

**THE FEDERAL TAX OMBUDSMAN
ISLAMABAD**

COMPLAINT NO.3019/LHR/IT/2023

Dated: 27.05.2023*RO, Lahore

M/s Adsum,

Office 10-F, Hajvery Tower, Chuburji
Chwok, Data Ganj Baksh Town, Lahore.

...Complainant

Versus

The Secretary,
Revenue Division,
Islamabad.

...Respondent

Dealing Officer	:	Mr. Khalid Javed, Advisor
Appraised by	:	Mr. Muhammad Tanvir Akhtar, Advisor
Authorized Representative	:	Mr. Muhammad Farooq Sheikh, Advocate
Departmental Representative	:	Mr. Muhammad Ali, ADCIR RTO Lahore

FINDINGS/RECOMMENDATIONS

The above-mentioned complaint was originally filed under Section 10(1) of the Federal Tax Ombudsman Ordinance, 2000 (FTO Ordinance) against alleged illegal issuance of notice under section 161(1A) of the Income Tax Ordinance, 2001 (the Ordinance) on 07.05.2018 for Tax Year 2016. Accordingly, after processing the same and completing the hearing process, this Forum passed following recommendations vide order dated 01.08.2023: -

"FBR to:-

- (i) *direct the Commissioner-IR, Withholding Zone, RTO Lahore to withdraw the notices issued u/s 161(1A) for Tax Year 2016 being barred by time and drop the proceedings, as per law; and*
- (ii) *report compliance within 45 days."*

However, the Deptt filed representation against the above said order before the Hon'ble President of Pakistan, who has now decided the same vide order No.170/FTO/2023 dated 18.01.2024.

"In the circumstances, it is a fit case for remanding it to the Federal Tax Ombudsman to decide the complaint afresh, keeping in view the respective stance of the parties. The learned FTO should take into consideration the stance of Agency as well as complainant, and suggest ways and means to resolve the issue as per law, which needs to be addressed expeditiously."

2. Briefly, the Complainant, is an (AOP), derives income from running business under the name & Style of M/s Adsum, was served with the notice u/s 161(1A) of the Ordinance on 07.05.2018 for tax year 2016. In compliance, the Complainant contested the legitimacy of the proceedings, being time barred in the light of Hon'ble Supreme Court of Pakistan's judgment dated 21.09.2021 in Civil Petition No. 1691-L of 2018. However, the Deptt Issued another notice u/s 161(1A) of the Ordinance for tax year 2016 on 18.04.2023. for compliance on 27.04.2023 in complete disregard to the judgment of the Superior Court, hence this complaint.

3. Accordingly, in pursuance of Hon'ble President's order dated 18.01.2024, fresh notices of hearing u/s 10(4) were issued to the Deptt as well to the Complainant.

4. Both parties heard and record perused.

5. On merits, it was contended by the Deptt that proceedings U/R 44(4) of the Income Tax Rules, 2006 were initiated vide notice dated 16.04.2018 followed by show cause notice u/s 161(1A) of the Ordinance dated **07.05.2018** for compliance by **12.05.2018** and reminder dated 18.04.2018. As per section 174(3) of the Ordinance, record is to be maintained upto 6 years after the end of the tax year to which that relate. As time limitation of 6 years ended on **30.06.2022**, hence the proceedings initiated are well within time. In this case notice u/s 161(1A) was Issued well before time barred limit i.e. before 30.06.2022, however, taxpayer deliberately avoided to furnish record and instead providing record, wait for getting it time barred which is mala fide on the part of taxpayer. As per section 174 (3) record is to be maintained upto 6 years after the end of the tax year to which they relate, for convenience provisions of section 174(3) is reproduced as under:

"174(3). The accounts and documents required to be maintained under this section shall be maintained for six years after the end of the tax year to which they relate."

It is clear that the time limitation of 6 years ended on 30.06.2022, hence, the proceedings initiated are well within time. Further it was contended that issuance of show cause notice is not a negative inference as the Complainant has an opportunity to file reply and put forward its case. In case of an adverse order, the Complainant has remedy to file appeal as a matter of right before Appellate fora and reliance was placed upon FTO's decision in C.No.3129/LHR/IT/2020. Further, stated that in case the impugned SCNs are asked to be withdrawn then there will be no remedy available with the department to check the irregularity, if any in the matter.

6. During hearing proceedings, AR and DR reiterated their respective stance taken in the complaint and parawise comments. The DR stated that Deptt issued Notice u/s 161 dated 07.05.2018 within the time limit of 6 years (whereas time was expiring on 30.06.2022). Further, the DR argued that the taxpayer was bound to maintain record once the notice was issued within prescribed time limit. The AR filed copy of Supreme Court Judgment dated 21.09.2021 in the case of **Panther Sports**. The AR argued that notice u/s 161 was issued on 07.05.2018 for compliance on 12.05.2018. In view of reported case laws i.e. 2023 PTD 569 and that of Superior Courts, Deptt cannot requisition the record beyond 6 years. He also referred to this Forum's judgment/order in C.No.3014/2014, which was contended to apply in all fours to the case under reference. He emphasized that production of record beyond 6 years is illegal and against the spirit of decided cases. The DR in response argued that reliance cannot be placed on the judgment of Hon'ble Supreme Court in the case of **Panther Sports**, as referred to above, on the plea that in that case notices u/s 161 were issued after expiry of 6 years whereas in the instant case notices u/s 161 were issued before expiry of six years (i.e. 30.06.2022).

7. The perusal of record reveals that the Deptt issued show cause notice u/s 161(1A) of the Ordinance dated 07.05.2018 for compliance on 12.05.2018, when time of six years was expiring on 30.06.2022. The Deptt

is of view that since they issued Notice well within time period of six years, therefore, Complainant was legally bound to maintain record and produce the same on the fixed date. The Complainant also referred judgment of Hon'ble Supreme Court of Pakistan in Civil Petition No. 1691-L of 2018 titled CIR Zone-IV Lahore Vs M/s Panther Sports & Rubber Industries, (Pvt) Ltd. The relevant part of judgment of Hon'ble Supreme Court of Pakistan's dated 21.09.2021 in Civil Petition No. 1691-L of 2018 is reproduced hereunder:

"For the above reasons we hold that a taxpayer is obliged to maintain the record under section 174(3) of the Ordinance for a period of six years and the taxpayer cannot be compelled to produce the record for a tax year beyond the period of six years as stipulated in section 174(3) of the Ordinance. Hence notices issued under section 165(2B) or 161(1A) of the Ordinance being ineffective and unenforceable are set aside."

However, the Deptt distinguished the above referred judgment of Hon'ble Supreme Court on the ground that in that case i.e. M/s Panther Sports, Notices u/s 161 were issued after expiry of six years. On query by this Forum, the DR further explained that Para 1 of above referred judgment mentions that Notices were issued in the year 2017 for tax years 2007 and 2009. The DR explained that for tax years 2007 and 2009, the period of six years had elapsed much earlier before the tax year 2017 when notices were issued. On this rational he stated that case law of M/s Panther Sports does not apply to the circumstances of this case where Notice u/s 161 was issued, before the time limitation on 30.06.2022. Further, the Deptt in parawise comments stated that Notices u/s 161 were issued well within time, however, the Complainant did not provide the record rather waited to get it time barred. The DR's contention carries weight. The circumstances of case clearly reflect that Notice u/s 161 dated 07.05.2018 was issued within the time period of 6 years i.e. before 30.06.2022.

8. The AR further relied on the case law reported as 2023 PTD 569, decided by Hon'ble Islamabad High Court on 19.01.2023 in Income Tax Reference No.253 of 2015. The relevant part of the same is reproduced below:

"9. In view of the law laid down the august Supreme Court in M/s Panther Sports the matter now rests. The learned counsel for tax department submitted that Section 174 spoke of the obligation of a taxpayer to maintain records and not of the withholding agent, who was under an obligation to withhold taxes on behalf of the Treasury under Section 153 of the ITO to maintain records. And this aspect of the matter had not been raised before the august Supreme Court in M/s. Panther Sports. The argument is without merit as the august Supreme Court in M/s, Panther Sports endorsed the law laid down by the learned Lahore High Court in Maple Leaf Cement where the question before the Court related to the failure of the taxpayer to discharge his withholding obligations and thus proceedings had been initiated under Section 161 of the ITO. It was in that context that the learned Lahore High Court held that the taxpayer could not be required to present proof of discharge of his obligations as a withholding agent and provide a reconciliation statement for purposes of Rule 44(4) of the Rules after the period prescribed for maintenance of tax records under Section 174 of the ITO has already passed."

It is clear that Hon'ble LHC has further explained the case law settled in M/s Panther Sports, discussed above. The above referred case does not lend any support to the view point of the Complainant.

9. The AR also referred to judgment of Hon'ble Lahore High Court in Income Tax Reference 64481 of 2022 dated 15.03.2023 in the case of Raja Sikandar Khan, Advocate which is also reproduced below:

"From the above definitions, it is abundantly clear that "finalization" is synonym for closing, completion, culmination of something which is already in progress or has already been commenced. Therefore, applicability of clause (i) of the Notification is confined to extension of limitation in the class of cases involving tax year 2014 for closing or completion wherein proceeding had already been commenced within the period of limitation, which clearly is not the case here since the notice under Section 122 was issued to the respondent on 30.11.2020. We are unable to give expansive interpretation to the word "finalization" used in clause (i) of the Notification to authorize commencement of proceedings in relation to issues pertaining to tax year 2014 after expiry of the period of limitation specified in Section 122 of the Ordinance." (emphasis provided)


The above referred judgment is pertaining to the extension in time limitation allowed under Section 214A of the Ordinance 2001 due to then prevalent corona situation in connection with finalization of proceedings then getting time barred as on 30.06.2020. The Hon'ble Lahore High Court defined the word "Finalization", while concluding that extension allowed upto 31.12.2020 with reference to the clause (i) of C.No.3(22) S (IR-Operations) 2020 dated 30.06.2020 was applicable only in those cases where proceedings had already been commenced before the original expiry date i.e. 30.06.2020. The learned AR interpreted that Deptt had to

finalize the proceedings within the time limitation on the basis of elaboration of word "Finalization" in the above referred case. However, a careful reading of above quoted case law transpires that it meant that only those cases could be finalized within extended date where proceedings were pending on the cut-out date as per original time limitation. As a corollary to above, this case also does not support the cause of the Complainant, as in the instant case Notices were issued on 27.06.2022 i.e. before expiry of limitation on 30.06.2022 and the same were pending on the cut-out date. Otherwise, the circumstances of extended date do not apply in the instant case.

10. In view of above account, it's clear that Deptt issued Notices u/s 161 dated 07.05.2018 which were within the time limitation of 6 years then expiring on 30.06.2022. It is not understandable that how a Notice u/s 161 for tax year 2016 dated 07.05.2018, as alleged by the Complainant in the complaint, can be illegal with reference to time limitation expiring on 30.06.2022. Once a legal notice is issued and served on taxpayer, the proceedings get initiated. The status of proceedings u/s 161 on 30.06.2022 was of pending proceedings.

Further, in parawise comments, the Deptt argued "that Notice u/s 161(1A) were issued well within time limit expiry on 30.06.2022. However, taxpayer, deliberately avoided to furnish record and waited for getting it time barred which is malafide on the part of the taxpayer."

11. Further, the provision of first proviso to sub-section (3) of Section 174 is very relevant to this case and the same read as under: -



[Provided that where any proceedings is pending before any authority or court the taxpayer shall maintain the record till final decision of the proceedings.]

It is abundantly clear that on cut out date the status of the proceedings u/s 161 was that of having been initiated and pending.

The above discussed first proviso & Explanation to the same were inserted through Finance Act, 2010. Thereby meaning that the same are

applicable to the tax year 2016 which is the subject matter of this complaint. Conclusively, the Notice u/s 161 were issued within time limit as set by the Superior Courts and the status of proceedings u/s 161 as on 30.06.2022 was of pending before an authority.

12. In view supra, it is held that Notices issued u/s 161 of the Income Tax Ordinance, 2001 for the tax year 2016, dated 07.05.2018 were well within the time limit of six year after the expiry of the tax year concerned, expiring on 30.06.2022 as set by the Hon'ble Supreme Court in the case of M/s Panther Sports. Further by virtue of above quoted provisions i.e. the explanation and first proviso to sub-section (3) of Section 174 of the Ordinance, the proceedings u/s 161 were pending as on 30.06.2022. Once notices issued within the 6 years' time period, **the taxpayer is bound to maintain record till decision of the proceedings.**

FINDINGS:-

13. Notwithstanding the above, Departmental lethargy and inattention is also glaringly visible. Show cause notice for TY 2016 was issued on 7th May, 2018 and then reminder was issued after 5 years on 18th April, 2023. Such an inattention and ineptitude tantamount to maladministration in terms of section 2(3)(ii) of FTO Ordinance, 2000.

RECOMMENDATIONS:-

14. FBR to direct-

- (i) the CCIR concerned to look into this unwarranted delay;
- (ii) fix the responsibility and initiate appropriate proceedings; and
- (iii) report compliance in 60 days.


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

Dated: 14.3.2024
Akif/satti

Approved for reporting