

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

M/s Fatima Enterprises Ltd, Multan  
 Versus  
 Federal Board of Revenue

21 DEC 2017

M(L)

**REPRESENTATION PREFERRED BY M/S FATIMA ENTERPRISES LTD, MULTAN AGAINST FINDINGS / RECOMMENDATIONS DATED 24.07.2017 PASSED BY THE FTO IN COMPLAINT NO. FTO/MLN/0000052/2017**

I am directed to refer to your representation No. NIL, dated 24.08.2017 on the above subject and to say that the President has been to pass the following order:

2. This Representation dated 24.08.2017 has been filed by the Complainant-M/s Fatima Enterprises Limited against the findings of the FTO dated 24.07.2017, whereby it has been held that:

"The contention of the Deptt appears to be convincing; Prima facie, the Complainant failed to discharge its tax liability under Section 147 of the Ordinance. As the matter pertains to the determination of tax liability in respect of which remedy of filing appeal was available under Section 127 of the Ordinance, this office has no jurisdiction to interfere into the matter in terms of the provisions of Section 9(2)(b) of the FTO Ordinance, hence the complaint is filed and case file consigned to record".

3. Brief facts of the case are that this complaint has been filed under Section 10(1) of the Federal Tax Ombudsman Ordinance, 2000 against the ex parte order dated 28.12.2016 under Section 147(7) of the Income Tax Ordinance, 2001.

4. The Complainant, a private limited company engaged in the business of spinning of textile fibers, was served with order under Section 147(7) of the Ordinance for payment of advance tax amounting to Rs.13.098 million for the first and second quarters of tax year 2017, without providing opportunity of being heard and recovery measures were adopted without issuing demand notice under Section 137(2) of the Ordinance. Issuance of recovery notice under Section 138(2) of the Ordinance was also stated to be contrary to the law. In support, the Complainant cited various judgments of the superior courts particularly 2016 SCMR 1961, 2016 CLC 1931, 2016 CLC 1805, 2015 SCMR 456, 2015 PLD 187, [(2001) 83 Tax 119 (S.C Pak), 2006 PTD 2207, 2011 PLD 365 and Board's Circular No. 3(6) Rev. Bud/2002/03 dated 09.08.2002. The Complainant prayed that the Deptt be directed to withdraw notice issued under Section 138(2) and vacate the order under Section 147(7) of the Ordinance.

5. The complaint was sent for comments to Secretary Revenue Division in terms of Section 10(4) of the FTO Ordinance. In response, the Deptt vide letter No. CCIR/RTO-MN-13487 dated 24.03.2017 challenged the jurisdiction of the FTO as per Section 9(2)(b) of the FTO Ordinance on the ground that the matter relates to the assessment of tax liability and interpretation of law in respect of which appeal lies under the Ordinance. On merits, it was stated that Show Cause Notice dated 28.12.2016 was issued to discharge advance tax liability under Section 147 of the Ordinance which was an opportunity to explain his point of view with regard to nonpayment of advance tax liability. The assessment of advance tax was made on the basis of tax liability declared by the Complainant himself. As the Complainant failed to discharge his liability, recovery proceedings were rightly initiated under Section 147(7)/138(2) of the Ordinance. Thus FTO has issued aforementioned findings.

6. The instant Representation has been filed by the Complainant. The Complainant has argued that the Respondent No. 5-Deputy Commissioner Inland Revenue, E&C Unit-02, Corporate Zone, RTO, Multan issued order of assessment under Section 147(7) of the Income Tax Ordinance, 2001 vide C.No.1272 dated 28.12.2016 to create demand amounting to Rs. 6,549,400/- for each quarter under Section 147(4) of the Income Tax Ordinance, 2001 without given prior notice to provide opportunity of being heard to the Petitioner-the Complainant.

7. The Complainant has stated that in continuation of ex-parte order under Section 147(7) passed by the Respondent No. 5 he issued recovery notice under Section 138(2) of the Income Tax Ordinance, 2001 vide No.DCIR/U-02/RTO/MN/2073 dated 27.02.2017 to deposit the demand tax of Rs. 13,098,800/- by 08.03.2017. He further intends that failing which proceedings may be initiated under these rules to recover the said amount by one or more of the following modes namely:

- a). Attachment and sale of moveable or immovable property;
- b). Appointment of receiver for the management of your movable or immovable property;
- c). Your arrest and detention in prison for a period not exceeding six months.

He further directed that the Complainant to sell, mortgage, charge, issue or otherwise deal any property belonging except with his permission to that effect in writing.

Chief(L-I)  
 S(Lit-SC)  
 SS(Lit-SC)  
 SS(T-I)  
 SS(T-II)  
 Chief(L-II)  
 S(Lit-MC)  
 SS(L-A&A)  
 Chief(L-III)  
 S(LDT)  
 S(LIDT)  
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9. The Complainant has pleaded that the FTO has erred to ignore the issue of maladministration that Respondent No. 5 issued assessment order under Section 147(7) of the Income Tax Ordinance, 2001 without creating demand under Section 137(2) of the Ordinance:

*"137(2): Where any tax is payable under an assessment order or an amend assessment order or any other order issued by the Commissioner under this Ordinance, a notice shall be served upon the taxpayer in the prescribed form specifying the amount payable and thereupon the sum so specified shall be paid within thirty days from the date of service of the notice".*

10. The Complainant has contended that the FTO has erred to give opinion that "the matter pertains to the determination of tax liability in respect of which remedy of filing of appeal was available under Section 127 of the Ordinance". It is important to mention here that first Forum of appeal available to the Petitioner was office of the Commissioner Inland Revenue (Appeals) under Section 127 of the Income Tax Ordinance, 2001. It is notable that an appeal can only be filed when original/ attested demand notice under Section 137(2) of the Ordinance accompanied with the form of appeal as provided procedure laid down in Rule 76 of the Income Tax Rules, 2002 otherwise leave to appeal will be declined but in the instant case, demand notice under Section 137(2) of the Ordinance was not issued and thus no Forum of appeal available to the Petitioner due to deficiency of mandatory document.

11. The Complainant has emphasized that the Petitioner filed complaint before the FTO on the issue that the Respondent No. 5 issued assessment order under Section 147(7) of the Ordinance without generating the demand notice under Section 137(2) of the Ordinance. It is worth important that the Petitioner did not file the complaint on the issue of assessment of income and determination of tax liability. The complaint was filed merely on the issue of deprivation of right of the Petitioner to file the appeal due to the failure and negligence of Respondents and the FTO has erred to indulge himself on the issue of determination of tax liability and rejected the complaint under Section 9(2)(b) of the FTO Ordinance without take up the issues of maladministration. Issuance of notice under Section 138(2) of the Income Tax Ordinance, 2001 by the Respondent No. 5 is also against the ratio decidendi of reported judgment 2011 PTD 2042 in which the Sindh High Court held that if something is required to be done in a particular manner then it has to be done in that manner only; otherwise any deviation, in the Petitioner was not in accordance with law and the proceedings taken subsequent thereto are not valid. Further, Supreme Court in case "Chairman, CBR Vs. Pak-Saudi Fertilizer Ltd". [(2001) 83 Tax 119 (S.C Pak) = 2000 PTD 3748 has held that Right of Appeal is a creature of statute.

12. The Complainant has expressed that the Islamabad High Court in W.P No. 4187/2015 dated 03.03.2015 also held that:

*"Hence, notice issued under Section 137 ibid to the petitioner was not in accordance with law and the proceedings taken subsequent thereto are not valid".*

13. In the case titled Z.N Exports Pvt. Ltd Vs Collector of Sales Tax (2003 PTD 1746), the Lahore High Court held that in all fairness, equity and justice an assessee should not be forced to pay a demand created by the Revenue Authority unless the order creating such demand has undergone the scrutiny of at least one independent forum. Similar view was taken in a subsequent decision by the referred High Court in case titled 'Sun Rise Bottling Company Pvt. Ltd. Federation of Pakistan (2006 PTD 535), wherein it was observed that access to justice was a fundamental right and essential feature of such right was determination of any grievance or dispute by an independent Tribunal. In this regard, it was observed that the Appellate Tribunal provides the independent adjudication of the impugned tax liability. In case titled Karachi Shipyard & Engineering Works Ltd. Additional Collector, Customs, Excise and Sales Tax (Adjudication III), Government of Pakistan, Karachi (2006 PTD 2207), the Division Bench of Sindh High Court endorsed the principle laid down in the above mentioned judgments.

14. The Complainant has explained that the FTO has erred to give opinion that 'prima facie, the Complainant failed to discharge its tax liability under Section 147 of the Ordinance'. It is stated that the FTO has no jurisdiction over the matters regarding assessment of income and determination of tax liability. The FTO indulged himself in a matter which is not in his jurisdiction and afterwards rejection of complaint without discussion the issue of maladministration is questionable. Above cited opinion hits the credibility of the Department of FTO which reveals that the Department of the FTO is biased enough towards Pro Revenue approach. Without prejudice to the above, the Petitioner has submitted an application to Respondent No.3-The Commissioner Inland Revenue, Corporate Zone, RTO, Multan under the subject intimation about illegal assessment order under Section 147(7) and Recovery Notice under Section 138(2) of the Income Tax Ordinance, 2001 issued by DCIR, E&C, Unit 02, Corporate Zone, RTO, Multan vide letter No. 48 dated 07.03.2017. The Petitioner did not find any response and then afterwards submitted 1<sup>st</sup> Reminder vide letter No. 53 dated 15.03.2017, then 2<sup>nd</sup> Reminder vide letter No.67 dated 14.04.2017 and then 3<sup>rd</sup> Reminder vide letter No. 89 dated 06.05.2017. The Petitioner still to date has not received any response about the action taken by the Respondent No. 3. The Petitioner through these letters challenged the chargeability is pending at the end of the Respondent No. 3. The FTO as well known the pendency of these letters at the end of Respondent No. 3 as the Petitioner also submitted all above communicated at the office of the FTO for awareness the matters allied to the complaint. The main question arose here that the Respondents are reluctant to rectify the mistake or otherwise answer the legal questions about the wrong chargeability of tax under Section 147 of the Ordinance. However, the FTO *ultra vires* decided the issue through a non speaking statement which is astonishing

for all stake holders. The Petitioner craves permission to add, amend or withdraw any of the grounds at the time of hearing.

15. The Complainant has prayed that the decision of the FTO dated 05.07.2017 in Complaint No.FTO/MLN/0000052/2017 may be vacated. Any other relief deemed appropriate including special cost of this Representation may graciously be awarded to the Petitioner.

16. On the other hand, the Agency has pointed out that the H'ble President of Islamic Republic of Pakistan in a number of representations filed by the department as mentioned below decided that the honorable Federal Tax Ombudsman has, no jurisdiction in matters in respect of which legal remedy of appeal or revision is available under the Income Tax Ordinance:-

- a. FBR Vs M/s Pawar Paper Products, Multan in FTO complaint No.133/FSD/ST(25)/583/2015.
- b. FBR Vs Indus CNG filling Station, Dera Ghazi Khan, in FTO Complaint No.152/FSD/IT(104)/1018/2014.
- c. FBR Vs Speed CNG Station, DG Khan, in FTO Complaint No.151/FSD/IT(103)/1017/2014.
- d. FBR Vs DG Petroleum & CNIG Filling Station, Dera Ghazi Khan, in FTO Complaint NO.150/FSD/IT(102)/1016/2014.
- e. FBR Vs Mian Naeem Ahmad Resident of Mailsi FTO complaint No.96/FSD/IT(65)/796/2014

Furthermore, this issue has already been held by the Honourable Sind High Court in a reported judgment 2013 PTD 486, as well as Honourable Supreme Court of Pakistan in a reported judgment 2001 SCMR/493.

17. The Agency has stated that proper opportunity of being heard has been given vide this office letter No.1272 dated 28.12. 2016 and served through courier service vide slip No.251542181. Recovery notice u/s 138(2) has been issued for recovery of advance tax u/s 147 read with Section 113 of the Income Tax Ordinance, 2001. In the light of provision of Section 147(7) of the Income Tax Ordinance, 2001:

*"the provisions of this Ordinance shall apply to any advance tax due under this section as if the amount due were tax due under the assessment order."*

18. The Agency has mentioned that the opinion of the H'ble FTO is in accordance with the facts and circumstances of the case as per provisions of law as well. The taxpayer has wrongly quoted irrelevant circular which is not related to this case.

19. The Agency has prayed that representation of the complainant may be rejected being devoid of merit as no maladministration is involved in the instant case. The case related to tax assessment and further appealable. Hence beyond the scope of FTO in terms of Section 9(2)(b) of the FTO Ordinance, 2000.

20. After perusal of record and examination of all documents, it has been observed that 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. In such circumstances, where remedy of appeal was available, FTO could not interfere with and could not pass orders.

21. 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."

22. 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. Thus the impugned findings are sustainable and the representation is liable to be rejected.

23. 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.

24. Nevertheless, this representation has been filed by the Complainant repeating the contents of the pleadings already made before the learned FTO. Nothing turns on the same as it fails to answer the reasoning of FTO and not even contain denial of the factual observations for his impugned decision. No grounds stand made out for interference with the decision of the FTO. Undoubtedly FTO decision is based on sound reasoning and supported by the law. Thus, the representation is devoid of any merits and is liable to be rejected. FTO impugned findings do not warrant any interference. Consequently FTO findings are sustainable and unexceptional having no illegality or improbability.

25. 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 not gone beyond the scope and powers, the impugned findings are sustainable. Consequently, the Complainant's representation is liable to be rejected. However, the complainant can seek remedy available to him from the relevant forums under the law if so desired.

26. Accordingly, the President has been pleased to reject the instant representation of Complainant-M/s Fatima Enterprises Limited and the impugned recommendations/findings of learned FTO are upheld.

(Zulfiqar Hussain Awan)  
Director General (Legal Affairs)

M/s Fatima Enterprises Limited,  
487-A, Mumtazabad, Vehari Road,  
Multan.

No. 150/FTO/2017 dated 18.12.2017

Copy for information to:

1. ✓ The Chairman, Federal Board of Revenue, Islamabad.
2. Mr. Muhammad Imran Ghazi, Advocate, Ghazi & Company, Chartered Accountant, Tawakkal Autos Plaza, Chowk Children Hospital, Abdali Road, Multan.
3. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
4. The Chief (Legal-I), Federal Board of Revenue, Islamabad.
5. Director to Secretary to the President.
6. Master file.

(Zulfiqar Hussain Awan)  
Director General (Legal Affairs)