

Most Urgent / Out Today

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**

JUDICIAL DEPARTMENT

18 MAY 2022

M (L) ✓

13097 / Writ  
12-May-2022

From, M(L & A - cust.)

**The Deputy Registrar(Judicial),**

Islamabad High Court,  
Islamabad.

Chief (L-I)  
S-Lit(SC)  
S(A&A)  
S(A)

To,

- 1\_Federal Tax Ombudsman through its Registrar  
Federal Tax Ombudsman Secretariat 5-A, Constitution Avenue, Islamabad
- 2\_Chairman  
Federal Board of Revenue, FBR House, Constitutional Avenue, Islamabad

Chief (L-II)  
S-Lit(SC)  
S(A)

Chief (L-III)  
S-Lit(SC)  
S(A)

**Subject: W.P. 2332/2021 Misc. Other (SB)**

**Abdul Waheed Khan-VS-Federal Tax Ombudsman etc**

Dear Sir,

I am directed to forward for information and immediate compliance a copy of this Court's order dated **07-03-2022** passed by **Hon'ble** Mr. Justice Babar Sattar in the above noted case.

Yours Faithfully,

**Assistant Registrar (Writ)**

For Deputy Registrar (Judicial)



Send

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**Decided Matter**

FBR e-Dox No. 20 MAY 2022  
Received in M(L) Office on

20532A

FBR eDOX Dy.No. 20532A  
Received in Chairman's Sectt.  
on 18 MAY 2022

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IN THE ISLAMABAD HIGH COURT, ISLAMABAD

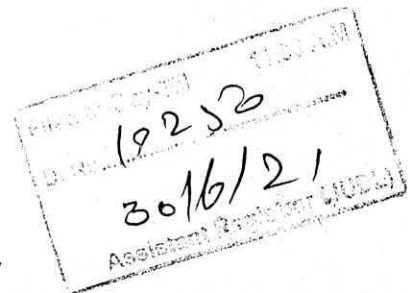
(W.P. No. 2332 /2021)

1. **Abdul Waheed Khan**  
Commissioner Inland Revenue,  
Audit Zone-I, LTO, Mauve Area G 9/1,  
Islamabad.
2. **Zulfiqar Ahmed**  
Commissioner Inland Revenue,  
AEOI Zone, LTO, 4<sup>th</sup> Floor, Evacuee Trust Complex,  
Agha Khan Road, Islamabad.
3. **Naeem Hassan**  
Commissioner Inland Revenue,  
Audit Zone-II, LTO, Mauve Area G 9/1,  
Islamabad.
4. **Shabana Mumtaz**  
Commissioner Inland Revenue,  
Legal Zone, LTO, Mauve Area G 9/1,  
Islamabad.

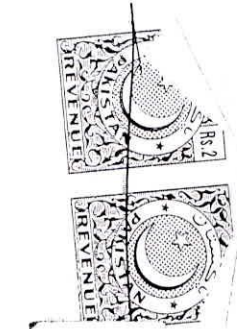
.....PETITIONERS

-: Versus:-

1. **Federal Tax Ombudsman**  
Through its Registrar,  
Federal Tax Ombudsman Secretariat, 5-A  
Constitution Avenue,  
Islamabad.
2. **Federal Board of Revenue**  
Through its Chairman,  
F.B.R. House, Constitutional Avenue,  
Islamabad.



...RESPONDANTS



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Form No: HCJD/C-121.  
JUDGEMENT SHEET  
IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
JUDICIAL DEPARTMENT

**WRIT PETITION NO. 2332 OF 2021**

Abdul Waheed Khan, Commissioner Inland Revenue & others.

Vs

Federal Tax Ombudsman & another.

PETITIONER BY: Syed Ishfaq Hussain Naqvi, Advocate.

RESPONDENTS BY: Mr. Mansoor Ahmed, Advocate for  
respondent No.1.

Hafiz Ahsan Ahmed Khokhar, Advocate  
for respondent No.2.

DATE OF DECISION: 07.03.2022.

=====

**BABAR SATTAR, J.-** The petitioners are aggrieved by respondent No.1's letter dated 14.04.2021, ordering the nomination of a committee to inspect the offices of Commissioner Inland Revenue ("**Commissioners**") in exercise of powers under Section 17 of the Federal Tax Ombudsman Ordinance, 2000 ("**Ordinance**"), on complaints of malpractices and corrupt motives in discharge of duties by the Commissioners.

2. Learned counsel for the petitioners stated that pursuant to Section 9(1) of the Ordinance in order to exercise inspection powers under Section 17 there must be a complaint by an aggrieved person which is to be investigated to redress the grievance of such person, to the extent that such grievance relates to maladministration. He submitted that given that the basis for exercise of the inspection powers are generic

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complaints, the matter does not fall within the jurisdiction of respondent No.1. That the investigation of corruption falls within the domain of relevant Investigation Agencies and not that of the Federal Tax Ombudsman ("FTO"). He submitted that investigation of corruption resulting to tax evasion across an industry does not fall within the functions of the FTO as envisaged under Section 9 of the Ordinance. That even if investigation of tax evasion fell within the domain of the learned FTO a complaint making an allegation against an officer of the Federal Board of Revenue was still needed for exercise of *suo motu* powers under Section 9 read with Section 17 of the Ordinance. That the impugned letter had been issued in breach of Section 10 of the Ordinance, which mandates that the learned FTO is first required to issue a notice to the officer under question then seek a reply from such officer before proceeding to the investigation. That the impugned letter also suffered from infirmity as it was issued without specifying the scope of inquiry and amounted to engaging in a fishing expedition barred by law. He relied on the following judgments to support his submissions: **The Barium Chemicals Ltd vs. The Company law board** (AIR 1697 SC 295), **Dr. Akhtar Hassan Khan vs. FOP** (2012 SCMR 455), **Syed Nusrat Nasir vs. FOP** (2013 PTD 486), **National Feeds Ltd vs. Competition Commission of Pakistan** (2016 CLD 1688), **PESCO vs. Wafaqi Mohtasib** (PLD 2016 SC 940), **Z & J Hygienic Products (Pvt.) Ltd vs. FOP** (2018 PTD 419), **Wafaqi Mohtasib vs. SNGPL** (PLD 2020 SC 586), **S.M Ali Zaman Gardezi vs. FOP** (2021 PTD 1788), **Jubilee Life**



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**Insurance Company Ltd vs. the Federal Government**  
**(2021 PLC (CS) 1563) and Nadia Naz vs. The President**  
**of Islamic Republic of Pakistan (PLD 2021 SC 784).**

3. The learned counsel appearing on behalf of respondent No.1 (FTO) submitted that the petition was not maintainable as it had been filed by Commissioners who could not have been aggrieved by the impugned letter as the inspection in question was not in respect of their officers, but related to allegation of tax evasion in the cigarette and tobacco industry. He submitted that the impugned letter was merely a request to FBR to nominate members of the inspection team, which had been issued in exercise of authority under Section 17 of the Ordinance. The said request had been made in the interest of transparency, as the learned FTO under Section 17 could constitute an inspection team without including any officers from within by hierarchy of FBR. He submitted that an article was published in newspaper on 31.03.2021 identifying the illicit manner of tax assessment re tobacco industry that was leading to a revenue loss running into billions per annum. In view of such article the learned FTO sought a preliminary report from his advisor. The advisor on the basis of production figures of tobacco projected tax revenue that ought to be collected and the data put together reflected that there were grounds to believe that tax evasion was underway across various tax jurisdictions in Pakistan. The learned FTO thus issued the impugned letter on the basis of complaints of malpractice with corrupt motives in discharge of duty and ordered the

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constitution of an inspection team while seeking a nomination from FBR. He contended that the impugned letter suffered from no infirmity and was opposed by the petitioners to cover-up corruption in relation to tax assessment within the tobacco industry.

4. The counsel for respondent No.2 (FBR) supported the petition. He submitted that the impugned letter did not specify the scope of the investigation that had been ordered by the learned FTO and suffered from jurisdictional defects.

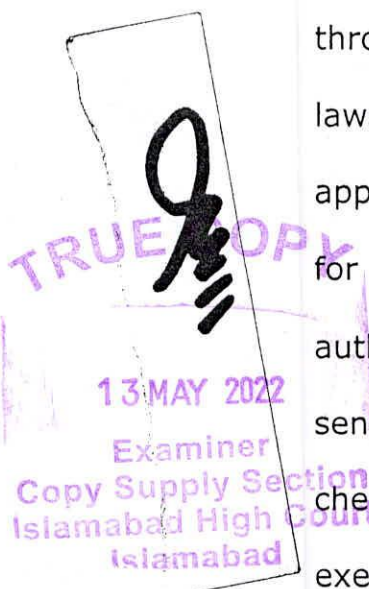
5. In rebuttal, it was contended that the petitioners were aggrieved persons because it was tax assessment that fell within their jurisdiction that the learned FTO ought to scrutinize without first notifying them of any allegations as required under Section 10 of the Ordinance. He further submitted that the learned FTO had no jurisdiction to undertake an across industry audit in the manner in which the tax was assessed in relation to tobacco industry. That even in the event that the learned FTO sought to investigate corruption, the correct course of action was to undertake a study under Section 9(4) of the Ordinance and then make appropriate recommendations to the FBR.

6. The contents of the impugned letter reveals that the learned FTO sought to investigate corruption in relation to discharge of duties by Commissioners assessing income of cigarette and tobacco industry. The learned FTO ordered an inspection and sought from the FBR the nomination of an official to be included in the three member inspection team.

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The question that arises is whether the investigation of corruption in relation to assessment of tax across an industry falls within the domain of maladministration as defined by the Ordinance and consequently within the functions and powers of the learned FTO. The second question that arises is procedural. In the event that the learned FTO is vested with powers to investigate certain allegations, what procedural requirements must be complied with. And in such process, whether ordering an inspection is the first step to be undertaken by the learned FTO while assuming jurisdiction to investigate a complaint.

7. Let us start with the preamble to the Ordinance to understand the legislative intent as reflected in provisions of the Ordinance. The first proviso of the preamble states that the appointment of the learned FTO is expedient "to diagnose, investigate, redress and rectify any injustice done to a person through maladministration by functionaries administering tax laws". The rationale for creating the office of the learned FTO appears to be provided for a complaint redressal mechanism for individual taxpayers who fall within the jurisdiction of authorities administering relevant tax legislation. This makes sense as the institution of the Ombudsman was conceived as a check on exercise of executive authority from within the executive. The Ombudsman is not a judge sitting in judgment over rival claims between two litigating parties. It is an in-house check within the executive over exercise of authority and discretion by public functionaries who form part of the executive authorized to make recommendations to the highest



echelons within the executive to curb maladministration and resolve the complaints of individuals. The mandate of the learned FTO is not that of a corruption watchdog or of an auditor diving into the tax assessment practices across industries or that of an agency responsible for maximizing tax revenue. The scope of the authority and jurisdiction of the learned FTO is focused on addressing the grievances of individuals who are caught on the wrong side of exercise of authority and discretion by public functionaries administering tax laws and to address the grievances of such victims of maladministration. The definition of maladministration supports such interpretation of the scope or authority of the learned FTO, which is defined in Section 2(3) as follows:

**(3) "maladministration" includes,-**

(i) a decision, process recommendation, act of omission or commission which-

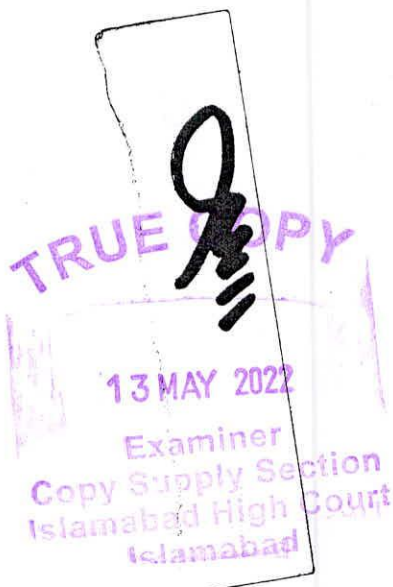
(a) is contrary to law, rules or regulations or is a departure from established practice or procedure, unless it is bona fide and for valid reasons;

(b) is perverse, arbitrary or unreasonable, unjust, biased, oppressive, or discriminatory;

(c) is based on irrelevant grounds; or

(d) involves the exercise of powers, or the failure or refusal to do so, for corrupt or improper motives, such as bribery, jobbery, favouritism, nepotism, and administrative excesses;

(ii) neglect, inattention, delay, incompetence, inefficiency and ineptitude, in the administration or discharge of duties and responsibilities;





(iii) repeated notices, unnecessary attendance or prolonged hearings while deciding cases involving –

(a) assessment of income or wealth;

(b) determination of liability of tax or duty;

(c) classification or valuation of goods;

(d) settlement of claims of refund, rebate or duty drawback; or

(e) determination of fiscal and tax concessions or exemptions;

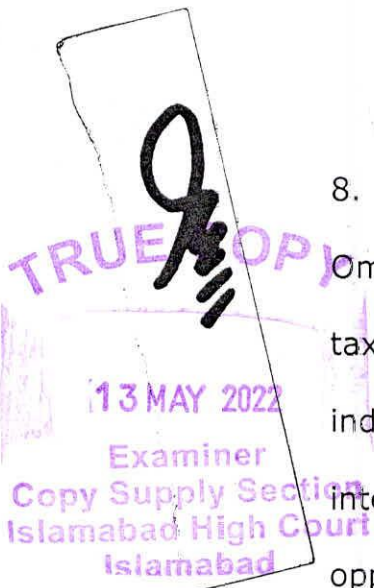
(iv) wilful errors in the determination of refunds, rebates or duty drawbacks;

(v) deliberate withholding or non-payment of refunds, rebates or duty drawbacks already determined by the competent authority; (vi) coercive methods of tax recovery in cases where default in payment of tax or duty is not apparent from record; and

(vii) avoidance of disciplinary action against an officer or official whose order of assessment or valuation is held by a competent appellate authority to be vindictive, capricious, biased or patently illegal.

8. Perusal of the above definition clarifies that the Ombudsman is not a corruption watchdog or the maximizer of tax revenue. The role of the Ombudsman is to protect individuals against practices and decisions that injure the interest of individuals and in the process create rent-seeking opportunities for public officials administering tax laws.

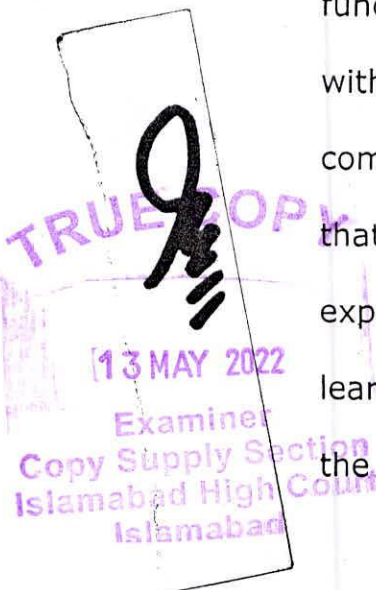
9. The language of the impugned letter reflects that the learned FTO has deemed the allegation of corruption, as the basis for exercising *suo moto* authority, to fall under Section 2(3)(ii) and thus sought to exercise authority to curb corrupt



practices in discharge of duties and responsibilities by tax officials. What the learned FTO did not take into account was that it is "neglect, inattention, delay, incompetence, inefficiency and inaptitude, in the administration or discharge of duties and responsibilities," that constitutes maladministration for purposes of Sections 2(3)(ii) of the Ordinance. The word corruption or dishonesty in discharge of duties and responsibilities is evidently missing from definition of maladministration. The reason is simple. Under relevant laws, the curtailment of corruption falls within the domain of other specialized agencies. The legislature in its wisdom did not endow the learned FTO with such responsibility as discharge of such functions requires certain expertise and an organizational setup. The learned FTO was not conceived to perform such function. The learned FTO can logically scuttle corrupt practices within the tax administration while investigating individual complaints by identifying the processes and practices and ethos that create rent-seeking opportunities for tax officials. When exposed to corrupt practices in discharge of his functions, the learned FTO need not ignore them. Section 9(4) thus provides the following:-

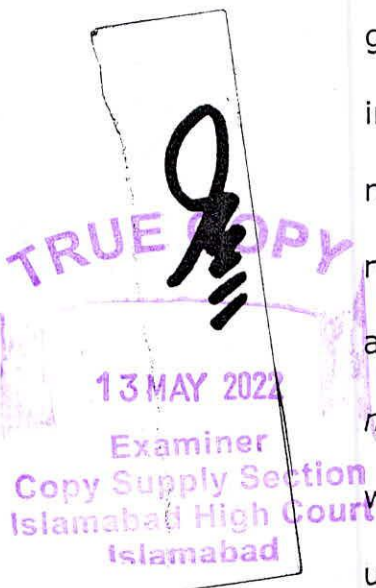
*(4) For carrying out the objectives of this Ordinance and, in particular for ascertaining the causes of corrupt practices and injustice, the Federal Tax Ombudsman may arrange for studies to be made or research to be conducted and may recommend appropriate steps for their eradication.*

10. The language of this provision very clearly provides that the role of the learned FTO is prescriptive: to ascertain the



causes of corrupt practices for which purpose the learned FTO can undertake studies and research. The following corrective action is not in the form of making recommendations for implementation under Section 11 of the Ordinance, but to recommend appropriate steps for eradication of such corrupt practices to the FBR, the Revenue Division, the Federal Government and to refer individual cases involving corruption to investigation agencies vested with the jurisdiction to investigate cases of corruption. As aforementioned, the definition of maladministration read together with Section 9 of the Ordinance (which defines the jurisdiction, functions and powers of the learned FTO) does not envisage the learned FTO as a corruption watchdog.

11. Section 9 of the Ordinance, focuses on individual grievances. Section 9(1) authorizes the learned FTO to investigate an allegation of maladministration on his own motion as well. Section 9(1) read together with Section 10(2) requires that an allegation of maladministration must not be anonymous or pseudonymous. The rationale for providing *suo moto* investigative power under Section 9(1) appears to be that while investigating a certain complaint filed by a complainant under Section 10, the learned FTO may come across other maladministration being practiced by tax officials which the Ombudsman is then authorized to take cognizance of on his own motion. We need not determine, for purposes of instant petition, all circumstances in which jurisdiction can be assumed by the learned FTO of his own motion. But suffice it to say that



there must exist a concrete allegation of maladministration whether or not there is a complainant. Under Section 10(4) such allegation is to be put to the person within the tax administration against whom it is leveled.

12. Section 9(1) read together with Section 10 highlights that there must exist an explicit allegation of maladministration. Such allegation must not form part of any anonymous or pseudonymous complaint. Such allegation must be against a public official within the tax administration who is alleged to have engaged in maladministration. And where the learned FTO purposes to conduct an investigation in relation to such allegation he is required to issue a notice to the Secretary of the Revenue Division and the official who is alleged to have indulged in maladministration, requiring such official to file a reply to the allegations to be investigated by the learned FTO. In the event that such notice is issued and the official in question fails to respond to such allegation contained in the notice issued by the learned FTO within a period of thirty days of receipt of such notice, the learned FTO can then proceed with the investigation after recording reasons as to why the learned FTO deems necessary to proceed with such investigation.

13. Thus even in relation to an investigation initiated by the learned FTO of his own motion, the two necessary conditions for initiation of investigation are that (i) there must be an allegation of maladministration against the tax official, and (ii) such tax official must be issued a notice identifying the

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allegations against him which the learned FTO purposes to investigate, providing such official with an opportunity to respond to such allegations. Once the official alleged to have indulged in maladministration files a response that is not found satisfactory by the FTO, the learned FTO can proceed with the investigation under Section 14 of the Ordinance. The learned FTO is vested with powers of a Civil Court under Code of Civil Procedure, 1908, including, the power to compel production of documents and receiving evidence on affidavits, issuance of commission for the examination of witnesses, etc. Section 14(2) vests in the Ombudsman the power to require any person to furnish information that the learned FTO finds relevant for purposes of an investigation. Section 15 of the Ordinance confers the authority to enter and search a premises where the learned FTO has reason to believe that any documents relating to the subject-matter or investigation may be found. Section 17 then empowers the learned FTO to constitute an inspection team for performance of any functions under the Ordinance.

14. Let us now revert to Section 9(2), which excludes from the jurisdiction of the learned FTO, the investigation or inquiry into matter that relates to assessment of income or determination of tax liability. The determination of income or tax liability is a function vested under the Income Tax Ordinance, 2001, and Sale Tax Act, 1990, in the Commissioner within his/her respective jurisdiction. When the tax department is to generate a tax demand against a taxpayer, such demand



cannot be generated without first hearing the taxpayer. The tax statutes then provide statutory remedies of appeal and identify forums that can be approached by a taxpayer or the tax department whoever is aggrieved by exercise of adjudicatory functions by the Commissioner, Commissioner (Appeals) or the Appellate Tribunal. That is why Section 9(2)(b) excludes the jurisdiction of the learned FTO when it comes to assessment of tax liability, as for such purpose appropriate statutory remedies have been provided by law. This scheme is guided by the principle of *audi alteram partem* and the right of a taxpayer to due process. In the instant case, for example, the learned FTO has sought to initiate an investigation into tax evasion on part of taxpayers involved in the business of tobacco and the insinuation is that tax commissioners across the country are complicit in facilitating such tax evasion. To determine whether or not the income and tax liability of taxpayers involved in the business of tobacco has been under-assessed, would require the learned FTO to sit in judgment over the assessment undertaken by Commissioners. This is barred by Section 9(2)(b) of the Ordinance. The enterprise would require the learned FTO to pass judgment on the tax liability of taxpayers who are not complainants before the learned FTO and whose tax affairs are not to be judged by the FTO. And any recommendation in relation to tax affairs of such taxpayers without granting them an opportunity to be heard would obviously fall foul of the guarantee to fair trial in determination of civil liabilities under Article 10-A of the Constitution.

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15. The learned FTO on the basis of an article published in a newspaper and a report by his advisor has determined of his own motion that there exists basis to investigate tax evasion on part of entities involved in the business of tobacco, which is being caused by corruption on part of public officials within the tax administration. Such investigation falls foul of Section 9(2)(b) as well as Section 9(4). The learned FTO is assuming the role of a corruption watchdog over the tax administration and has sought to undertake an investigation to maximize tax revenue due from taxpayers involved in the business of tobacco. Section 9 of the Ordinance does not vest such jurisdiction in the learned FTO as such investigation does not relate to the grievance of any individual complaint who has made allegations of maladministration in the treatment meted out to him or her by officials administrating the tax machinery.

16. The procedure adopted by the learned FTO also suffers from irregularities. The learned FTO under Section 9(1) was under an obligation to identify the allegation of maladministration in the first phase. Then pursuant to Section 10(4) he was under an obligation to communicate such allegation to the tax official against whom such allegation of maladministration was leveled, while sending a copy of such notice to the Secretary of Revenue Division. And only upon failure of the tax official against whom the allegation was leveled to respond to such allegation in a satisfactory manner could the learned FTO initiate an investigation, after recording reasons as to why the learned FTO deemed such investigation

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to be necessary. Section 10(11) vests authority in the learned FTO to regulate the procedure for exercise of his powers under the Ordinance. However, the procedure adopted must be in pursuit of the object of the investigation in question and means employed must be reasonable in view of the end to be achieved by the learned FTO. Section 10(9) provides that the learned FTO may require any tax official to produce any document which in the opinion of the learned FTO is relevant for the conduct of any investigation. In the event that the learned FTO seeks such document and it is not provided by the tax official he can resort to his powers under Section 14 of the Ordinance to compel the production of such document. Even if exercise of such power does not bear fruit, the learned FTO can then resort to his power to order entry and search of any premises in which the required documents may be found. For such purpose he can constitute an inspection team under Section 17 of the Ordinance. What the scheme of the Ordinance does not envisage is putting the cart before the horse and starting by appointing an inspection team to enter and search a premises for procurement of the documents without resort the powers under Section 10(9) or Section 14, especially when the documents are in possession of a public official exercising jurisdiction under relevant legislation as defined in Section 2(6) of the Ordinance.

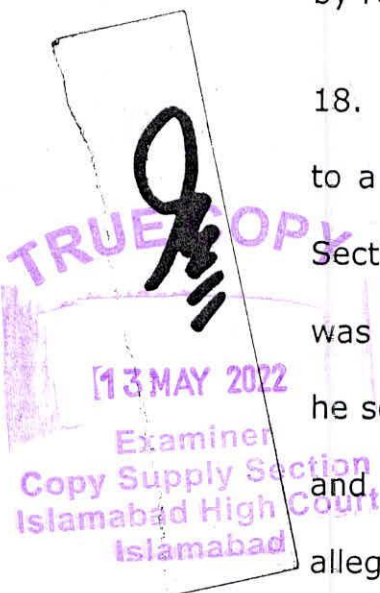


17. In the instant case, the learned FTO after concluding that an investigation into suspected corruption of tax officials was to be initiated by *suo moto*, did so without issuing any



notice to the relevant tax officials or copying the same to Secretary of Revenue Division. The learned FTO neither sought any explanation from the relevant tax officials nor recorded reasons for deeming the investigation necessary. He then chose not to exercise his authority under Section 10(9) and seek relevant record for purposes of the inquiry. The learned FTO elected to kick off the process by appointing an investigation team to possibly search the offices of Commissioners undertaking assessment of tax affairs of taxpayers involved in the business of tobacco across various jurisdictions. His resort to such procedure evidently suffers from infirmity in view of the scheme of the Ordinance as detailed above and is liable to be set aside. It is now settled that no authority vested with powers to investigate can exercise such power in order to indulge in a fishing expedition by resorting to a roving inquiry.

18. The learned FTO while assuming jurisdiction in relation to a matter in which the jurisdiction was vested in him under Section 9 of the Ordinance read together with Section 2(3), was under a mandatory obligation to identify the allegation that he sought to investigate. The articulation of the such allegation and identification of the tax officials against whom such allegations were leveled would then determine the scope of his investigation and the scope of the documents deemed relevant for purposes of such investigation. Without such determination, the initiation of any investigation would amount to initiation of a roving inquiry, which is not permissible in view of the law laid



down by the august Supreme Court in **Dr. Akhtar Hassan Khan vs. FOP (2012 SCMR 455)** and reiterated by this Court in **National Feeds Ltd vs. Competition Commission of Pakistan (2016 CLD 1688)**.

19. For the aforementioned reasons, this Court concludes that the subject-matter of the investigation purportedly being initiated by the learned FTO falls beyond the jurisdiction vested in his office under Section 9 of the Ordinance. The procedure adopted by the learned FTO falls foul of the requirement of Section 10. And the constitution of an inspection team as a first step in the investigation without first exercising authority to summon the required record amounts to procedural impropriety in breach of the principles of reasonability and proportionality. Further, the impugned letter is also in breach of Section 24-A of the General Clauses Act, 1897, as it records no reasons as to the scope or manner or propose of exercise of authority by the learned FTO.

20. For the above reasons, this petition is **allowed** and the impugned letter is set aside for being devoid of jurisdiction and in breach of the provisions of the Ordinance.

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Shakeel Afzal/-

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(BABAR SATTAR)  
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