

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

75

1. Mr. Muhammad Irfan Raza, Commissioner Inland Revenue, Zone-1, RTO, Gujranwala/FBR
2. Mr. Waqar Ahmad, CCIR, RTO, Zone-1, RTO, Gujranwala/FBR
3. Dr. Muhammad Akram Khan, CIR, RTO, Gujranwala/FBR.
4. Mr. Muhammad Nadeem, Inland Revenue Audit Officer (Now as Assistant Director Zone-1, RTO, Gujranwala/FBR)

Versus

Waheed Shahzad Butt, Lahore

REPRESENTATIONS PREFERRED BY FBR AGAINST FINDINGS / RECOMMENDATIONS
DATED 19.10.2015 PASSED BY THE FTO IN OWN MOTION NO.01/2014 IN COMPLAINT NO.
499/LHR/IT(340)/1161/2014

I am directed to refer to respective representations No.4(01)TO-I/2014 dated 17th November, 2015 and 18th November, 2015 on the above subject and to say that the President has been pleased to pass the following orders:

2. This order clubs together the following four representations filed by FBR/Agency as well as three affectee officers against the single FTO findings on his own Motion dated 19.10.2015:

1. No.89/FTO/2015 - COMPLAINT NO. 499/LHR/IT(340)/1161/2014
(FBR Vs Waheed Shahzad Butt, Lahore)
2. No.90/FTO/2015 - COMPLAINT NO. 499/LHR/IT(340)/1161/2014
(Mr. Waqar Ahmad, Chief Commissioner IR Vs Waheed Shahzad Butt)
3. No.91/FTO/2015 - COMPLAINT NO. 499/LHR/IT(340)/1161/2014
(Dr. M. Akram Khan, Commisioner IR Vs Waheed Shahzad Butt, Lahore)
4. No.92/FTO/2015 - COMPLAINT NO. 499/LHR/IT(340)/1161/2014
(Mr. Muhammad Nadeem, IRAO Vs Waheed Shahzad Butt, Lahore)

3. The aforementioned representations have been filed against recommendations of FTO dated 19.10.2015, whereby it has been recommended that:

“FBR to ensure that-

- i. the IRAO attends and successfully completes a course of compulsory training in Income Tax Law and Accounts at DOT(IR). His retention in service and payment of Additional Allowance to be made contingent to appropriate certification of professional competence by the training institution;
- ii. appropriate observations are recorded in the PERs of the IRAO and his supervisory officers, i.e. the CIR and the CCIR;
- iii. senior officers in field formations exercise regular supervisory oversight of work done by the sub-ordinate assessing officers and take prompt cognizance of all whimsical and arbitrary actions; and
- iv. report compliance for No.(i), within 45 days and for Nos.(ii) & (iii) within 30 days.”

P.T.O.

202

75

4. Brief facts the case are that Mr. Waheed Shahzad Butt (Advocate), admittedly not personally aggrieved filed a complaint pertaining to gross professional incompetence, inefficiency and mala fide of three FBR functionaries, before FTO on 09.09.2014, contending that Department failed to take action against said functionaries inspite clear observations as recorded by the CIR(A) as well as ATIR an this act is maladministration. The Agency replied that orders passed by Inland Revenue officers are appealable and Department has filed reference of the case before Lahore High Court Lahore where question of law was duly approved, hence maladministration was not involved.

5. Perusal of attached record indicates that in the particular case a Private Ltd. Company for Tax Year 2010, IRAO (Mr. M. Nadeem) finalized the amended assessment by adding an amount of Rs. 83,658,663/- u/s 111(1)(a) and 111(1)(b) and additional tax at Rs. 20,401,293/-. The aggrieved taxpayer (M/s Ball Point Industries (Pvt) Ltd) contested the said treatment before CIRC (Appeals), who deleted the additions made by the Department. Department contested this treatment before ATIR, where Departmental appeal was partially accepted. Consequently, Department filed reference before Lahore High Court where it was rejected. Now as per Complainant, the Agency was bound to take strict notice of the observations recorded by CIR (Appeals) as well as ATIR and the Department had to take action against the three FBR officials for their alleged gross professional incompetence. A specific request was moved to initiate misconduct/disciplinary proceedings against these officials and after three reminders by Mr. Butt, the Agency replied on 22.04.2014 that matter related to assessment/income and interpretation of law. The agency further replied that out of ten legal additions made under various head, eight additions were confirmed by the CIR (Appeals) and complainant did not file appeal before ATIR which demonstrates that complainant accepted the treatment accorded by CIR (Appeals) and the deptt was satisfied to the extent of confirmed additions. Moreover, a miscellaneous application was filed by the Department on 29.05.2015 requesting for expunging of remarks before ATIR and same was pending.

6. The Agency/FBR has filed the instant representation on the grounds that the complainant in this case is Mr. Waheed Shahzad Butt, who is enrolled as an Advocate and is neither an aggrieved person under the law nor he can become a party in any case relating to his client in accordance with law. He has, thus, no locus standi.

7. Agency has further pleaded that the complaint having been initiated by taxpayer's AR Mr. Waheed Shahzad Butt which cannot, under the law, be treated or entertained as Own Motion case or complaint against the cited respondents. It has been emphasized that against the unjustified and inappropriate remarks recorded by the ATIR in its judgment against the department and the author of the amended order, a miscellaneous application was filed by the department. During the pendency of such application, the action and subsequent findings / recommendations are neither justified nor permitted by law.

8. Agency has argued that Section 227 of the Income Tax Ordinance, 2001 puts a bar on any authority or agency to initiate inquiry or investigation against an officer performing functions under the ITO, 2001. It is pertinent that the inquiry in the matter conducted by the department concluded that "the audit officer passed a balanced order well within limits prescribed by law and deserves appreciation rather any action against him."

9. Agency has contended that the FTO had taken cognizance of the subject matter on the basis of a complaint filed by Mr. Waheed Shahzad Butt advocate, who is not an aggrieved person in terms of Section 9(1) of the FTO Ordinance, 2000. However, later on, the proceedings were converted into investigation by the FTO on "Own Motion" which is allegedly illegal. So, FTO has no jurisdiction to convert a complaint by any person into his "Own Motion". The entire proceedings are illegal and void *ab initio* and thus findings / recommendations are liable to be struck down. Section 9 of the FTO Ordinance, 2000 is reproduced as under:-

Contd....P/3

(201)

“(1) Subject to Sub Section (2). The Federal Tax Ombudsman may on a complaint by any aggrieved person, or on a reference by the President, the Senate or the National Assembly, as the case may be, or on a motion of the Supreme Court or a High Court made during the course of any proceedings before it or of his own motion, investigate any allegation of maladministration on the part of the Revenue Division or any Tax Employee”

10. Agency has emphasized that since the taxpayer had availed the remedy of appeal under the available law, the matter was beyond the jurisdiction of the FTO. The aforementioned submissions were made time and again before the FTO in Para-wise comments as well as during the course of hearings, but appear to have been ignored for no reason.

11. Agency further pleaded that considering the enquiry report of the Commissioner and upholding of substantial additions made by the officer by the first appellate authority, it is established that the Officer had concluded proceedings in accordance with law and in good faith. It is stated that u/s 77 of the Pakistan Penal Code, 1860, judicial function discharged in good faith is not an offence. The relevant extract is as under:

“Nothing is an offense which is done by a judge when acting judicially in exercise of any power which is or which in good faith he believes to be given to him by law.”

12. Agency has explained that u/s 224 of the Income Tax Ordinance, 2001 any proceedings under the Ordinance are judicial proceedings which can be challenged before the competent appellate fora. Similar grounds have been taken by the IR officers namely Dr. Muhammad Akram Khan, CIR, RTO, Gujranwala, Mr. Waqar Ahmad, CCIR, RTO, Gujranwala, Mr. Muhammad Nadeem, IRAO, RTO, Gujranwala. On the other hand, the Complainant has endorsed/supported impugned findings of learned FTO viz his comments dated nil received in this Secretariat on 28.12.2015.

13. 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.

14. Agency finally emphasized that further, the complainant has misrepresented the facts of the case and his assertion that IRAO had made only two additions in his order is absolutely incorrect. The correct position is that he had made 10 legal additions in his order dated 21.6.2013 aggregating Rs.109,611,927/-. Out of these ten, eight additions were upheld by the CIR (A) aggregating Rs.25,953,264/-, who did not find any wrong with the IRAO's action. Owing to particular action of the IRAO Rs.2.6 crore have been added in national exchequer, which shows that IRAO has performed bona-fide and professionally. Thus he succeeded in handsome addition to the national kitty.

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

P.T.O.

200

75

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 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.

17. Before parting from the order, it would be relevant to point out that the representative of the Agency has brought to the notice of CLA that after the lapse of 60 days FTO Office has started implementation proceedings and is pressing hard to the Agency for the payment of refund amount as 60 days period of suspension of finding of FTO has been passed and the representation has not been yet cleared. The taxpayer if receives the refund amount and then there is every likelihood of dragging the department into an unending litigation where balance of convenience would be in favor of the Complainant and it would not be possible easily to recover the paid amount owing to unnecessary haste of the office of FTO. Proprietary demands that when the matter is pending before the appellate forum and the appellate forum can set aside the recommendations of FTO, the respondent should not be forced under the threat of contempt proceedings to act upon the findings. Even otherwise, if the recommendations are implemented under the pressure of FTO, there is strong chance that the representation would become in-fructuous. It amounts to interference in the powers of the appellate authority. Section 14(2) of Act No.XIV of 2013 indicating that impugned decision remains suspended for period of 60 days is directory and not mandatory in nature. There are a number of cases/representations pending and it is not possible by the appellate authority for the time being to decide all pending cases within 60 days. It would be appropriate if the FTO should wait for the decision of the appellate forum and should not show extraordinary interest in implementation of impugned recommendations. Section 14(2) of Federal Ombudsmen Institutional Reforms Act 2013, provides that on filing of representation status quo shall be maintained for a period of 60 days only. It is pointed out that the judgment of Hon'able Supreme Court of Pakistan reported in PLD 1971 S.C 242 is relevant, *inter alia*, wherein the learned apex Court has laid down the law that when a Statute/Act, which empowers an authority, Tribunal or Court to give a final decision, the power to grant interim relief by suspension of an order under appeal impliedly exists. In another decision of Supreme Court (1991 SCMR page 2319), *inter alia*, it was held in para-7 that power to suspend the execution of the decree is ancillary and incidental to the power to grant main relief. In case the recommendations of the Mohtasib are implemented and subsequently the said recommendations are set aside by the Hon'able President on acceptance of the representation, the situation may cause embarrassment for the stakeholders and the case may reach to the stage where the point of return may be hardly available. It is, thus, appropriate to suspend the operation of impugned findings/recommendations of FTO till the final decision in the representation(s) by the Honorable President of Pakistan.

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199

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



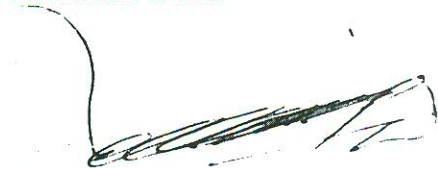
Zulfiqar Hussain Awan
Director (Legal-II)

The Chairman,
Federal Board of Revenue,
Islamabad

1. No.89/FTO/2015 dated 22.6.2016
2. No.90/FTO/2015 dated 22.6.2016
3. No.91/FTO/2015 dated 22.6.2016
4. No.92/FTO/2015 dated 22.6.2016

Copy for information to:

1. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
2. Mr. Waheed Shahzad Butt, Advocate, 87-Shahrah-e-Quaid-e-Azam, Republic Motors, Lahore
3. Mr. Waqar Ahmad, Chief Commissioner-IR, Regional Tax Office, Zone-I, RTO Gujranwala.
4. Dr. Muhammad Akram Khan, Commissioner-IR, Regional Tax Office (RTO), Gujranwala.
5. Mr. Muhammad Nadeem, Inland Revenue Audit Officer (Now as Assistant Director Zone-1, Regional Tax Office, Gujranwala
6. Director to Secretary to the President.
7. Master file



Zulfiqar Hussain Awan
Director (Legal-II)