

Federal Board of Revenue  
Versus  
M/s Naudero Sugar Mills, Karachi

REPRESENTATION PREFERRED BY FBR AGAINST FINDINGS / RECOMMENDATIONS DATED 18.05.2016 PASSED BY THE FTO IN COMPLAINT NO. 75/KHI/IT(23)/258/16

I am directed to refer to your representation No. 4(258)TO-I/2016 dated 15.06.2016 on the above subject and to say that the President has been pleased to pass the following orders:

2. This representation dated 15.6.2016 has been filed by the Agency/FBR against the findings of FTO dated 18.5.2016 whereby it has been recommended that:

"FBR is to:-

- i. Direct the Commissioner to cancel the order dated 08.12.2015 in terms of section 122A of the Ordinance and pass fresh order after providing opportunity of hearing to the complainant in a transparent manner;
- ii. The senior officers working in the field at management level to be sensitized to avoid such serious misapplication of law in future; and
- iii. Report compliance within 30 days."

3. The brief fact of the case are that the complaint is filed against alleged unlawful order dated 8.12.2015 passed under Section 122A of the ITO 2001 for Tax Year 2015.

4. The Complainant a private limited company engaged in manufacturing and sale of refined sugar, was served with a notice dated 16.7.2015 by the officer IR, Unit-I WHT Zone, RTO-II, Karachi calling for various information / details for Tax Year 2015 as required under Rule 44(4) of the Income Tax Rules, 2002 and under Section 176 of the Ordinance. The Complainant complied with the statutory notice and furnished complete details and documents required by the OIR, Unit-I, WHT. The OIR, thereafter, passed the order dated 6.8.2015 under Section 161 read with Section 205 of the Ordinance. According to the Authorized Representative (AR), the Complainant subsequently received impugned order dated 8.12.2015 from the Commissioner IR (CIR) WHT Zone, RTO-III, whereby exercising jurisdiction under Section 122A of the Ordinance, he annulled the order dated 6.8.2015 and remanded the case back to the OIR for de-novo proceedings. He contended that maladministration had been committed on the grounds that the impugned order was passed-

- a. Without providing opportunity of hearing to the Complainant;
- b. Without having proper jurisdiction; and
- c. In violation of Section 122A(3) which stated that order passed under Section 122A(2) of the Ordinance shall not be prejudicial to the taxpayer.

5. In response to the notice of complaint issued to the Secretary, Revenue Division, FBR vide letter C.No.4(257)TO-I/2016 dated 21.3.2016 submitted comments of the CIR, WHT Zone dated 14.3.2016 to FTO. It was contended that monitoring of withholding Tax was carried out in the Complainant's case and in consequence the default of collecting and depositing tax was established against him. Consequently the order dated 6.8.2015 was passed under Section 161 read with Section 205 of the Ordinance creating tax liability of Rs.186,023/- but this order suffered from serious lapses / discrepancies on the part of OIR as reported by the Additional Commissioner IR vide letter dated 6.10.2015. It was further contended that in terms of Sub Section (2) of Section 122A of the Ordinance, where, after making such enquiry as was necessary, the CIR could consider the revision of the order (suo moto) as he deemed fit. Thus by invoking jurisdiction under Section 122A of the Ordinance, the order was annulled and remanded back to the OIR for fresh proceedings. The CIR considered that there was no need to provide an opportunity of being heard to the Complainant since no prejudice was caused to him. As regards jurisdiction of the CIR WHT to initiate proceedings under Section 122A of the Ordinance the Chief Commissioner IR, RTO-III vide letter dated 25.4.2016 added that in terms of Section 209(1) of the Ordinance the FBR vide Sr. No.07, Column-III of Notification dated 6.2.2013 had conferred upon CIR WHT for the purpose of 'monitoring and enforcing' in respect of the Ordinance, Sales Tax Act 1990 and FED 2005. The powers of the CIR were nowhere curtailed in respect of revisiting an order under Section 122A of the Ordinance. It was averred that the CIR WHT had rightly exercised his statutory powers in terms of Section 122A of the Ordinance.

6. The Authorized Representative (AR) in his rejoinders dated 2.4.2016 and 5.4.2015 reiterated his pleadings on the original grounds. He argued that during the monitory proceedings the Complainant had furnished complete

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record / information required by the OIR vide letter dated 16.7.2015. This fact was duly mentioned by the OIR in the order dated 6.8.2015. He further argued that the impugned order was passed without jurisdiction and was prima facie illegal as provision of Section 122A(3) clearly provided that order under Section 122A(2) 'shall not be prejudicial to the person to whom the order relates'. Even otherwise the cardinal principle of justice, audi alteram partem, has been violated as the CIR while passing the impugned order has denied the Complainant an opportunity of hearing. Moreover, the Complainant has no legal remedy available to seek justice against this perverse, arbitrary and unlawful treatment.

7. The arguments of both the parties have been given due consideration and record perused by FTO. Thus FTO has issued the aforementioned findings.

8. The instant representation has been filed by the Agency-FBR. The Agency has taken ground that the FTO was not justified to hold that passing impugned order dated 8.12.2015 is in violation of provisions of sub Section (3) of Section 122A of the Ordinance and without affording opportunity of hearing is tantamount to maladministration in terms of Section 2(3) of the FTO Ordinance. The observations of the FTO are contrary to the provisions of law.

9. The Agency has argued that FTO was not justified to interpret the law when no prejudice has been caused to the taxpayer and when there is no any provision for opportunity of hearing in the statutory provision of Section 122A of the Ordinance. Hence in the instant case there is no violation of principles of natural justice. This view gains support from the decision of Supreme Court of Pakistan in the case of Justice Khurshid Anwar Bhinder Vs Federation of Pakistan and others (CMA No.2745/2009 in CRP No.Nil/2009 in Const.P.No.08/2009). The relevant excerpt from the decision is reproduced as under:-

....."Since the audi alteram partem rule is intended to inject justice into the law, it cannot be applied to defeat the ends of justice, or to make the law lifeless, absurd, stultifying, self defeating or plainly contrary to the common sense of the situation. 'Audi alteram partem' rule as such is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications." (Emphasis provided). (Maneka Gandhi v. Union of India AIR 1978 SC 597). It may not be out of place to mention here that by now it is well established that "where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded. Thus, the rule may be discarded in an emergent situation where immediate action brooks no delay to prevent some imminent danger or injury or hazard to paramount public interests."

10. The Agency has pleaded that the FTO was not empowered to entertain the complaint in terms of Section 9(2)(b) of the FTO Ordinance, 2000 which clearly says that the FTO shall not have the jurisdiction to investigate or inquire into matter where legal remedy is available under the relevant legislation. The relevant provisions are reproduced as below:

"9(2) "The FTO shall not have jurisdiction to investigate or inquire into matters which:

- a. "relate to assessment of income or wealth, determination of liability of tax or duty, classification or valuation of goods, interpretation of law, rules and regulations relating to such assessment, determination, classification or valuation in respect of which legal remedies of appeal, review or revision are available under the Relevant Legislation."

11. The Agency has prayed that the findings of the impugned order of the FTO may very be vacated.

12. On the other hand, the Complainant has filed his comments against the instant representation of FBR-Agency on 2.7.2016 through Rao & Company, Chartered Accountants and supported the impugned recommendations/findings of learned FTO.

13. FTO has no jurisdiction to intervene in the matters where remedy by way of filing an appeal as a matter of right is available. FTO cannot direct for exercise power of review u/s 122A as this power exclusively for Commissioner. FTO has no power to set aside earlier passed order by Competent Authority. 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.

14. 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." 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. 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, if so advised.

15. Accordingly, the President has been pleased to accept the representation of the Agency/FBR and set aside the recommendations of learned FTO

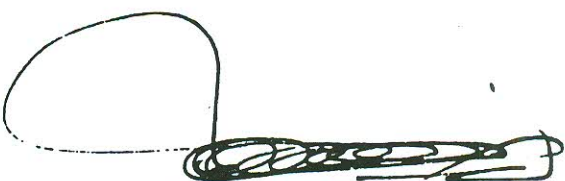
  
Zulfiqar Hussain Awan  
Director (Legal-II)

The Chairman,  
Federal Board of Revenue  
Islamabad.

No.107 /FTO/2016 dated 01.09.2016

Copy for information to:

1. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
2. Mr. Zaheer Ahmed, Compay Secretary M/s Naudero Sugar Mills Pvt) Ltd, State Life Building No. 10, Abdullah Haroon Road Karachi.
3. Rao Nisar Ahmed, FCA, M/s Rao & Copany, Chartered Accountants, Karachi Chambers, Hasrat Mohani Road, Karachi.
4. The Chief (Legal-I), Federal Board of Revenue, Islamabad.
5. Director to Secretary to the President.
6. Master file

  
Zulfiqar Hussain Awan  
Director (Legal-II)

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