordinance to be an assessment order issued to the taxpayer by the Commissioner on the day the return was furnished."

valid for “**all purposes**” under the Ordinance. A plain reading of the text of section 120(1) of the Ordinance makes it abundantly clear that “all purposes” includes payment of refund and determination of compensation for any delay in making payment of refund. The Hon’ble Supreme Court also reaffirms the same view in Judgment reported as **100 TAX 177 [SC Pak]**:

“...Now coming to the scheme, it has been specifically mentioned in section 120 of the Ordinance that where a taxpayer has furnished a return of income, the same shall be taken to be complete if it is in accordance with the provisions of subsection (2) of section 114 of the Ordinance. It clarifies that the income declared in the return stands assessed...”

In Tribunal's judgment **[(2010PTD(Trib)(519)]** it has been held that refund order under section 170(4) of the Ordinance is to be passed within the time allowed under the statute for processing / disposal of refund claims cited as per return of income filed. In complainant's case the statutory time allowed under the Ordinance for processing / disposal of its refund claim is 45 days from date of deemed assessment (or 90 days after date of deemed assessment as per the 'later' judgment of the Tribunal), An order under section 170(4) of the Ordinance was thus required to have been passed within 45 days of the mandatory statutory timeframe. The deptt did not adhere to this mandatory timeline and is thus responsible for the resultant delay in payment of refund and is therefore liable to pay compensation under section 171 of the Ordinance for such delay.

12. The Courts have held in a number of judgments that filing of application for payment of refund was not mandatory under the statute **[(2009) 100 TAX 178 (Trib.)]** , **[2001PTD3956(KHC)]** and refund was liable to be paid to a taxpayer immediately it became

due without waiting for any refund application. The e-filed refund application u/s 170 of the Ordinance is therefore to be seen as a 'reminder' to the deptt for payment of a taxpayers' outstanding refund. The judgments in which it has been so held have not been controverted / modified in any manner by a superior court nor has any Stay of proceedings allowed by a competent court. These judgments thus continue to hold field.

13. The views expressed by the Tribunal in its cited orders with regard to reckoning of compensation amount under section 171 of the Ordinance relate to general policy prescription required to be followed by FBR vis a vis ALL taxpayers claiming compensation. It is obvious that the Tribunal cannot prescribe different modes of reckoning compensation amount for different cases involving similar facts. This part of the Tribunals judgment therefore must necessarily have a general application for all taxpayers in which compensation payment for delayed issuance of refund is involved and the deptt is wholly misconceived in its view that the mode of reckoning compensation given in the cited Tribunal judgment is relevant only for the particular taxpayer in appeal before the Tribunal. As pointed out above, the Tribunal has passed two judgments relating to payment of refund and reckoning of compensation **[(2010)PTD(Trib)(519)] and judgment ITA No's 1314/LB/2012 to ITA No.1319/LB/2012, order dated 04.07.2013]** and none of these two judgments have been controverted /modified by the superior courts nor has Stay been allowed. The Tribunal's observations in these two judgments on payment of refund and reckoning of compensation, relate to general policy prescription required to be followed by FBR Officials. The said judgments therefore constitute valid precedent in law and in the face of similar facts pertaining to

delay in disbursement of refund they must be followed by all FBR functionaries when charged with determination of compensation payment payable u/s 171 of the Ordinance. The **President of Pakistan in his decision No.87/2011-Law(FTO) dated 9.7.2013, disposing of dept'l representation in compliant No.180/LHR/IT/152/268/11 (FBR Vs M/s Ajar Enterprises), Lahore** has rejected the dept'l representation against FTO's recommendation to FBR to direct the Commissioner to vacate the refund order passed u/s 170(4) of the Ordinance rejecting the refund claim, by exercising revisionary jurisdiction u/s 122A of the Ordinance and to issue refund/compensation due to the complainant within 21 days. There is no direction in the said order of the President to reckon compensation from the date of refund order passed belatedly. It is to be noted that in this case as well Explanation to section 171(2) of the Ordinance having been placed on the statute through Finance Act 2013 would not be applicable as the refund claim relates to Tax Year 2006.

14. From the discussion above it is evident that there is no "mistake" as such in the order passed by the FTO dated 04.02.2013 disposing of complaint No.1473/2013 (IQ Studio Pvt Ltd Lahore) that needs to be corrected during review. It is also not established by the deptt that any argument made or ground taken during complaint proceedings before FTO was not considered in the order passed by the FTO disposing of the complaint. That being so, the dept'l review application is found to have no merit and is hereby rejected.

(Abdur Rauf Chaudhry)
Federal Tax Ombudsman

Dated:
mmq/my