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PRESIDENT'S SECRETARIAT (PUBLIC)
AIWAN-E-SADR, ISLAMABAD

Favourable

Federal Board of Revenue
Versus
Mr. Muhammad Ajmal Khan

Sub: **REPRESENTATION PREFERRED BY FBR AGAINST FINDINGS / RECOMMENDATIONS
DATED 26.7.2016 PASSED BY THE FTO AGAINST COMPLAINT NO. 60/MLN/IT/38/469/2016**

21 NOV 2016

M(L)

I am directed to refer to your representation No. 4(469)TO-I/2016 dated 23rd August, 2016 on the above subject and to say that the President has been pleased to pass the following orders:

2. This representation dated 23-08-2016 has been filed by the FBR/Agency, against the findings of the FTO dated 26-07-2016, whereby it has been held that:

"The Departmental action to withhold refund despite commitment and initiate proceedings to create tax demand amounts to defiance and maladministration cognizable under the provisions of FTO Ordinance 2000. Chairman, FBR needs to look in to this practice of its field officers and get an inquiry on the acts of omission and commission in the instant case conducted to identify the officer(s).

A report of the inquiry so conducted should be forwarded to this office within 30 days."

Muh
23.11.2016

3. The brief facts of the case are that this complaint is filed against orders of amendment under Section 122(5A) of the Income Tax Ordinance, 2001 (the Ordinance) dated 30.03.2016 for the Tax Year 2014 and the Tax Year 2010, 2011 and 2013.

4. Briefly stated, the Complainant had earliest filed complaint No. 120/FSD/IT(96)489/2015 dated 17.04.2015 against non-issuance of refund on account of excess tax withheld under Section 321A of the Ordinance. During the processing of complaint, the Department 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 with mutual assistance, settle the refund claim and report compliance within three weeks. But the Department failed to comply with the Recommendations within the due date. Aggrieved, the Complainant filed application under Section 16(1)(a) of FTO Ordinance, 2000 on 14.12.2015 for initiation of contempt proceedings. In retaliation, the Department initiated proceedings for amendment of assessment vide notice under Section 122(9) of the ordinance bearing No. 3660296248643 dated 19.02.2016 and passed order on 30.03.2016 determining Tax at Rs. 3.430 million.

5. The Authorized Representative (AR) vehemently assailed the order of amendment as unlawful and arbitrary. According to him, only a general and 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 30.03.2016.

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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 in a vindictive manner by raising substantial demand of Rs. 3.430 million. As per FTO, the action of passing such malafide 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 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 submitted contending that no authority or court shall have jurisdiction to entertain matters which fall 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 Department had vindictive and arbitrarily amended assessment in violation of the aforementioned provisions of FOIRA, 2013.

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(469)/TO-I/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 has 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 decisions No.178/2005-Law(FTO) dated 26.05.2006 in C.No. 1096-L/2015 and No.118/2014-Law(FTO) dated 14.06.2015 have been referred. On merits, the Department contended that specific notice u/s 122(9) of the Ordinance read with Rule 68 was issued and the Complainant and was also provided three opportunities, but 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. Lastly, the case was fixed for hearing on 30.03.2016, but the hearing notice remained un-complied with. 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.

8. The DR reiterated the written comments. According to him, the order was legally justified as per facts. The matter has been considered and both the parties heard by FTO. Thus FTO has issued 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 Ajmal Khan, Proprietor New Khan Commission Shop, Ghalah Mandi, Mailsi, before the FTO.

10. The Agency has argued that the 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 with mutual assistance, settle the refund claim and report compliance within three weeks.

11. The Agency has contended 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 assessments vide order dated 30.03.2016 and as a result of this no refund was due to the taxpayer.

12. The Agency has pleaded that without prejudice to the above, the recommendation of the FTO dated 26.07.2016 are against the facts and circumstances of the case as the delay in issuance of refund is not on the part of any officer of department rather it is due to technical problem and not functioning of newly introduced system "IRIS" as the department is bound to observe the law and procedures.

13. The Agency has prayed that decision of the Federal Tax Ombudsman dated 26.07.2016 in the complaint No. 66/ML/IT/38/469/2016 may be vacated.

14. On the other hand, the complainant has filed comments against the instant representation of FBR through Khalid Hussain Ghori, Advocate High Court and supported the impugned recommendations of learned FTO.

(5) SS

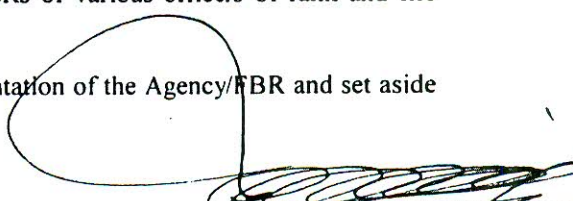
15. In terms of Section 9(2)(b) of the FTO Ordinance 2000, the FTO has no jurisdiction to investigate or inquire into the matters which relate to the assessment of income, determination of liability of tax, interpretation of law, rules and regulations relating to the said assessment/ determination in respect of which legal remedies of an appeal, review or revision are available under the relevant legislation.

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. 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.

18. 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 including unnecessary inquiry just under the garb of maladministration.

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



 Zulfiqar Hussain Awan
 Director (Legal-II)

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 The Chairman,
 Federal Board of Revenue,
 Islamabad.

No.134/FTO/2016 dated 15.11.2016

Copy for information to:

1. Mr. Muhammad Ajmal Khan, Prop, New Khan Commission Shop, Ghalla Mandi, Mailsi.
2. Mr. Khalid Hussain Ghori, Advocate, High Courts, Seat No.105, U, Sub Divisional Courts, Mailsi.
3. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
4. The Chief (Legal), 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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