

**JUDGMENT SHEET**  
**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT**

**W.P.No.791-2017**  
Ed-Zublin AG and another  
*vs.*  
The Federation of Pakistan and others.

Petitioners by: Mr. Nauman Rafique, Advocate.

Respondents by: Syed Ishfaq Hussain Naqvi, Advocate for respondents.

Date of Decision: 30.05.2022.

**MOHSIN AKHTAR KAYANI, J:** Through the instant writ petition, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioners have assailed the order dated 01.11.2016, passed by President of Pakistan, whereby representation filed by the respondent FBR was allowed and the recommendations/findings given by Federal Tax Ombudsman were set-aside.

2. Brief facts referred in the instant case are that petitioners have executed the contracts for construction of civil engineering works titled CO1 (Barrage) and CO2 (Power Channel) in December, 1995 of Ghazi Barotha Hydro Power Project with Joint Venture (GBC), comprising of four (04) companies, whereby status has been settled by Peshawar High Court in its judgment dated 14.05.2004 reported as **2004 PTD 1994 (Commissioner of Income Tax vs. Ghazi Barotha Construction)** that GBC JV's foreign partner companies were to be assessed individually on net basis and not on presumptive tax basis as per the provisions of law and treaty i.e. Agreements for Avoidance of Double Taxation between

Government of Pakistan and other States. The Court has passed the order for refund of deducted tax. The judgment of the Peshawar High Court has been assailed by the revenue department before Hon'ble Supreme Court of Pakistan through C.P No.773-P of 2005, which was dismissed as withdrawn on 12.04.2005. The petitioners in compliance of judgment of Peshawar High Court have applied for refund and the same was assessed by Regional Tax Office, Abbottabad, whereafter Demand Notice was issued, but the refund has not been released, which persuaded the petitioners to file the complaint before Hon'ble Federal Tax Ombudsman on 31.12.2009, the same was decided by FBR, resultantly, the FBR has admitted the refund to the tune of Rs.784,495,495/- as due to the present petitioners. The Hon'ble Federal Tax Ombudsman issued recommendations dated 31.05.2010, which have further been assailed by the respondent Revenue Department before Worthy President of Pakistan through representation, which was dismissed on 18.07.2011. However, during the pendency of the matter before President of Pakistan, the FBR have issued demand of tax on the allegation of non-deduction of tax on payments of interest to non-resident banks for the loans obtained in Italy for purchase of machinery to be used in Pakistan by G.B.C. The matter was also agitated before Peshawar High Court by declaring the said proceedings as counterblast, as a result whereof, Peshawar High Court has summoned the Chief Commissioner throughailable warrants of arrest. Even the demand raised by the respondent Department, has been challenged by the Department and finally the Appellate Tribunal Inland

Revenue, Islamabad vide its order dated 08.01.2013 annulled the impugned demand of Rs. 3.7 billion created through orders under Section 161/205 of the Ordinance dated 12.11.2010. On the other hand, petitioners after rejection of FBR's representation by the Worthy President of Pakistan, have filed application to the Hon'ble Federal Tax Ombudsman for implementation of its recommendations dated 31.05.2010, whereby FTO has disposed of the same vide order dated 22.10.2011 to the effect that FBR will pay the outstanding refund while the complainants/present petitioners would furnish a post dated cheque alongwith undertaking duly indemnified by M/s WAPDA, Lahore. However, when the order dated 08.01.2013 of the Appellate Tribunal Inland Revenue, Islamabad has been passed, the petitioners/complainants filed a Review Application before the FTO with the plea that the condition of furnishing of post dated cheque was no longer applicable as there was no tax demand in the field against the petitioners and the same has already been declared illegal, resultantly FTO has passed the Review Order dated 13.11.2013 and revised his earlier order dated 22.10.2011. The said order has been assailed before President of Pakistan through a second representation, the same was also dismissed vide order dated 26.05.2015 while considering the Income Tax Reference Application No. 11 to 16/2013 by the Inland Revenue Department against the initial order of Islamabad High Court on 18.02.2014. The respondent Department has issued refund in compliance of FTO Order dated 31.07.2015, but compensation has not been given, despite repeated request, whereas the petitioners claim the compensation for payment of refund

from the date of order of Peshawar High Court dated 14.05.2004, therefore, respondent Department again filed Review Application before FTO on 01.01.2016 against the recommendations dated 13.11.2013 & 31.05.2010 to the extent of compensation, but the same was also dismissed by the FTO. The respondent Department has again filed a representation on 15.07.2016, which was accepted vide order dated 01.11.2016 by the Worthy President of Pakistan by taking a somersault and declared the entire case of the petitioners contrary to settled decisions of different forums.

3. Learned counsel for the petitioners *inter-alia* contends that the President of Pakistan lacks the jurisdiction to entertain representation against the implementation of the directions, issued by the office of Hon'ble FTO dated 18.09.2015 and 29.04.2016 because it is expressly provided under Section 32 of the Federal Tax Ombudsman Ordinance, 2000 that representation is available against the recommendations of FTO only and not against the Review Order before the Advisor; that assessment years under consideration were governed by substantive provisions of repealed Income Tax Ordinance, 1979, whereby Section 100 of the Ordinance expressly provides that the Deputy Commissioner shall refund the amount to the assessee irrespective of the fact that whether he has or has not made any claim in that behalf; that the order passed by Worthy President of Pakistan dated 01.11.2016 in the presentation dated 15.06.2016 be declared to be without lawful authority and of no legal effect.

4. Conversely, learned counsel for the respondents while relying upon the order rendered by Worthy President of Pakistan on the representation

filed by the FBR against the order of FTO contends that the forums below have not considered the law in its true perspective, even certain important aspects have not been settled, especially when the petitioners are aggrieved with the findings of Inland Revenue Office on the claim of refund, petitioners may file an appeal to the Commissioner (Appeals) Income Tax or the Peshawar High Court or as the case may be and as such the initial direction, passed by FTO are in excess of jurisdiction, even the adverse remarks against the Officers are without following the legal course of action, which have rightly been settled by the Worthy President of Pakistan.

5. Arguments heard and record perused.

6. Perusal of record reveals that instant case has a checkered history of refund claim as well as compensation in terms of Section 100 of the Income Tax Ordinance, 1979 (Repealed law), though the refund has already been made to the petitioners on 31.07.2015 and this aspect has been acknowledged by both the parties before this Court. However, the question of compensation on the refund as per the original recommendation of FTO dated 31.05.2010 has never been challenged by the FBR before the FTO and therefore, Federal Tax Ombudsman has rightly asked FBR to pay the compensation, even the earlier direction given by the FTO were remained in field and two different reviews have been filed, which have been settled on different intervals of time. However, the crux of the order passed by Worthy President of Pakistan is as under:-

*It has been settled by the Supreme Court of Pakistan in case of Mst. Kaniz Fatima reported in 2001 SCMR 1493, that where a particular statute provides self contained machinery for determination of questions arising under the statute and law provides a remedy by appeal or revision to another forum fully competent to give any relief, any indulgence to the contrary by any other forum is bound to produce a sense of distrust in statutory forums and writ petition will not be maintainable without first availing the alternate statutory legal remedy. The FTO has no jurisdiction to set aside the order where the forum of appeal is available to the complainant. Thus the impugned findings are not sustainable and the representation is liable to be accepted. Perusal of the record further indicates that the recommendations of the FTO are in excess of his jurisdiction. Undoubtedly no adverse remarks can be recorded in PER of Officers i.e. Chief Commissioner, Commissioner and IRAO without following the legal course of action and without giving them an opportunity of hearing. Only the competent authority can initiate proceedings against officers and adverse action can be taken after following a proper legal procedure. As per law, FTO has limited scope to identify maladministration and debarred from interpreting the law as it is function of the courts. Thus FTO has no jurisdiction to intervene in the matters where remedy by filing an appeal as matter of right is available. Thus FTO has no power to interfere in the service matter and has no authority that any adverse observations be recorded in the PERs including disciplinary proceedings of various officers of rank and file just under the garb of maladministration.*

*It has been established from the record that the refund in the Complainant's case was passed on 31.07.2015 and refund was issued on the same date. Thus no compensation is due and warranted in the instant case. Moreover, FTO has no power to interfere in the service matter and to pass on adverse observations to be recorded in PERs including disciplinary proceeding against various officers under garb of maladministration. In such circumstances, where remedy of appeal was available FTO could not interfere with the matter of assessment of*

*tax and interpretation of law. Thus FTO having gone beyond the scope and powers, the impugned findings are not sustainable. Consequently, the Agency's representation is liable to be accepted and impugned findings/recommendations of FTO are to be set aside by the appellant forum.*

*Accordingly, the President has been pleased to accept Representation of FBNR and set aside the impugned recommendations/findings of FTO.*

7. While going through the above referred order of the President of Pakistan, this Court has attended the original review application filed by the Department FBR dated 01.11.2016, which is apparently time barred, though application for condonation of delay has been filed but the same was without any justiciable reason. Stance of the FBR has been recorded in the order dated 21.06.2021, passed by Federal Tax Ombudsman, whereby FBR has prayed for setting aside of the old recommendations dated 12.11.2013 of FTO, which is not possible at this stage. The Federal Tax Ombudsman has rightly observed that the compensation was considered earlier, whereby, Review Application was filed at that time, but same was declined and even the representation submitted to the President also stood rejected, hence, this aspect confirms that instant review is third in number, which has been filed after the delay of approximately one year from the refund order dated 31.07.2015 for no justiciable reason and the same was rightly rejected by FTO. However, when the matter was assailed before President of Pakistan through representation without taking into account the question of filing of third review and much emphasis has been placed on the jurisdiction of FTO even determination of tax liability, refund amount on account of tax etc, though, it is admitted position of law that

determination of tax liability is not within the domain of President of Pakistan under Federal Tax Ombudsman Ordinance, 2000.

8. This Court has confronted the respondents counsel to justify the review application on the basis of any provision of Federal Tax Ombudsman Ordinance, 2000, as such not a single provision has been quoted, in such scenario, the concept of review has to be taken into account on the basis of settled principles in case law reported as PLD 2019 Supreme Court 749 (Moinuddin and others vs. The State), PLD 2015 Supreme Court 50 (Khalid Iqbal and 02 others vs. Mirza Khan and others), 2018 SCMR 359 (Iqbal Pervaiz and others vs. Harsan and others), 2018 SCMR 997 (Syed Rizwan Ahmed and 03 others vs. Secretary, CADD, Islamabad and others), PLD 2013 Supreme Court 829 (Begum Nusrat Ali Gonda vs. Federation of Pakistan and others), whereby it was settled that second or subsequent review petition is not maintainable, when earlier review has already been decided, neither revisit of the judgment was warranted under the law. Once a case was finally decided, the Court became *functus officio*, only provision which allowed changes in the final order was the provision of review, scope of which was limited to correcting an error that was floating on the face of the record. To have a second opinion of the findings reached in the final order by the same Court or Tribunal was not permissible while exercising power of review.

9. It is also settled position that the review could not be granted to reconsider the merits of any case or on the basis of any additional grounds, which is beyond the scope of review jurisdiction, hence, the Worthy



President of Pakistan in this case has acted without legal jurisdiction while going into the scope of taxable liability and adjustment of refund claims of the petitioners notwithstanding the order passed by the Tax Authorities, which attained the finality against the FBR, whereby they have been directed to refund the amount. This court has also been guided by the principles settled by the Peshawar High Court in the same subject matter reported as 2004 PTD 1994 [Peshawar High Court] (Commissioner of Income Tax vs. Ghazi Barotha Construction), whereby conclusive direction was passed, which is as under:-

*In Writ Petition No. 249 of 2002, it has been prayed that WAPDA be directed not to deduct tax from the payments made to the petitioners and that the amounts already deducted be refunded. Further that the respondents, that is, the Department of Income Tax shall assess the petitioner on net income basis as held by the Income Tax, Appellate Tribunal. In the light of the findings given in the two appeals, the writ petition is allowed in the terms prayed for.*

It can safely be concluded that the referred order has not been denied in any manner, but the refund payment was made on the basis of order dated 31.07.2015 for no justiciable reason of delay, unnecessary litigation is also apparent on record in the past two decades, which has not been denied by the respondent side.

10. The initial claims of refund of the petitioners' company is arising out of two assessment years 1996-97 and 1997-98 on the basis of Income Tax Ordinance, 1979 (repealed law) at the moment, which deals with the refund of assessment in appeal under Section 100 of the Ordinance that general refund of the amount is to be accepted in favour of assessee,

whether he has or has not made any claim in that behalf. Provided that where a refund becomes due to an assessee, who had paid tax under Section 85 read with Section 129, as a result of the decision of the Income Tax Appellate Tribunal, a sum at the rate of fifteen percent per annum shall be payable to him after three months from the receipt of such decision. Similarly, in terms of Section 102, where refund is due and is not paid within three months of the date on which it becomes due, there shall be paid to the assessee, a further sum [by way of compensation at the rate of fifteen percent per annum] of the amount of refund from the expiration of the said three months upto the date on which the refund order is made.

11. The above referred legal aspect has not been denied by the respondent counsel before this Court, in such scenario, the President of Pakistan has gone beyond its scope in terms of legal jurisdiction, while giving certain observation to protect the officials, who have maneuvered and managed the proceedings in last one decade against the petitioners for no justiciable reason.

12. No doubt, the right of representation is available in terms of Section 32 of the Federal Tax Ombudsman Ordinance, 2000 before President of Pakistan to an aggrieved person against the recommendation of the Federal Tax Ombudsman, but it should be within the scope of maladministration provided in Section 2(3) of the Ordinance and as such no illegality has been committed by the FTO while passing the observation against the officials of department and officers of Inland Revenue, especially when they are in a clear defiance of recommendations given by

the Federal Tax Ombudsman in terms of Federal Tax Ombudsman Ordinance, 2000, even there is no bar or restriction upon the FTO to recommend the disciplinary action for corrective measures to the revenue division as envisaged under Section 13 of the Federal Tax Ombudsman Ordinance, 2000.

13. In view of above, when the order of the President of Pakistan is without jurisdiction beyond the settled principles of law and against the precedent settled by the apex Court, in review jurisdiction, this Court is within its powers available under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 to rectify such wrong when the very basic order is beyond jurisdiction on the face of record.

14. The gist of the matter is that instant writ petition is ALLOWED. The impugned order dated 01.11.2016, passed by Worthy President of Pakistan is hereby SET-ASIDE with no order as to costs.

(MOHSIN AKHTAR KAYANI)  
JUDGE

RAMZAN