

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

Federal Board of Revenue
Versus
Syed Nusrat Ali Shah, Islamabad

**REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE AGAINST FINDINGS
/ RECOMMENDATIONS DATED 27.10.2017 PASSED BY THE FTO IN COMPLAINT NO.
689/ISB/IT/2017**

I am directed to refer to your representation No. 4(689)S(TO-I)/2017, dated 09.11.2017 on the above subject and to say that the President has been to pass the following order:

2. This Representation dated 09.11.2017 has been filed by the Agency-FBR against the findings of the FTO dated 27.10.2017 whereby it has been held that:

“Whereas the Federal Tax Ombudsman has suspended operation of notices issued under Section 140 of the Income Tax Ordinance, dated 28 September 2017, while exercising the powers conferred upon him u/s 11 of the Federal Ombudsmen Institutional Reforms Act 2013 for a period of 15 days, up till 15.11.2017.”

3. The instant Representation has been filed by the FBR. The Agency has stated that the order of the FTO dated 27.10.2017, the Petitioner seeks for Representation before the President of Pakistan against order for suspension of operation of notices issued under Section 140 of the Income Tax Ordinance, 2001 (ITO, 2001) dated 26.09.2017 by exercising powers conferred upon him under Section 11 of the Federal Ombudsmen Institutional Reforms Act No. XIV of 2013 for a period of 15 days up till 15.11.2017. The injunction of the FTO is contrary to the express provisions of the ITO, 2001 and those of the Establishment of the Office of the Federal Tax Ombudsman Ordinance, 2000 which is requested to be vacated.

4. The Agency has mentioned that the proceedings were initiated in the case of a fish farm by the name of M/s Inayat Ali Shah Fish Farm village Jehanian Shah, Tehsil Sahiwal, District Sargodha (TR No. 4057) on the basis of information received from the Fisheries Department, Government of Punjab reflecting the said name of fish farm and address. The statutory notices under Sections 114(4) & 116(1) were issued on 08.12.2015 and served through registered post, but remained un-complied. Thereafter, Show Cause Notice under Section 122C for tax years 2011 to 2014 were issued on 25.01.2016 and served through registered post but no reply whatsoever was submitted by the taxpayer. Accordingly, the assessment orders under Section 122C were finalized on 04.02.2016 by creating a tax demand of Rs. 2,983,231/-. The assessment orders alongwith demand notices dated 04.06.2016 for all tax years were served through registered post. None of the notices/ order were returned back, hence, assessment was made strictly in accordance with the law and after proper service of notices. Hence, the assessment proceedings attained finality as per law. Thereafter, no legal remedy was availed against this assessment order as per law. Recovery proceedings were, therefore, initiated by issuing notice under Section 140 on 30.12.2016 to the Manager HBL, Nehang, Tehsil Sahiwal, District Sargodha for recovery of outstanding demand of Rs. 2,983,231/- as the said Fish Farm was run by the Complainant alongwith other co-owners.

5. The Agency has contended that the Manager HBL Nehang Branch had blocked the Bank accounts of the following co-owners of the Fish Farm on 30.12.2016, which was never objected by the Complainant or other co-owners:

Sr. No.	Name of legal heirs	Account Nos.	Balance Blocked
1.	Nusrat Ali Shah	062700084445-03	Rs. 5,132/-
2.	Mujtaba Ali Shah	062772000080-03	Nil
3.	Raza Ali Shah	062772000081-03	Rs. 2,034/-
4.	Raza Ali Shah	1720710017980-3	Rs. 851/-

As a meager amount was available in the above bank accounts, therefore, another notice under Section 140 was later issued on 26.09.2017 to different banks in respect of all co-owners of the Fish Farm.

6. The Agency has pleaded that the complaint was filed by the Respondent No. 2-Mr. Nustrat Ali Shah against the demand before the FTO after the lapse of 20 months on 18.10.2017 alongwith application for stay of recovery proceedings and de-attachment of bank accounts on the plea that tax demand and recovery proceedings are illegal. On stay application, parawise comments were submitted to the FTO on the fixed date on 26.10.2017 and an Officer well versed with the instant case also attended the hearing proceedings. By virtue of that, injunction order has been passed on 27.10.2017 by the FTO suspending operation of notices issued under Section 140 of ITO, 2001 dated 26.09.2016 by exercising powers conferred upon under the Federal Ombudsmen Institutional Reforms Act No. XIV of 2013 for a period of 15 days uptill 15.11.2017.

*SS(TO-I)
13470-R
01/02/18*

*SS(TO-I)
13470-R
01/02/18*

*SS(TO-I)
13470-R
01/02/18*

*PDF
11/02/18
2/2/18*

7. The Agency has taken ground that the injunctions/ order of the FTO are not in conformity with established law and the provisions of ITO, 2001. Therefore, Representation under Section 14 of the Federal Ombudsmen Institutional Reforms Act No. XIV of 2013 is being preferred. The case involved in the instant case pertains to assessment of income and determination of tax liability. Therefore, the same is covered by the provisions of Section 9(2)(b) of FTO Ordinance, 2000. The President of Pakistan accepted the departmental representation in complaint number 101/FSD/IT(70)/830/2014 observing that:

“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 (Appeals), 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 or 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. In the circumstances, the impugned findings of FTO are not sustainable. Consequently the Representation of the Agency is liable to be accepted.”

8. The Agency has underscored that the President of Pakistan vide order in Complaint No. 108/FTO/2016 dated 17.10.2016 has observed as under:

“The jurisdiction of the FTO is barred u/s 9(2)(b). FTO could not interfere in appealable order, assessment of tax and interpretation of law and in the service matter. However, the Complainant can seek remedy available to him from forum under the law.”

9. The Agency has underscored that in another complaint, the President of Pakistan while accepting the departmental representation vide order in Complaint No. 60/2012-Law(FTO) dated 04.10.2013 has held that:

“The jurisdiction of the FTO is barred u/s 9(2)(b). FTO cannot work as appellate authority. FTO could not interfere in appellate order, assessment of tax and interpretation of law.”

10. The Agency has underlined that the jurisdiction of the FTO in respect of cases pertaining to RTO, Sargodha lies with the FTO, Lahore as per Chapter 2 of Schedule of Territorial Jurisdiction (Regulation 3(3) of the FTO Regulations, 2001, hence, impugned order is without lawful jurisdiction. The Assistant Commissioner (IR) RTO Sargodha attended the proceedings on 26.10.2017 and submitted detailed para-wise comments on stay application on the directions of FTO, but while granting stay against recovery proceedings facts of the case and comments of the department were completely ignored on 27.10.2017. The order dated 27.10.2017 of the FTO is not speaking and has been passed without jurisdiction.

11. The Agency has prayed that the decision of the FTO dated 27.10.2017 may be set aside / vacated.

12. On the other hand, the complainant has not filed any written comments against the instant representation of FBR despite issuance of notices on 13.11.2017 and 29.11.2017 by this Secretariat.

13. After perusal of record and examination of all documents, it has been observed that Section 40 of Income Tax Ordinance, 2001 provides as under:-

40. Deductions in computing income chargeable under the head “Income from Other Sources”.- (1) Subject to this Ordinance, in computing the income of a person chargeable to tax under the head “Income from Other Sources” for a tax year, a deduction shall be allowed for any expenditure paid by the person in the year to the extent to which the expenditure is paid in deriving income chargeable to tax under that head, other than expenditure of a capital nature.

(2) A person receiving any profit on debt chargeable to tax under the head “Income from Other Sources” shall be allowed a deduction for any Zakat paid by the person 3[] under the Zakat and Ushr Ordinance, 1980 (XVIII of 1980), at the time the profit is paid to the person.

(3) A person receiving income referred to in clause 4[] (f) of sub-section (1) of section 39 chargeable to tax under the head “Income from Other Sources” shall be allowed —

(a) a deduction for the depreciation of any plant, machinery or building used to derive that income in accordance with section 22; and

(b) an initial allowance for any plant or machinery used to derive that income in accordance with section 23.

(4) No deduction shall be allowed to a person under this section to the extent that the expenditure is deductible in computing the income of the person under another head of income.

(5) The provisions of section 21 shall apply in determining the deductions allowed to a person under this section in the same manner as they apply in determining the deductions allowed in computing the income of the person chargeable to tax under the head “Income from Business”.

1[(6) Expenditure is of a capital nature if it has a normal useful life of more than one year.]

14. Notwithstanding, it is pointed out that Section 11 of Federal Ombudsman Institution Reforms Act 2013 provides regarding powers of temporary injunctions as follows:

“11. Temporary Injunction.- The Ombudsman may stay operation of the impugned order or decision for a period not exceeding sixty days.”

15. It has been noted that the temporary injunction powers can be used by FTO if the matter does not fall within the purview of Section 9(2)(b) and 9(2)(a) of FTO Ordinance, 2000, wherein 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. The matter involves the determination of tax liability and refundable amount on account of tax cannot be adjudicated by FTO. 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 already 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.

18. The issuance of Show Cause Notice is not a negative inference as the Complainant has an opportunity to file reply and put forward its case. In case of an adverse order, the Complainant has remedy to file appeals as a matter of right to the Commissioner (Appeals), Appellate Tribunal, High Court and the Supreme Court. In case the impugned SCNs are asked to be withdrawn or temporary injunctions issued then there will be no remedy available with the Department to check the irregularity, if any, in a particular matter.

19. Lahore High Court, Lahore vide their order in ICA Review Application No. 118756/2017 dated 12.12.2017 has been pleased to hold that "the minute examination of Section 9 of the Ordinance the word may has been used for investigation of any allegation of maladministration but the same has been fastened with sub Section 2 of Section 9 of the Ordinance. The sub Section 2 clearly mentioned the word shall meaning thereby that the FTO shall not have jurisdiction to investigate or inquire into the matters relating 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. Admittedly, the matter involved falls within the domain of Section 9(2)(b) of the Ordinance. As such, the mandatory provisions of law are to be followed in its strict compliance. The impugned order reflects that all the issues has been dilated upon and specific findings in this regard have already been delivered. In view of above situation, the learned counsel for the Applicant has failed to convince us that there is an error of fact or of law on record to interfere in the same which has been passed in accordance with law. Hence, the instant application being devoid of any merit is hereby dismissed".

20. It has been surprising to note that FTO granted temporary injunction under Section 11 of Federal Ombudsman Institution Reforms Act 2013 despite issuance of judicious orders by the President of Pakistan in numerous cases on hereinabove lines. 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 neither sustainable nor maintainable in the eyes of law. Consequently, the Agency's representation is liable to be accepted.

21. Accordingly, the President has been pleased to dispose off the instant representation of Agency-FBR on the above lines.

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

The Chairman,
Federal Board of Revenue,
Islamabad.

No. 164/FTO/2017 dated 29.01.2017

Copy for information to:

1. Syed Nusrat Ali Shah, 1-E, Ali Plaza, Jinnah Avenue, Islamabad.
2. Mr. Nazeer Abdul Wajid. Advocate High Court, Flat No. 08, Block No. 19, Allah Dad Plaza, G-8 Markaz, Islamabad.
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)