

FEDERAL TAX OMBUDSMAN
ISLAMABAD

Complaint No.39/Isd/IT(35)/42/2010
Dated 05-01-2010*

M/s Ghazi Barotha Contractors
Islamabad

Complainant

Versus

Secretary,
Revenue Division,
Islamabad

Respondent

Dealing Officer : Sardar Irshad Shaheen, Advisor

Authorized Representatives : Mr. Nauman Rafique, FCA and
Mr. Ali Akhtar, Senior Engineer
and Director, WAPDA

Departmental Representatives : Mr. Shaukat Mahmood,
Additional Commissioner
Mr. Zafar Iqbal, Additional
Commissioner IR
Mr. Asif Haider Orakzai,
Additional Commissioner
Mr. Muhammad Asif, DCIR
Mr. Mohsin Khan, DCIR
Mr. Zaheer Qureshi, DCIR
Mr. Islam-ur-Rehman, SOIR,
Mr. Zia Ahmed Butt, SO IR, LTU
Islamabad
Mr. Salahuddin, FTO/DPU,
Peshawar

FINDINGS/RECOMMENDATIONS

The Complainants, two non-resident contractors, are aggrieved by non-issuance of Income Tax refunds amounting to Rs. 784 million for assessment years 1996-97 to 2002-2003 even after the appellate decisions of the higher judicial fora. It has been

* Date of receipt in FTO Sectt

accepted by the CIT (Appeals). On further appeal, the ITAT accepted Complainant's plea and held that JV comprising non-resident companies could not be assessed as AOP, and their assessment was required to be completed on individual net income basis as per provisions of Double Taxation Treaty (DTR) as well as the agreement clearly showing share of each contractor in profit/loss. On appeal by the Deptt, the High Court endorsed the Tribunal's order in its detailed judgement dated 14-05-2004 holding that provisions of DTR override the provisions of local law in case of a non-resident. The Deptt filed appeal before the Supreme Court which was later withdrawn. The departmental decisions for succeeding years were also annulled by the ITAT on the basis of High Court's decision for assessment years 1996-97 and 1997-98. However, refunds on account of deduction of tax were not issued after giving appeal effect, hence this complaint.

4. During the hearing on 10-02-2010, 17-02-2010, 30-03-2010 and 31-03-2010 and vide letters dated 21-04-2010 and 28-04-2010, the ARs raised the following points:

- (i) The unlawful orders passed by the Department and treating payment of tax as covered under PTR for assessment years 1996-97 to 2000-2001 were merely to thwart issuance of refund on account of excess deduction of tax at source.
- (ii) The Deptt indulged in prolonged litigation upto High Court for assessment years 1996-97 and 1997-98 where it lost its case and the decision of the ITAT was upheld.
- (iii) The Deptt then filed appeal before the Supreme Court, but later withdrew the appeal. Consequently, the High Court judgement attained finality and an

understanding was given to the Complainants that the refund due would be promptly issued.

- (iv) The Deptt assessed the JV as AOP for assessment years 1998-99 to 2000-2001 also, but the Tribunal annulled the orders on the basis of High Court's decision for the preceding years.
- (v) As the Deptt was bent upon thwarting the issuance of refunds, an illegal demand amounting to Rs. 619 million was created against the Complainants on the pretext that the non-resident members of JV being agents of five foreign banks were its lenders, not paying tax on interest. This order was annulled both by CIT (Appeals) and ITAT, but to thwart the issuance of refunds, a reference was filed in the Peshawar High Court. The Peshawar High Court also upheld the decision of ITAT vide its order dated 16-02-2010 with the observation that "the CIT Appeals and the Tribunal have rightly annulled the assessment order by declaring the same as illegal and void abinitio".
- (vi) For assessment years 2001-2002 and 2002-2003 deemed assessments were made, but credit of refund was not allowed through rectification.
- (vii) Member Income Tax CBR vide letter No.3(26) Rev Bud/2001 dated 06-02-2009 directed the Deptt to issue refund of Rs. 164 million, but instead a penalty of Rs. 155 million was imposed on the pretext that returns were not filed by the foreign lenders (banks). This penalty was also deleted both by CIT (Appeals) and ITAT, but the Deptt filed reference in the Peshawar High Court just to prolong litigation, which also stands

deleted as a consequence of Peshawar High Court's decision referred to above.

- (viii) To deny the issuance of refund to the Complainants, the Deptt has made yet another attempt after filing complaint before FTO, intimating that no refund could be issued as an amount of Rs. 510 million was due on account of sales tax and penalties against Ghazi Barotha Consortium, although this amount was to be paid by WAPDA as per General Manager's letter No.GM&PD/GBHP/Cont/487 CA/10229 dated 12-07-2006. Moreover, this demand has since been set aside by Lahore High Court vide its decision dated 28-04-2010.
- (ix) To further aggravate and complicate the issue of refund, the FBR transferred the jurisdiction of the case to RTO Abbottabad from where the jurisdiction was transferred to LTU Islamabad on 20-08-2009. After 1½ years the Chief Commissioner LTU Islamabad started pressing the ARs to get the case transferred back to Peshawar. All these attempts are arbitrary and oppressive tactics to force the Complainants not to press for their due refund.
- (x) The FBR has also been approached several times during the last so many years, but no meaningful action was taken to restore the confidence of the foreign investors/Complainants (who also had constructed Tarbela Dam).
- (xi) The FBR vide letter No.3(26) Rev Bud/2001 dated 11-03-2010, directed the Chief Commissioner LTU, Islamabad, to issue 'balance refund' after 'retaining' another (then outstanding) Sales Tax demand of

Rs. 510 million. But without prejudice to our total claim, no action has been taken for issuance of even the smaller part of refund. And in the meanwhile the Sales Tax assessment has also been remanded back to the Tribunal by Lahore High Court on 28-04-2010 with the direction to decide the case "afresh in accordance with law after hearing the parties", and now no demand remains pending against Ghazi Barotha or WAPDA.

The ARs prayed that action be taken against the concerned officials on account of gross injustice and maladministration cognizable u/s 2(3) of the FTO Ordinance, and the Department be directed to issue refund with compensation due to the Complainants without further delay.

5. The DRs controverted the claim of the ARs and contended that:

- (i) Reference had been filed before the Peshawar High Court against deletion of penalties, and the issue being subjudice (no decision of the court was claimed to have been received by the Deptt on the date of hearing), the jurisdiction of the FTO to hear the complaint was ousted u/s 9(2)(a) of the FTO Ordinance, 2000.
- (ii) The complaint was filed by the Mr. Nauman Rafique, AR, and not by the Complainants which could not be heard u/s 9(1) of the FTO Ordinance.
- (iii) Full evidence of payment of tax/challans was not produced by the Complainants for determining refunds for various years.

- (iv) The assessment orders and IT30s for some years were not available, and there were 'missing links' in the record which needed to be completed.
- (v) Credit of tax deducted had not been given for some years as some payments pertained to Ghazi Barotha Consortium and not to two individual companies.
- (vi) Sales tax amounting to Rs. 510 million was outstanding against M/s Ghazi Barotha Consortium as against Complainant's claim of income tax refund of Rs. 784 million (decision of reference filed by the Complainants in Lahore High Court had not yet been received by the Deptt).

The DRs further claimed that due to old record and transfer of jurisdiction, the case had been delayed, but there was no malafide or maladministration.

6. The AR objecting to the claim of DRs contended that being Chief Financial Officer and Resident Representative, he was duly authorized by the two non-resident companies "to represent their case before any court of law or authority or to appoint any counsel/lawyer and sign any documents incidental to the exercise of these powers". He produced evidence in support of his claim and contended that the departmental objection in the matter was legally invalid. The ARs also rebutted the contention of the DRs regarding non-rectification of assessments and non-verification of payment of tax. They claimed that the officers of the Department were themselves monitoring collection of the contractors of Ghazi Barotha Consortium at every stage as it was in their interest to show higher collection of tax for better performance. They asserted that all the evidence was produced before various circles through

tax payment vouchers prepared by WAPDA and its detail was available with the Deptt's Federal Treasury Officer, and no further evidence was required as per provisions of Section 164(2) applicable during the relevant period (before amendment through Finance Act 2009). The ARs submitted copies of payment vouchers issued by WAPDA to the credit of Income Tax Deptt and cheques duly received by the concerned officers, and copies were placed on record together with print-out verifying the details of payment. They claimed that non-verification of payment and non-rectification (allowing credit for payment) was a mere ploy to delay the issuance of refund to the Complainant.

7. Mr. Ali Akhtar, representing WAPDA, claimed that Sales Tax demand (created unlawfully) was the liability of WAPDA as per terms of Contract Agreement, and this demand has been set aside by the Lahore High Court. He contended that even such demand could not be adjusted against the Complainant's refund. He explained that WAPDA, being a stakeholder in the Project, had deducted tax @ 3% as per terms of agreement with non-resident companies and 2% tax was paid by WAPDA as it had to deduct tax @ 5%, and therefore, WAPDA had re-imbursible share of 2% in the amount of refund claimed by the Complainants on account of this deduction.

8. As regard the preliminary objections raised by DR, the same are not tenable on the ground: (a) orders of penalties being illegal were annulled by ITAT and Tribunal's decision had been endorsed by the Peshawar High Court vide its judgement dated 16-02-2010; and (b) the documents produced by Mr. Nauman Rafique empower him to represent the non-resident contractors to file appeal/complaint or to engage any counsel in the matter.

9. During the hearing, the officers concerned from the RTO Abbottabad produced Daily Collection Registers which indicated

that refund had been created by the Deptt after appeal effects for various years as claimed by the Complainant. (Copies of tax payment vouchers issued by WAPDA and received by the Taxation Officers together with verified detail of payment submitted by the Federal Treasury Officer, DPU Peshawar who also appeared during the hearing showed that claim of the Complainants was genuine and justified.)

10. The fact that the FBR also issued direction to the Chief Commissioner LTU Islamabad vide letter dated 11-03-2010 to issue refund amply demonstrates that Complainant's claim of refund was accepted as genuine, although the FBR does not appear to have examined record properly to appreciate the fact that sales tax demand of Rs. 510 million created against Ghazi Barotha Consortium be adjusted against the refund of the Complainants. The disputed sales tax demand was actually the liability of WAPDA as Employer, as per terms of Contract, as also confirmed by WAPDA's letter, addressed to GB Contractors for filing reference in the High Court. The Complainants being separate juridical persons could not be made responsible for any disputed sales tax demand. Moreover, this demand was also set aside by Lahore High Court on 28-04-2010, and at present no demand is outstanding against the Complainants.

11. After in-depth examination of record, a dismal picture of arbitrary conduct by the departmental functionaries is evident. The concerned tax officials have acted in an oppressive, unreasonable and unlawful manner. They have not only indulged in prolonged purposeless litigation, but have also resorted to arbitrary tactics of creating illegal demand on the pretext of different defaults and penalties which were time and again declared unlawful by the appellate authorities. Such a behaviour not only tends to shatter confidence of foreign investors but has also wasted time and

energy of the Deptt, and unnecessarily created the right of the taxpayer for compensation on the delayed issuance of refund due.

Findings:

12. The arbitrary, unreasonable, oppressive, biased and unlawful conduct of the concerned tax officials is established in the instant case.

Recommendations:

12. FBR to direct the Chief Commissioner to –
- (i) issue refund/compensation due as per law within 30 days;
 - (ii) take measures to avoid unnecessary litigation; and
 - (iii) report compliance within 45 days.

(Dr. Muhammad Shoaib Suddle)
Federal Tax Ombudsman

Dated: 31-07-2010
M.I.

Approved for printing

Mukhtar Hussain

Mukhtar Hussain
Assistant Director (I&M)
Federal Tax Ombudsman Secretariat
Islamabad