

**PRESIDENT'S SECRETARIAT (PUBLIC)**  
**AIWAN-E-SADR, ISLAMABAD**  
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Federal Board of Revenue  
 Versus  
 Mr. Sajjad Ahmed, Haroonabad

**REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE AGAINST FINDINGS / RECOMMENDATIONS DATED 17.08.2017 PASSED BY THE FTO IN COMPLAINT NO. FTO-MLN/0000093/2017**

I am directed to refer to your representation No. 4(093)TO-I/2017, dated 14.09.2017 on the above subject and to say that the President has been to pass the following order:

2. This Representation dated 14.09.2017 has been filed by the Agency-FBR against the findings of the FTO dated 17.08.2017 whereby it has been held:

"FBR to-

(i) Direct the concerned CIR to settle refund/ compensation due expeditiously; and

(ii) Report compliance within 45 days".

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 non issuance of refund. The orders under Sections 161/205 of Income Tax Ordinance, 2001 were passed as under:

Tax Year	Date of Order	Demand raised
2011	13.06.2016	730,427
2012	13.06.2016	2,086,527
2013	18.03.2016	2,640,460
2014	08.08.2016	1,616,400
2015	13.06.2016	4,348,256

4. Statedly, the Deptt illegally recovered an amount of Rs. 9.132 million through attachment of bank account by invoking the provisions of Section 140(1) of the Ordinance. Aggrieved, the Complainant filed appeal before CIR(Appeals) Bahawalpur who vide orders in appeal No. 28, 29, 30, 130 & 633 dated 16.01.2017 annulled the assessments with directions to the Deptt to refund the amount withdrawn from banks. The Complainant filed refund application on 07.02.2017 followed by Representation to the CIR and CCIR on 18.02.2017 and 19.04.2017 but the refund was not issued. According to the Complainant attachment of bank account without show cause notice under Section 138(1) of the Ordinance and withdrawal of amount before expiry of the date of filing of appeal was tantamount to maladministration in terms of Section 2(3)(i), (ii) & (iii) of FTO Ordinance. Further contended that the delay in issuance of refund also create right to receive compensation under Section 171 of the Ordinance.

5. The complaint was sent for comments to the Secretary Revenue Division in terms of Section 10(4) of the FTO Ordinance. In response, the Deptt vide comments dated 17.05.2017 submitted that second appeal has been filed before the ATIR and so the matter is *subjudice* before the Tribunal. Under the circumstances, the complaint may be dismissed. On merits, it was stated that the amount was withdrawn from banks after fulfilling all legal formalities by issuing notice under Section 138 vide document No. 314021-1 dated 17.06.2016 through IRIS, which was not responded and so the provisions of Section 140 of the Ordinance were invoked which empower the DCIR to recover outstanding tax. Further stated that the Complainant filed manual refund application whereas the same was required to be filed on line. Both the parties heard and record perused by the FTO. Thus, FTO has issued aforementioned findings.

6. Hearing of the case was held on 20.12.2017. Mr. Irfan Rehmani, Advocate High Court has represented the FBR. On the other hand, Mr. Tajammal Hussain Adovcate has appeared for the hearing on behalf of the Complainant namely Sajjad Ahmed on the particular issue.

7. The instant Representation has been filed by the Agency-FBR. The Counsel of the Agency has stated that the taxpayer, an individual, derived income from cotton ginning at Haroonabad. The taxpayer falls under the ambit of the prescribed persons for the purpose of Sections 153 and 233 of the Income Tax Ordinance, 2001 and was required to deduct tax on gross amount of payment for purchases made during the period 2011 to 2015 and deposit the same in to the Government Treasury but the taxpayer committed the default of non deduction of tax. A Show Cause Notice was issued but no explanation was offered by taxpayer. Consequently order under Section 161/205 of the ITO, 2001 was passed creating tax liability for the tax years under consideration as follows:

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06 JAN 2018  
 06 JAN 2018



Tax Year	Demand raised
2011	730,427
2012	2,086,527
2013	2,640,460
2014	1,616,400
2015	4,348,256
<b>Total demand created</b>	<b>Rs.11,422,070/-</b>

8. The Counsel of the Agency has pointed out that the recovery proceedings under Sections 138 & 140 of the ITO, 2001 had been initiated to recover the outstanding demand and the amount of Rs. 4,132,580/- for the tax years under consideration was withdrawn from banks after fulfilling all legal formalities.

9. The Counsel of the Agency has apprised that taxpayer filed an appeal before the Commissioner Inland Revenue (Appeals) Bahawalpur and directed vide its order No. (s) 28,29,30,130 and 633 dated 16.01.2016 to issue the refund as the taxpayer has already deposited the amount higher than actual demand of tax. However, the department has filed appeal before the ATIR against the order of the Commissioner Inland Revenue (Appeals).

10. The Counsel of the Agency has taken ground that the FTO does not hold jurisdiction over the instant matter. As per Section 9(2)(b) of the Federal Tax Ombudsman Ordinance, 2000 all matters pertaining to assessment and determination of tax etc. for which remedy is provided in law by way of appeal do not fall within the purview of FTO. Further, as per ratio settled by the President vide Order communicated through President Secretariat Law, Justice and Human Rights Division in Complaint No.564/LHR/ST(157)999/13 (M/s Khalid Modern Industries (Pvt) Ltd, Hasilpur), the President set aside the FTO's recommendation and held that 'FTO shall not have jurisdiction to investigate or inquire into matters which:

- a) Are *subjudice* before a court of competent jurisdiction or Tribunal or Board of Authority on the date of the receipt of a complaint, reference or motion by him; or
- b) 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 Counsel of the Agency has underlined that in Complaint No. 154/KHI/ST(66)/527/2015 (M/s Libra International, Karachi), the President set aside the FTO's recommendation and held 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 of any action or inaction on the part of official(s) of the Agency, it has remedy to file an appeal at appropriate forum under the relevant law. In such circumstances, where remedy of appeal is 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 not sustainable.

12. The Counsel of the Agency has pleaded that the FTO has directed the department to settle refund/compensation due expeditiously without taking into the consideration that department has filed the appeal before the ATIR Lahore Bench Lahore against the order of Commissioner Inland Revenue (Appeals) Bahawalpur on 28.03.2017 which is pending for adjudication. The refund if any will be determined after the finalization of pendency before the Appellate fora.

13. The Counsel of the Agency has contended that the FTO was not justified to direct for compensation as provision of Section 171(2)(c) of the Income Tax Ordinance, 2001 refund will be treated to be due to taxpayer after passing of the refund order under Section 170(4) of the Ordinance and the compensation will be due to the taxpayer after three months of passing of refund order.

14. The Counsel of the Agency has prayed that the findings as well as recommendations of the FTO in Complaint No. FTO-MLN/000093/17 dated 17.08.2017 may be set aside.

15. On the other hand, the complainant has filed his written comments against the instant representation of FBR on 28.09.2017 and the Counsel of the complainant has argued and supported the impugned recommendations/findings of learned FTO with the request that the representation of Agency may be rejected.

16. The Counsel of the complainant has stated that the department misconceived the provisions of Section 9(2) of the Ordinance as the matter of assessment is not controversial issue decided by the FTO. Nor any interpretation of law etc involved in the complaint. Here it is the core issue decided by the FTO was denial of order of the Commissioner (Appeal) relate to maladministration as defined in Section 2(3)(v) of the FTO Ordinance 2000. FTO has the jurisdiction to entertain the complaints regarding mal-administration and to pass appropriate order and issue recommendations against any tax official in term of Sections 9,13 and 14 of the FTO Ordinance 2000. The FTO has vast jurisdiction over all the tax official under the Ordinance 2000, therefore, the contention of the learned Commissioner IR regarding wrongful assumption of jurisdiction in the instant case is misconceived. It is further submitted that in term of Section 2 of the Ordinance, the scope of the term mal-administration has been defined, which is very vast and the act of the learned Commissioner under the circumstances fell within the definition of mal-



administration, therefore, the FTO was justified to assume the jurisdiction and to issue recommendations against the department.

17. The Counsel of the complainant has pleaded that the complaint was filed before the FTO on 29.4.2017 after decision of Honorable Commissioner (Appeals) dated 16.1.2017. No issue is pending or subjudice before any court at the time of filing of complaint. The department raising the objections of jurisdiction for the sake of objection. FTO Ordinance is a comprehensive legislative instrument and complete code in itself in accordance with its objects as held by the Supreme Court of Pakistan in a judgment reported as PLD 2017 Supreme Court 139 (Federation of Pakistan through Secretary Revenue Division Vs Sahib Jee & Others).

#### **Analysis/Conclusion**

18. After perusal of record, examination of all documents, and detailed hearing, it has been observed that Commissioner IR, Bahawalpur vide his letter No.CIR-WHT-RTO/BWP/2016-17/1758 dated 18.5.2017 has already pointed out in parawise comments that "the taxpayer went in appeal against the order u/s 161 of the Income Tax Ordinance, 2001 before the Commissioner Inland Revenue (Appeal) Bahawalpur. The Department filed the second appeal before ATIR against the order of CIR (Appeal). The matter is sub-judice. The complaint may very kindly be dismissed."

19. It has been pointed out that as confirmed from the available record the date of filing appeal before ATIR by FBR/Agency is 28.3.2017. Date of complaint filed before FTO has been confirmed as 2.5.2017. As the matter was sub judice FTO's jurisdiction was debarred under Section 9(2)(a) FTO Ordinance 2000.

20. Section 9(2)(a) of the FTO Ordinance 2000 provides that FTO shall not have jurisdiction to investigate or inquire into matters which are subjudice before a court of competent jurisdiction or tribunal or board of authority on the date of the receipt of a complaint, reference or motion by him.

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 already been settled by the Lahore High Court in Case No. Tax Reference No.48 of 2011 (Commissioner Inland Revenue Versus M/s Chicago Metal Works), that--- "it is incumbent upon the Commissioner under sub Section (3), to satisfy himself that tax was overpaid and he is obliged to reduce the payable refund by adjusting the tax payable under this Ordinance and under other statutes.

23. Nevertheless, the Commissioner is bound under Sub Section (4), to make a refund order within sixty days from receipt of application for refund. His inaction is made appealable under Sub Section (5). In our opinion, on expiration of sixty days, a negative order is presumed to have been passed. In case appeal is accepted, against the inaction, and refund is determined by Appellate Court, the refund shall be taken as due on the date when sixty days expired from receipt of application for refund. Courts would not allow the department to take advantage of its own inaction within the stipulated period of sixty days.

24. For the reasons discussed above, we do not agree with the interpretation and decision given by the Appellate Tribunal. Our answer to the questions of law, supra, is in "Negative" i.e. in favor of applicant department. ---For the reasons given in this judgment, the applications, detailed hereunder are also decided in favor of the department in same terms. PTR No.49 of 2011 and PTR Nos.26,27,28,29,30,31,32,33,34,35,36,37,38,39,40 & 41 of 2009."

25. It has been held by Lahore High Court in 2017 PTD 2019 (Messrs Shahzadi Polypropylene Industries through Proprietor Vs Federation of Pakistan through President and 4 other) in I.C.A. No.1213 of 2017, that "complaint against non-issuance of income tax refund---Jurisdiction of the Federal Tax Ombudsman in relation to cases of tax refund---Intra-court appeal---Maintainability---Petitioner's complaint before the Federal Tax Ombudsman regarding non-issuance of income tax refund was decided in petitioner's favor, which was subsequently set aside by order in representation to the President of Pakistan filed by Department---Petitioner's Constitutional petition against said order in representation was dismissed---Validity---Federal Tax Ombudsman had no jurisdiction to investigate or inquire into matters which related to assessment of income, determination of liability of tax, interpretation of law, rules and regulations relating to assessment/determination in respect of which legal remedies of appeal, review or revision were available under the relevant legislation---Intra Court appeal was hit by proviso to S.3(2) of the Law Reforms Ordinance, 1972 as S. 32 of the Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000 provided remedy of representation before the President against recommendations of the Federal Tax Ombudsman---Intra Court appeal was dismissed, in circumstances."



26. 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.

27. 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.

28. In such circumstances, where remedy of appeal was available FTO could not interfere with the matter of assessment of tax and interpretation of law as well as sub judice cases. Thus FTO having gone beyond the scope and powers, the impugned findings are not sustainable. 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.

29. Accordingly, the President has been pleased to accept the instant representation of FBR-Agency and to set aside the impugned recommendations/findings of FTO.



(Zulfiqar Hussain Awan)  
Director General (Legal Affairs)

✓  
The Chairman,  
Federal Board of Revenue,  
Islamabad.

No. 158/FTO/2017 dated 05.01.2018

Copy for information to:

1. Mr. Sajjad Ahmed, M/s Umer Usman, Cotton Ginning & Allied Industries, Grain Market, Haroonabad.
2. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
3. The Chief (Legal-I), Federal Board of Revenue, Islamabad.
4. Director to Secretary to the President.
5. Master file.

✓  
(Zulfiqar Hussain Awan)  
Director General (Legal Affairs)