



INTERNATIONAL

Tax Litigation and the System of Appeal in Pakistan

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Abstract

This article provides a critical analysis of the level of tax litigation and the appeal system in Pakistan. The author triggers a debate on the possible reasons for the increased tax litigation and the excessive pendency of tax appeal cases, especially in the high courts and the Supreme Court.

1. Introduction

In Pakistan, tax litigation begins when the taxpayer disagrees with a tax assessment made by the tax authorities or any order concerning the imposition of a penalty or additional tax (interest) passed by the tax authorities or any administrative decision taken by the tax authorities.

As will be discussed in section 4 of this paper, tax litigation has been increasing in Pakistan for several reasons. Over the three-year period from 2014 to 2016, the combined pendency of litigation cases in the Supreme Court (“SC”) and the high courts (“HCs”) increased from 304,813 to 312,478. In the SC alone, the pendency of cases increased from 22,764 in 2014 to 31,807 in 2016. However, there was a marginal decrease in the pendency of tax litigation cases in the HCs from 282,049 in 2014 to 280,671 in 2016.²

Approximately 717,266 cases were filed in the SC and HCs during the three-year period from 2014 to 2016. The SC and HCs gave decisions in 685,553 cases. The SC and HCs decided 48,637 and 639,916 cases, respectively, during the same period. Around 59,177 and 658,089 fresh tax litigation cases were instituted in the SC and the HCs, respectively, during the same period.³

Thus, the statistical data reveal that the overall pendency of cases in the SC and the HCs has increased and that fresh litigation cases outpaced the cases decided by the courts during the period 2014 to 2016.

Like many other countries, Pakistan has a standard tax appeal system. An aggrieved taxpayer may appeal the decision of the tax authorities in the office of the Commissioner (Appeals) competent to hear the appeal. If the decision of the Commissioner (Appeals) does not satisfy the taxpayer or the tax authorities, either party may appeal the decision in the Appellate Tribunal (“Tribunal”) competent to proceed on the appeal.

If one of the parties is not satisfied with the decision of the Tribunal, it may lodge an appeal in the HC on the question(s) of law arising out of the Tribunal’s order. The losing party may file an intra-court appeal (“ICA”) in the HC against the decision of a bench comprised of a single judge. The proceedings of an ICA are conducted by a bench comprised of at least two HC judges. Such a bench is called a divisional bench (“DB”). If the taxpayer or the tax authorities are not satisfied with the decision of the HC, either party may file a civil petition for leave to appeal (“CPLA”) to the SC.

The first two appellate fora decide cases on both question of fact and question of law, whereas the HCs and the SC do not examine the facts but only the correct application of substantive law and fundamental procedural rules.

At all the appellate fora, cases are represented by the taxpayer’s representative or counsel. In the tribunals, the HCs, and the SC, cases are pleaded through a legal representative. Normally, the tax authorities represent the cases at the first and second levels of appeal. However, before the HCs and SC, the tax authorities are represented by legal advisors or attorneys.

The remainder of the paper is structured as follows. Section 2 discusses the tax appeal system in the different appellate fora, including the Commissioner (Appeals), the tribunals, the HCs, and the SC. Section 3 presents an overview of other tax fora, such as the office of the Federal Tax Ombudsman (“FTO”) and the alternative dispute resolution (“ADR”) mechanism. Section 4 discusses the possible reasons for the increased tax litigation and the excessive pendency in the HCs and the SC. Section 5 concludes the paper with brief recommendations.

2. Tax Appeal System in Pakistan

Pakistan has a four-tier tax appeal system: Commissioner (Appeals), the Tribunal, the HCs, and the SC. The first two tiers, the Commissioner (Appeals) and the Tribunal, are appellate fora of the first and second instance that decide tax litigation cases on the question of facts and the question of law. The last two tiers, the HCs and the SC, are the judicial fora that decide tax matters involving a question of law only.

2.1. The Commissioner (Appeals)

Normally, the Commissioner (Appeals)⁴ is a senior officer of the Inland Revenue Service (“IRS”) who is appointed by the Federal Board of Revenue (“FBR”). There are several offices of the Commissioner (Appeals) across the country. A taxpayer dissatisfied with any order concerning assessment of tax liability, penalty, or additional tax; rectification of a mistake; claim for a refund; or any other administrative decision of the tax authorities may appeal to the Commissioner (Appeals) on a prescribed form within 30 days of being served with a demand notice for recovery of tax or an administrative decision. If the appeal is against an assessment order, a moderate fee of PKR 1,000 is applicable. In cases where the appeal is against an order other than an assessment order, the fee is PKR 1,000 for companies and PKR 200 for other taxpayers.⁵ The Commissioner (Appeals) may grant a stay against the recovery of tax for a 30-day period, further extendable for another 30 days. After providing adequate opportunity for both parties to be heard, the Commissioner (Appeals) has to pass an order within 120 days of the filing of the appeal or within an extended period of 60 days, wherein he can

- confirm the assessment order of the tax authorities;
- modify the assessment order of the tax authorities;
- or
- annul the assessment order of the tax authorities.

While modifying the assessment order of the tax authorities, the Commissioner (Appeals) can increase the amount of tax or decrease the amount of a refund only after affording sufficient opportunity for the taxpayer to be heard.

2.2. The Appellate Tribunal

The Tribunal⁶ comprises a chairperson and judicial and accountant members appointed by the federal government. A person may be appointed as a judicial member of the Tribunal if he/she has exercised the powers of a district judge or is, or has been, an advocate of a HC and is qualified to be judge of the HC. A Commissioner or Commissioner (Appeals) with at least three years’ experience as a Commissioner, or a chartered accountant or a cost and management accountant with 10 or more years of experience may be appointed as an accountant member of the Tribunal.⁷ A bench consists of at least two members, a judicial member and an accountant or technical member. The tax authorities or a taxpayer dissatisfied with the order of the Commissioner (Appeals) may refer an appeal to the Tribunal within 60 days of being served with an order. A moderate fee of PKR 2,000 is applicable for taxpayers. The Tribunal may stay recovery of tax for a period of 180 days. The Tribunal has to pass an order within 6 months of the filing of an appeal, wherein the Tribunal may make one of the following decisions:

- affirm the assessment order;
- modify the assessment order;
- annul the assessment order; or
- remand the case to the tax authorities or to the Commissioner (Appeals) for a *de novo* enquiry.

2.3. The High Court

There are five HCs. The strengths of the Lahore HC, Sindh HC, Peshawar HC, Balochistan HC, and Islamabad HC are fixed at 60, 40, 20, 11, and 7, respectively.⁸ The qualifications mentioned for the post of a judge are 10 years’ experience as an advocate of

a HC or 10 years' service as a civil servant, including 3 years' experience as a district judge or 10 years' experience in a judicial office.⁹

Either the taxpayer or the tax authorities aggrieved by the decision of the Tribunal may file an appeal in the HC only on the question of law arising out of the order of the Tribunal within 90 days of communication of the order.¹⁰ The SC held in a case of *M/s Squibb Pakistan (Pvt.) Ltd. v. Commissioner of Income Tax* that subsection (1) of section 133 confers on any person or the Commissioner aggrieved by a final order of the Tribunal the right to file an application before the HC along with a statement that must set out¹¹

- the facts as stated in the Tribunal's order; and
- question(s) of law which arise out of the Tribunal's order, regardless of whether this was previously urged or not.

Nonetheless, taxpayers often file a constitutional petition under Article 199 of the Constitution directly in the HC, bypassing the first two appellate fora, on the grounds of violation of fundamental rights by the tax authorities. It is held by the SC that there is a direct right to approach the HC in a similar manner as in appeals, revisions, reviews, and so forth.¹²

A fee of PKR 100 has to be paid by the taxpayer for filing an appeal. Although the tax legislation prescribes that the appeal must be heard by a bench comprised of at least two judges,¹³ normally a bench consisting of a single judge hears appeals concerning tax matters. However, an intra-court appeal ("ICA") is heard by a bench consisting of at least two HC judges. The HC can stay recovery of tax for a period of 6 months. After hearing both parties, the HC is obligated to decide the question of law and to pass a judgment that modifies the decision of the Tribunal accordingly.¹⁴ In other words, the decision of the Tribunal merges into the order of the HC.

2.4. The Supreme Court

An aggrieved party from a decision of the HC may file a final appeal (CPLA) in the SC. The SC is comprised of a principal seat in Islamabad and four branch registries in Lahore, Karachi, Peshawar, and Quetta. The working strength of judges in the SC is 17, a chief justice and 16 judges.¹⁵ A person with 5 years' experience as a judge of a High Court or 15 years' standing as an advocate of a HC is eligible to be appointed as a judge of the SC.¹⁶

The SC reviews the decisions of the five HCs. It is the court of ultimate appeal and the final arbiter of the law and the Constitution. Its decisions are binding.¹⁷ Trials before the SC focus on question(s) of law. The important and indispensable tasks of the SC include the following:¹⁸

- to interpret the law and the Constitution;
- to ensure uniform application of the law;
- to conduct judicial reviews;
- to protect fundamental rights, human rights, and right to life; and
- to contribute towards the development of the law.

3. Other Tax Dispute Resolution Fora

In addition to the appellate fora discussed supra, there are other tax dispute resolution fora, such as the office of the FTO and the ADR mechanism.

3.1. Federal Tax Ombudsman (FTO)

The office of the FTO was created in 2000 to establish a system which is people friendly, expeditious, and capable of providing cost-free redressal services to the public and taxpayers against the malpractices of tax officials.¹⁹ Any taxpayer can file a complaint in the office of the FTO against the malpractices of the tax authorities. In 2017, the office of the FTO received 1,858 complaints on different issues, as against 1,758 in 2016.²⁰ Out of the total complaints received in 2017,

the FTO decided 1,385 complaints in favour of the taxpayers (about 75%), 366 complaints were rejected (18%), and 109 complaints were withdrawn (6%).²¹ The average time for disposal of complaints was 47 days. The main issues in these complaints filed in the FTO office, *inter alia*, included

- non-issuance of refunds within the time limitation provided in the tax statutes;
- non-payment of additional tax (interest) on delayed payment of refunds;
- visit of the tax authorities at business premises for the purpose of monitoring the production and resumption of business records; and
- suspension and subsequent blacklisting of registered taxpayers by the tax authorities.

If aggrieved by a decision of the FTO, the taxpayer or the tax authorities can file a representation before the President of Pakistan, whose decision can also be challenged in the HC by either of the aggrieved parties. In the case of *Chief Commissioner Inland Revenue v. M/s Cherat Cement Company Ltd*, the Peshawar HC held that the petition filed by the department against the *quasi-judicial* order of the President of Pakistan in the HC was maintainable and subject to judicial review.²²

3.2. Alternative Dispute Resolution (ADR)

Any person with a grievance concerning liability of tax, admissibility of a refund, or the waiver or fixation of a penalty or fine may apply for the appointment of a committee for the resolution of any hardship or dispute. Taxpayers can seek to resolve tax disputes via ADR instead of through the conventional method of appealing through the appellate authorities, tribunals, and courts of law. The aims of ADR are to reduce the costs of appeal to taxpayers, to expedite the resolution of tax disputes, and to reduce tax litigation.²³

Generally, taxpayers can apply in writing for ADR if they have issues pertaining to income tax, sales tax,

customs duty, or excise duty which are pending before the appellate authorities, tribunals, or courts of law provided that prosecution or criminal proceedings have not been initiated or that the case does not involve interpretation of law. Taxpayers do not have to pay to apply for ADR.

Once an application for ADR is approved, an ADR committee (“ADRC”) will be formed within 60 days (for income tax cases) or within 30 days (for other cases). The ADRC will carry out proceedings to determine the issue(s) before making recommendations to the FBR within 90 days of its constitution, failing which a new committee will be formed to decide on the case within an extended period of 90 days. If the case cannot be resolved by then, it will revert to the appellate authorities, tribunals, or courts of law. If the FBR does not pass an appropriate order within 90 days from the receipt of the ADRC’s recommendation, the ADRC’s recommendation will be treated as an order passed by the FBR. The resolution reached between the FBR and a taxpayer cannot be used as a precedent in the same case or any other cases.²⁴

An appeal to the ADR does not strip taxpayers of their rights to appeal through the appellate system. Hence, taxpayers who disagree with an FBR order can still appeal through the appellate authorities, tribunals, or courts of law. Taxpayers can withdraw an application for ADR before the ADRC submits its recommendations to the FBR.²⁵

Taxes, duties, interests, and penalties imposed would still have to be paid pending finalisation of tax disputes. However, the ADRC cannot increase the taxes or duties.

The FBR has also constituted ADRC committees consisting of leading consultants, chartered accountants, retired tax officers of the FBR, and persons from chambers and commerce.²⁶

4. Reasons for Increased Tax Litigation and Pendency of Cases

A fresh wave of litigation cases have taken place in the recent past against the actions of the Directorate General of Intelligence and Investigation (Inland Revenue), which was established during the tax year 2012 to take stringent action against tax evasion and money laundering. The Directorate General initiated prosecutions against many tax evaders on the basis of definite information of tax evasion in the form of records retrieved from business premises under the provisions of tax laws. However, the HC at Lahore held that determination of civil liability is a prerequisite for the initiation of a prosecution.²⁷ Hundreds of such cases are pending before the SC for a final verdict. Recently, the HC at Lahore declared the powers and functions of the Directorate General illegal and against the Constitution on the grounds that the establishment of the Directorate General was not approved by the federal government.²⁸ Many cases initiated by the Directorate General are pending in the HCs on this issue. Other reasons for the increased tax litigation and huge pendency of cases at the appellate fora and at various courts can be found at the tax authority level, the taxpayer level, and the appellate fora level.

4.1. At the Tax Authority Level

As Pakistan's economy is largely informal, it is difficult for the tax authorities to trace money trails and to establish definite information concerning tax evasion. Most of the assessment orders are passed *ex parte* and without bringing on record definite information concerning tax evasion. All such assessment orders are being challenged in the appellate fora and are being contested up to the courts.

Assessment orders, especially in the cases hitting the statutory time limitation, are being passed without

affording sufficient opportunity of hearing. All such assessment orders are being challenged in the appellate fora and the courts on the grounds of the non-affording of the opportunity of a hearing, which is against natural justice and violates a person's fundamental rights. The SC held that no one can be punished unheard.

The tax authorities repeatedly pass assessment orders on the legal provisions which are declared *ultra vires* of the Constitution by the courts. Last but not least, important cases involving considerable tax revenue are not being pursued actively and on a priority basis, thus depriving the national exchequer of tax revenue for years.

4.2. At the Taxpayer Level

Taxpayers file appeals in the appellate fora and petitions in the courts on the issues which are either already decided by the courts or which are frivolous in nature, which result in a loss of valuable court time.

Taxpayers do not always cooperate with the tax authorities by providing records during tax audits. Tax audits concluded *ex parte* with huge tax demands are always challenged by the taxpayers. They intentionally do not attend the hearing, and when an assessment order or any other order is passed, they challenge such orders on the grounds that they were not provided the opportunity of a hearing. However, they produce relevant records before the appellate fora.

There is an increasing trend among taxpayers to file petitions in the courts rather than participate in the proceedings and to seek relief through the appellate fora. Instead of participating in the proceedings and pursuing the matter with the tax authorities, taxpayers are frequently challenging notices of the initiation of tax proceedings and of the recovery of tax in the courts in order to seek a stay of proceedings and recovery.

4.3. At the Appellate Fora Level

The Commissioner (Appeals) and the tribunals do not always follow the deadline prescribed in the tax legislation for making decisions, and litigation cases continue to pile up. The Commissioner (Appeals) and the tribunals also entertain appeals which are beyond their jurisdiction, although these offices are not sufficient to deal with the large number of litigation cases.

There is an excessive workload on judges due to limited number of judges in the courts. With the current pendency of 38,342 cases in the SC and 295,745 cases in the HCs, there is an average workload of 2,396 cases per judge in the SC and 2,444 per judge in the HCs.²⁹ To add to this, the courts observe the summer and winter holidays in addition to the official national holidays. This practice, coupled with lawyers' strikes, reduces the number of working days. Otherwise, the judges would be in a position to decide more cases, which would result in a significant reduction of pendency.

The HCs liberally grant interim relief by way of a stay of proceedings or demand suits. This practice encourages taxpayers to file more petitions. The courts seldom impose costs on the parties in the case of appeals and petitions involving issues of a frivolous nature. There is no mechanism at the level of the courts concerning the segregation of important cases, which remain pending for years. For example, the case of *Taj International (Pvt.) Ltd. etc. v. The Federal Board of Revenue, etc.*, wherein the Lahore HC gave a decision in 2013 that the determination of civil liability is a prerequisite for lodging prosecution proceedings against tax fraudsters, is still pending in the SC.³⁰ There are 340 large taxpayers in this case.

Last but not least, the quality of representation before the courts is not satisfactory due to lack of expertise among public prosecutors (legal advisors) in taxation

matters and also because the fee structure for them is not competitive vis-à-vis the private sector.

5. Conclusion

This article revisited tax litigation and the tax appeal system in Pakistan. Tax litigation is increasing, and the pendency of cases in the appellate fora and the courts is very high. It takes many years for cases to be finally decided by the SC.³¹ In order to reduce tax litigation and to ensure speedy and affordable justice for taxpayers, it is essential to standardise business practices so that the tax authorities can seek guidance from these standards while finalising assessments. Improving the quality of the assessment work of the tax authorities by providing them with periodic training on tax laws and reviewing the assessment work of the tax authorities and assigning audit work to the tax officers and officials who are competent and skilled in the area of auditing could play a significant role in reducing litigation.

Tax law is riddled with excessive tax exemptions, and tax relief needs to be simplified and anomalies and inconsistencies must be removed so as not to provide opportunities for taxpayers to file appeals in the courts.

For the speedy disposal of cases, measures such as increasing the number of courts and the number of judges, simplifying the procedure of the courts, hearing cases involving the same issue together, including technical members with experience of tax matters on the benches of the courts, and imposing costs on the parties instituting appeals or petitions on tax issues of a frivolous nature are proposed.

Last but not least, strengthening the ADR mechanism, making extended use of technology for the better management of litigation cases, and improving the skills, knowledge, and expertise of legal advisors through training and encouraging them to participate in seminars, workshops, and writing papers would

be helpful in overcoming the problem of excessive litigation.

Endnotes

1. Additional Director Intelligence & Investigation (Inland Revenue), Federal Board of Revenue, Pakistan. The author graduated in Taxation Policy and Management from Keio University, Japan, under a Joint Japan/World Bank Graduate Scholarship. The opinions expressed in this article are the author's and do not represent the opinion or position of the Federal Board of Revenue. The author can be contacted at bilal.hassan@fbr.gov.pk. I am thankful to Mr. Muhammad Zeeshan, Assistant Commissioner (Inland Revenue), for reviewing the article.
2. See M. T. Masood, *Strategy for delay reduction and expeditious disposal of backlog of cases*, paper presented at the 8th Judicial Conference (4-5 May 2018) organised by the Law and Justice Commission of Pakistan. Data also contain cases relating to customs duty or trade taxes administered by the Customs Department.
3. Id.
4. The Collector (Appeals) is the first stage of appeal for hearing tax litigation cases involving the Customs Department and taxpayers.
5. Section 127 of the Income Tax Ordinance 2001 (ITO).
6. The Customs Tribunals hear cases concerning customs duty or trade taxes.
7. Section 131 of the ITO.
8. Id.
9. Article 193 of the Constitution.
10. Section 133 of the ITO.
11. 2017 SCMR 1006.
12. See *M/s Squibb Pakistan (Pvt.) Ltd. v. Commissioner of Income Tax* [2017] SCMR 1006.
13. Section 133 (4) of the ITO.
14. 2017 SCMR 1006.
15. See Dr. F. Hussain, *The Judicial System of Pakistan*, at http://www.supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf (accessed 28 May 2018).
16. Article 177 of the Constitution.
17. Article 189 of the Constitution.
18. See S. A. Zafar, *Role of Supreme Court in Contemporary Age*, at <http://www.supremecourt.gov.pk/ijc/articles/9/4.pdf> (accessed 29 May 2018).
19. See Federal Tax Ombudsman, *Annual Report 2017*, at http://www.fto.gov.pk/files_upload/annualreports/Annual_Report_2017.pdf (accessed 28 May 2018).
20. Id.
21. Id.
22. Writ Petition No. 2132-P/2015 decided on 30 January 2018, at http://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/Writ-petition-2132-2015-_-Chief-Commissioner-Inland_.pdf (accessed 31 May 2018).
23. See Z. I. Kalanauri, *ADR for resolving tax related disputes*, at <http://www.zklawassociates.com/wp-content/uploads/2012/03/ADR-for-Resolving-Tax-Related-Disputes-.pdf> (accessed 30 June 2018).
24. Pakistan News, 9 May 2017, IBFD.
25. See Federal Board of Revenue, *The mechanism of alternative dispute resolution* (April 2017), at <http://>

download1.fbr.gov.pk/Docs/20174141643022460TheMechanismofADR.pdf (accessed 31 May 2018).

26. See SRO 60(I)/2018 of 25 January 2018 at <http://download1.fbr.gov.pk/SROs/2018130151424025SRO60of2018.pdf> (accessed 30 May 2018).
27. See judgment of the High Court in the case of *Taj International (Pvt.) Ltd. etc. v. The Federal Board of Revenue, etc.*, at <https://delawarelaw.widener.edu/files/resources/tajinta2013lhc4817.pdf> (accessed 30 May 2018).
28. See judgment of the High Court Lahore in the case of *F.M. Textile Mills & others v. Federal Board of Revenue and others*, at <http://sys.lhc.gov.pk/appjudgments/2017LHC2656.pdf> (accessed 30 May 2018).
29. See Masood, *supra n. 2*.
30. Writ Petition No. 5047/2012.
31. See Dr I. Haq, *CJP and judicial reforms*, Daily Times (15 April 2018), at <https://dailytimes.com.pk/228113/cjp-and-judicial-reforms/> (accessed 30 May 2018). **T**