

**BEFORE
THE FEDERAL TAX OMBUDSMAN
ISLAMABAD**

COMPLAINT NOS.2336 & 2337/KHI/IT/2022

Dated: 10.06.2022 R.O. Karachi

Mr. Ali Asghar Khan, Director
M/s. Incom Rock Wool (Pvt) Ltd,
Shernaz House, 8 West Wharf Road,
Karachi.

... *Complainant*

V e r s u s

The Secretary,
Revenue Division,
Islamabad.

... *Respondent*

Dealing Officer	: Ms. Seema Shakil, Advisor
Appraisal Officer	: Mr. Muhammad Tanvir Akhtar, Advisor
Authorized Representative	: Mr. Wajid Hussain Advocate,
Departmental Representative	: Ms. Farha Abid, DCIR, Audit-I CTO, Karachi

FINDINGS/RECOMMENDATIONS

The above-mentioned complaint has been filed against the Commissioner-IR, Audit-I CTO Karachi in terms of Section 10(1) of the Federal Tax Ombudsman Ordinance, 2000 (FTO Ordinance), for issuance of notice under Section 221, for Tax Year 2017 for creation of demand of Rs.479,761/- on account of adjustment of undetermined refund. Since both the complaints are on similar issue for denying right of adjustment of undetermined refund of Tax Year 2008 & 2010, the same are disposed of through a single consolidated order.

2. The Complainant has e-filed return of income with adjustment of admitted tax liability of Rs.479,761/- against previous years refund. Department issued notice under Section 221 dated 16.4.2022 for creation of demand of Rs.479.761/- on account of adjustment of undetermined refund. It is submitted that refund of income for the years 2008 & 2010 were e-filed with refunds of Rs.711,103/- and Rs.327,894/- respectively. Application for refund were also duly filed & copy of the same were produced during hearing. As the department instead of

determining refund, intended to create demand on account of undetermined refund, the instant complaints is filed.

3. The complaint was referred to the Secretary, Revenue Division for comments in terms of the FTO Ordinance read with Section 9(1) of the Federal Ombudsmen Institutional Reforms Act, 2013. In response, the Chief Commissioner-IR, CTO, Karachi submitted reply of CIR Audit-I, CTO Karachi vide letter dated 22.06.2022. Preliminary objection regarding bar of jurisdiction is raised as it is contended that the matter pertains to assessment of income & tax liability for which legal remedy is available. On merit, it is contended that Show Cause Notice under Section 221 of the Ordinance, 2001 has been issued on the basis of non-verification of refund order under Section 170(4) of the Ordinance, 2001. While filing Income Tax return, a taxpayer can adjust his tax liability for the year against refunds for the previous year subject to the availability of such refunds duly created by passing orders under Section 170(4) of the Income Tax Ordinance, 2001. Legally, no taxpayer can adjust his tax liability for the year against refunds for the previous year on the basis of deemed assessment order under Section 120 for the previous years. On above issue, Hon'ble Supreme Court of Pakistan has held vide judgment in Civil Petitions No.283-L to 286-L of 2018, dated 05.03.2020 as under;

“the impression that deemed assessment under Section 120, when the annual tax return filed under Section 114 shows a refund payable to the taxpayer, passes for a refund order, stands dispelled by the Explanation to Section 171 inserted through Finance Act. 2013, which states as under;

Explanation. -For the removal of doubt, it is clarified that where a refund order is made on an application under sub-Section (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.

In view of above, taxpayer's claim of adjustment tax liability against refunds for the previous year is inadmissible until and unless the same

is supported by order under Section 170(4) of the Income Tax Ordinance, 2001. Even if the taxpayer had filed refund applications for the Tax Years 2008 & 2010, refund orders were required to be passed under Section 170(4) of the Ordinance, 2001. In case of failure of passing refund order under Section 170(4) of the Ordinance, 2001, subject matter was appealable in terms of Section 170(5) of the Ordinance, 2001 and the taxpayer failed to file such appeal.

4. Both the parties were heard & record perused.

FINDINGS:

5. (i) The preliminary objection regarding bar on jurisdiction is misconceived. The issue in hand is not of assessment or determination of tax. The complainant has outstanding refund claim of previous two years far in excess of admitted tax liability for 2017. Applications under Section 170 for both the years have already been filed and are pending with the department for several years against prescribed period of 6 months for disposal. The order under Section 170 for determination of refund was to be passed by the department which has not been done. Now the department intends to penalize the taxpayer for not being able to produce refund order which was in fact to be passed by department itself. This being a fit case of maladministration, the objection is over ruled.

(ii) On merit, the department contends that taxpayer cannot adjust any refund against its tax liability on its own. In support, clarification under Section 171 and the judgment of superior courts are quoted. The relevant provision and judgments are with reference to claim of additional payments for delayed refunds (compensation). Here the issue in hand is not of additional payment for delayed refund. The claim of complainant is his own excess payment for which he has applied to the department as per law & after having failed to get the refunds issued,

he has resorted to claiming of its adjustment in his return of subsequent years. Here again the issue of adjustment is pending for action by the department. Once the return of 2017 was filed, the department should have conducted the desk audit of previous years, determined the available refund and applied it for adjustment against admitted tax liability of 2017 in terms with the provisions of Section 170(3)(a) of the Income Tax Ordinance 2001. All the actions of disposal of refund application, determination of refund and adjustment of the same against complainant's admitted liability are pending with the department. Whereas the department is asking complainant to produce the evidence for the same. The non-disposal of refund application and issuance of show cause under Section 221 without conducting proper desk audit and disposal of previous refund application tantamounts to maladministration in terms of Section 2(3)(i)(a)(b)&(ii) of the FTO Ordinance.

RECOMMENDATIONS:

6. FBR to direct: -

- (i) commissioner-IR, Enforcement-ICTO, Karachi to dispose of refund applications for Tax Years 2008 & 2010 as per law & after providing opportunity of hearing
- (ii) commissioner-IR, Enforcement-I CTO, Karachi to settle the refund claim in terms with the provisions of Section 170(3) (a) against tax liability of Tax Year 2017
- (iii) commissioner-IR, Audit-I CTO, Karachi to withdraw the notice under Section 221 as per law, if admitted liability of Tax Year 2017 is settled under Section 170(3)(a); and
- (iv) report compliance within 45 days.

(Dr. Asif Mahmood Jah)
(Hilal-i-Imtiaz) (Sitara-i-Imtiaz)
Federal Tax Ombudsman

Dated: 3 : 8 : 2022

Approved for reporting