

Federal Board of Revenue
Versus
M/s Khan Traders, Mailsi

**REPRESENTATION PREFERRED BY FBR AGAINST FINDINGS / RECOMMENDATIONS
DATED 11.07.2016 IN COMPLAINT NO. 63/MLN/IT/41/489/2016**

I am directed to refer to your representation No.4(489)TO-I/2016 dated 09th August, 2016 on the above subject and to say that the President has been pleased to pass the following orders:

2. This Representation dated 09-08-2016 has been filed by the FBR - Agency against the findings of the FTO dated 11-07-2016, whereby it has been held that:

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"Instead of initiating proceedings under Section 122(5A) of the Ordinance, the Deptt should have just finalized the refund case as per its commitments. Chairman, FBR is advised to look into this aspect and have an inquiry conducted against defaulting officers/officials. This office may be appraised of the outcome."

3. The brief facts of the case are that this complaint is filed under Section 10(1) of the Federal Tax Ombudsman Ordinance, 2000 (FTO Ordinance) against order of amendment under Section 122(5A) of the Income Tax Ordinance, 2001 (the Ordinance) dated 11-04-2016 for the Tax Year 2014.

4. The Complainant had earlier filed complaint No.118/FSD/IT(94)/487/2015, dated 17-04-2015 against non-issuance of refund of Rs.0.582 million on account of excess tax withheld under Section 231A of the Ordinance. During the processing of complaint, the Deptt contended that due to technical problems in the IRIS, the refund could not be issued within the time prescribed in law. However, the Departmental Representative (DR) assured to dispose of refund claim as per law as soon as the system was operative. Findings/recommendations were issued on 08-10-2015. Both the parties were directed to resolve the matter amicably, settle the refund claim and report compliance within three weeks. But the Deptt failed to comply with the recommendations within the due date. Aggrieved, the Complainant filed application under Section 16(1)(a) on 14-12-2005 for contempt proceedings. In retaliation, the Deptt initiated proceedings for amendment of assessment vide notice under Section 122(9) of the Ordinance bearing No.10000001024076 dated 29-02-2016 and passed the impugned order on 11-04-2016 determining tax at Rs.1.051 million.

5. The Authorized Representative (AR) vehemently assailed the order of amendment as illegal and uncalled for. According to him, only a general but factually incorrect notice under Section 122(9) of the Ordinance was issued without specifying the relevant provisions of law. The notice prescribed under Rule 68 read with Part-II of the First Schedule of the Income Tax Rules 2002 was never confronted. Moreover, three opportunities of 15 days as per directions of FBR vide Circular No. 7(2)/94 dated 01-02-1994 were denied. The Additional Commissioner IR (Audit) issued first notice under 122(9) on 19-02-2016 which was served on 25-02-2016 for compliance on 29-02-2016, second notice issued on 04-03-2016 was served on 11-03-2016 for compliance by 15-03-2016 and the third notice issued on 19-03-2016 was served on 23-03-2016. The AR sought adjournment on 30-03-2016 but the Additional Commissioner ignored the request and hastily passed order under Section 122(5A) of the Ordinance dated 11-04-2016.

6. According to the Complainant, it was only a ploy to not only deny the refund but also to cause further harassment to the Complainant by raising substantial demand of Rs.0.438 million. The action of passing such illegal order without jurisdiction was tantamount to maladministration under Section 2(3) of the Ordinance. The Complainant prayed to take serious notice of the same, declare the order as unlawful and grant other appropriate relief, as coercive measures for recovery had been initiated and the Complainant was likely to suffer irreparable loss. Application for stay against the recovery was also filed under Section 11 of the FOIRA, 2013 by the Complainant. Another application U/S 18 read with Section 12 of the said Act was moved on 14-04-2016 contending that no authority or court had jurisdiction to entertain matters which fell within the jurisdiction of an Ombudsman nor any court or authority would assume jurisdiction in respect of any matter pending with or decided by an Ombudsman. It was argued that the Deptt had ignored the same and arbitrarily amended the assessment in violation of the aforementioned provisions of FOIRA, 2013.

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7. The complaint was sent for comments to the Secretary Revenue Division, in terms of Section 10(4) of the Federal Tax Ombudsman Ordinance, 2000 (FTO Ordinance). In response, the FBR vide letter C.No.4(489)/TO-1/2016, dated 04-05-2016 forwarded comments dated 27-04-2016 of the Commissioner IR, Sahiwal, Zone contending that the matter pertains to the determination of income tax liability. The office of FTO had no jurisdiction to investigate or enquire into such matters as legal remedy of appeal or review was available under the relevant legislation. In support, President's decision No.178/2005-Law (FTO) dated 26-05-2006 in XC.No.1096-L/2015 (Mr. Munir Hussain, Okara VS FBR) and No.118/2014-Law (FTO) dated 14-06-2015 have been referred. On merits, the Deptt contended that specific notice U/S 122(9) of the Ordinance read with Rule 68 was issued and he neither provided explanation nor attended the proceedings. The case was fixed for hearing on 29-02-2016. In response, the Complainant requested adjournment which was accorded. The hearing was re-fixed on 15-03-2016, but no compliance was made. Under the circumstances, the case was decided on 30-03-2016 as per facts on merits after affording proper opportunity of being heard. The Additional Commissioner IR lawfully amended the assessment along with seven (07) other cases, hence no personal grudge was involved. The DR reiterated the written comments. According to him, the order was legally justified as per facts.

8. The matter has been considered and both the parties heard by FTO. Thus FTO has issued the aforementioned findings.

9. The instant Representation has been filed by FBR. The Agency has taken ground that the complaint was lodged on 17-04-2015 by Mr. Muhammad Hussain Prop. M/S Khan Traders Ghallah Mandi Mailsi, before the Honorable FTO. Honorable FTO disposed of the complaint vide order dated 08-10-2015 with the observations that on the assurance of the department to settle the refund claim as soon as IRIS starts functioning, both the parties were directed to resolve the matter amicably, settle the refund claim and report compliance within three weeks.

10. The Agency has pleaded that the refund claim could not be processed within prescribed period as per Board's directions contained in letter dated 01-01-2015 that all processes relating to Income Tax for the Tax Year 2014 are to be performed through IRIS and manual processing was not allowed. The IRIS was not fully operational at Sahiwal at that time. However, during the pendency of refund, the Additional Commissioner Inland Revenue amended the assessment vide order dated 11-04-2016 and as a result of this no refund was due to the taxpayer.

11. The Agency has contended that without prejudice to the above, the recommendations of the Honorable FTO dated 11-07-2016 are against the facts and circumstances of the case as the delay in issuance of refund is not on the part of any officer / officials of department rather it is due to technical problem and non-functioning of newly introduced system "IRIS" as the department is bound to observe the law and procedures.

12. The Agency has prayed that decision of the Honorable Federal Tax Ombudsman dated 11-07-2016 in the complaint No.63/MLN(41)/489/2016 may be vacated.

13. On the other hand, the Complainant has filed comments against the instant Representation of FBR on 18-8-2016 and prayed that the representation filed against complaint No.63/MLN/IT/(41)489/2016, which is already in favour of department may be rejected being not maintainable and proceed the department u/s 12 of the FTO Ordinance 2000 which is refer to by the Honorable FTO in Complaint No.118/FSD/IT/(94)487/2015 and obliged and also take appropriate measures against the Department for suppression of facts and not implement the finding/Recommendation passed in complaint No.118/FST/IT/(94)487/2015.

14. There is no question on the facts that the jurisdiction of the FTO is barred u/s 9(2)(b) to investigate or inquire into the matter which relate to assessment of income or wealth, determination of liability of tax, interpretation of law, rules and regulations relating to such assessment / determination in respect of which legal remedy of appeal or review or revision is available under the relevant legislation. In case the complainant was aggrieved of any action or inaction of the Agency, the complainant has the remedy to file an appeal to the Commissioner Appeals, Income Tax Tribunal, the High Court and the Supreme Court of Pakistan. Hence the matter was not within the jurisdiction of FTO, which is not an appellate forum. In such circumstances, where remedy of appeal was available, FTO could not interfere with and could not pass orders under garb of maladministration.

15. It has already been held vide order No. 88/FTO/2013 dated 05.06.2013 (corresponding Law Division's Summary No.73/2011-Law(FTO) dated 12.06.2013 in Complaint No. 90/LHR/IT(79)/204/2011), that: "matter pertained to assessment of income and determination of liability of tax as also interpretation of law and there is no dispute that legal remedy of appeal as well as revision was available under the Income Tax Ordinance 2001. Findings and recommendations of FTO are not sustainable." In another case No. 384/FTO/2013 dated 09.09.2013 (corresponding Law Division's summary No.50/2012-Law(FTO) dated 24.07.2013 in Complaint No. 181/LHR/IT (128)/ 355/ 2012), it has been held that: "there is no manner of doubt that the matter pertained to determination of liability of tax also involving interpretation of law/ rules relating to such determination and legal

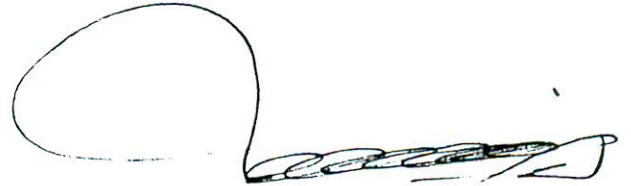
remedies of appeal are available under the said Ordinance 2001. Findings do disclose that FTO has assumed unto himself the jurisdiction of appellate authority which is not permissible under the provisions of FTO Ordinance 2000. Findings and recommendations of FTO are therefore not sustainable.”

16. It is an admitted position that the matter involves the determination of tax liability and refundable amount on account of tax. Such matters are appealable before the Commissioner (Appeal), Appellate Tribunal (IR), the High Court and the Supreme Court. Where remedy of appeal is provided under the law the FTO has no jurisdiction to investigate the matter in the name of maladministration. In case the complainant was aggrieved of any action or non action on the part of official(s) of the Agency, it has the remedy to file an appeal at appropriate forum under the relevant law.

17. Perusal of the record 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 a 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 of various officers of rank and file just under the garb of maladministration.

18. 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. However, the complainant can seek remedy available to him from the relevant forums under the law.

19. Accordingly, the President has been pleased to accept the Representation of FBR – Agency and set aside the recommendations of FTO.



Zulfiqar Hussain Awan
Director (Legal-II)

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The Chairman,
Federal Board of Revenue,
Islamabad.

No.125/FTO/2016 dated 29.9.2016

Copy for information to:

1. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
2. Mr. Muhammad Mazhar Hussain, M/s Khan Traders, Ghalla Mandi, Mailsi.
3. Mr. Khalid Hussain Ghori, Advocate, 16-B, Fareed Canal, Qasim Pur, Multan.
4. Director to Secretary to the President.
5. Master file.

Zulfiqar Hussain Awan
Director (Legal-II)

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