

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

Federal Tax Ombudsman Suo Moto Action

REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE ON SUO MOTO NOTICE THROUGH OWN MOTION BY THE HONOURABLE FEDERAL TAX OMBUDSMAN FINDINGS / RECOMMENDATIONS DATED 17.12.2020 PASSED BY THE FTO IN COMPLAINT NO.0200/OM/2019

Kindly refer to your representation on the above subject addressed to the President in the background mentioned below:-

- 1) Rep. No. 06/FTO/2021 in C. No. 0200/OM/2019
- 2) Rep. No. 06 (A)/FTO/2021 in C. No. 0200/OM/2019
- 3) Rep. No. 06 (B)/FTO/2021 in C. No. 0200/OM/2019
- 4) Rep. No. 06(C)/FTO/2021 in C. No. 0200/OM/2019

In an Own Motion (OM) investigation initiated while exercising powers under Section 9(1) of the Federal Tax Ombudsman Ordinance, 2000 (FTO Ordinance), to investigate irregularities committed by the FBR's field formations in processing and sanctioning of bogus Income Tax Refunds (ITR) during the period 2011-2014 as identified by the Directorate General I&I-IR (Dte. Gen I&I-IR), FBR, the under mentioned order was passed by the learned Federal Tax Ombudsman on 17.12.2020.

"FBR to-

- i. *initiate proceedings for recovery of tax demand created for Tax Years 2007, 2008, 2009 and 2011 vide consolidated order dated 05.06.2013, as per law;*
- ii. *initiate disciplinary proceedings against the Chief Commissioner-IR, Corporate RTO, Lahore and Commissioner-IR, Zone-IV, Corporate RTO, Lahore who willfully and maliciously submitted misleading comments/reports (dated 24.09.2019 and 27.08.2019);*
- iii. *direct the Chief Commissioner-IR, Corporate tax employee(s) RTO, Lahore to investigate and identify the tax employee(s) involved in preparation/approval/issuance of refund for Tax Years 2007 to 2009 and 2011 and initiate disciplinary and criminal actions against those found involved in the said fraudulent activity; and*
- iv. *report compliance within 45 days."*

2. These four representations have been filed by:-

- (i) FBR – RepNo.06/FTO/2021
- (ii) Dr. Muhammad Sarmad Qureshi – Rep No.06(A)/FTO/2021
- (iii) Syed Nadeem Hussain Rizvi – Rep No.06(B)/FTO/2021
- (iv) Ch. Muhammad Tariq – Rep No.06 (C)/FTO/2021

3. The background is that in the case of M/s China National Electric Wire & Cable Import & Export Corporation [Register Person (RP)], an AOP registered vide NTN 2789363-2 with principal activity of electrical installations refund for Tax Year 2012 amounting to Rs.26.119 million was claimed. In terms of sub-Section(3) Tax deducted on the income of a Resident Person or Permanent Establishment (PE) of the Non-Resident Person under clauses (a) and (c) of Section 153(2) of the Income Tax Ordinance, 2001 (the Ordinance) should be final Tax. Thus, ITR claimed by the RP, a Permanent Establishment of the Non-Resident Person for Tax Year 2012 was inadmissible. The Dte. Gen I&I-IR FBR, after conducting investigation issued Red Alert vide letter dated 17.04.2013 proposing action against the RP under Section 122(5A) of the Ordinance for Tax Year 2012. Furthermore, after conducting Post Refund Audit (PRA) of the RP for Tax Years 2007, 2008, 2009 and 2011, the Directorate I&I-IR (Dte I&I-IR) Lahore also issued investigation report to the Chief Commissioner-IR (CC-IR), RTO, Lahore vide letter dated 30.04.2013. As per report, the RP claimed refund for Tax Years 2007 to 2009 and 2011 amounting to Rs.26.778 million, Rs.25.264 million, Rs.71.151 million and Rs.0.170 million respectively. The Deptt had, however, already issued refunds for Tax Years 2007 to 2009 and 2011 aggregating to Rs.123.364 million. In order to retrieve the loss of revenue, the Dte I&I-IR also proposed initiation of action for Tax Years 2007 to 2009 and 2011 under Section 122(5A) of the Ordinance.

4. In the own motion action the learned Federal Tax Ombudsman called comments from the Secretary, Revenue Division, Islamabad. In response thereto, the FBR vide letter dated 27.08.2019 submitted comments of the Commissioner-IR, Zone-IV, CRTO, Lahore. It was averred that the refund for Tax Years 2007 to 2009 and 2011 was issued genuinely as the taxpayer in question was to be taxed under normal proceedings where tax payment in excess of

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the tax liability was refundable, therefore, no irregularity was made with reference to issuance of refund for Tax Years 2007 to 2009 and 2011 vide vouchers Nos. 11 dated 10.09.2009 and 11.09.2009. It was prayed that the matter may be closed as no maladministration was committed.

5. Subsequently, the CCIR, CRTO Lahore vide letter dated 26-12-2020 reported that in order to retrieve loss of revenue, the Deptt had already completed proceedings vide consolidated order dated 05.06.2013 under Section 122(5A) of the Ordinance for Tax Years 2007, 2008, 2009 and 2011 and created tax demand against the RP amounting to Rs.39.331 million, Rs.31,205 million, Rs.102.046 million and Rs.6.6496 million respectively. Further, the FBR had been approached to facilitate the recovery of above refund tax liability through Government of the Peoples Republic of China. The Commissioner-IR, Audit-I, CRTO further contended that proceedings for Tax Year 2012 would be completed vide order dated 13.06.2018 under Section 122(5A) of the Ordinance whereby return of the RP was subjected to final tax liability vide letter dated 05.11.2020. As a result, claimed refund amounting to Rs.26.119 million for Tax Year 2012 was no more available to the RP. Concluded that the instructions issued by the Dte I&I-IR vide Red Alert dated 17.04.2013 would duly be implemented.

6. The case was fixed for 04.08.2021, when Syed Nadeem Hussain Rizvi, Member FBR, Ch. Muhammad Tarique, Member FBR and Mr. Ahmad Taimoor, DCIR, Lahore appeared for themselves and on behalf of the FBR. It was re-fixed for 07.09.2021, when Syed Nadeem Hussain Rizvi, Member FBR and Mr. Ahmad Taimoor, DCIR, Lahore appeared and produced the relevant record.

7. The grievance sought to be projected is as follows:-

- i. That subsequent to issuance of refunds with the approval of the Commissioner-IR, an officer junior in rank to the Commissioner namely Additional Commissioner (Audit) invoked the provisions of Section 122 (5A) of the Ordinance *ibid* while assigning the status of a Resident AOP to the taxpayer. The assessment order of the Additional Commissioner (Audit) clearly mentions that the taxpayer was an AOP having a single member owning 100% share of such AOP. At the first place, there cannot be an AOP having a single member which fact the Additional Commissioner failed to appreciate. Secondly, the Additional Commissioner (Audit) reasoned that since the only member of the AOP is resident, the AOP is also a resident person consequently. This is a faulty logic because the relevant law contained in the Ordinance clearly and unambiguously provides that the test for determining the residential status of an AOP is the place of its control and management and not the residential status of the members of the AOP. It, therefore, demonstrates that the assessment order passed by the Additional Commissioner (Audit) suffers from very significant and ostensible mistakes of law and appreciation of relevant facts.
- ii. Further, it is a matter of record that the taxpayer is a known Chinese Corporation having its official website www.cccme.org.cn and on the basis of facts available on record, the status of the taxpayer seems to have been rightly determined by the concerned Deputy Commissioner-IR as a Non-Resident Corporation during the course of refund proceedings which position was approved by the Additional Commissioner-IR as well as the Commissioner-IR. This position also stands substantiated from the fact that the taxpayer got registered itself with the SECP as a foreign company under Section 450 of the Companies Ordinance, 1984. It shows that the status of Non-Resident Corporation was assigned by the Refund Processing Officers quite in good faith and resultantly, observation of the FTO regarding fraudulent issuance of refund in the case does not hold ground.
- iii. Moreover, like every other Statute, Income Tax Ordinance, 2001 provides legal shelter to all actions taken by the State functionaries under the law in good faith as Section 227 of the said Ordinance is quite clear in this regard. It may be further relevant that hundreds of thousand actions have been taken under Section 122(5A) of the Ordinance or the corresponding provisions of Section 66A of the repealed Income Tax Ordinance, 1979 whereby erroneous assessments/orders made by subordinate authorities have been amended, or cancelled but the authors of the erroneous orders have not even been issued an explanation letter because of the good faith shelter provided by the law.
- iv. A cursory look of the impugned Order indicates that Order passed by the Additional Commissioner (Audit) U/S 122(5A) of the Income Tax Ordinance, 2001, dated 05.06.2013 was ab initio void because the Refund Order U/S 170(4) of the Ordinance, 2001 though passed by the DCIR, had become Order of the CIR, who examined and approved the same for issuance of refund vide Order dated 11.01.2010. Being an Order of the CIR, it was not revisable by a lower authority i.e. an Additional Commissioner U/S 122(5A) of the Ordinance, 2001 as he could not sit in judgment upon the CIR, who examined and approved the refund. This dictum has been upheld by the Hon'able Supreme Court of Pakistan in the case of M/s Glaxo Laboratories Limited reported as 1992 PTD 932(SC).

- v. Moreover, a question arises as to whether an Additional Commissioner-IR could use the authority delegated to him under Section 122(5A) of the Ordinance to amend an order passed by a Commissioner-IR, an authority senior to him without any specific instructions by a higher authority at least equivalent to a Commissioner. However, Additional Commissioner-IR under Section 122(5A) had the delegated authority to amend the order of Deputy Commissioner-IR being an authority junior to him but the Additional Commissioner-IR could not have authority to amend the order passed by the Commissioner-IR, an authority senior to him. Conversely, the record shows that Additional Commissioner-IR took that action only on the basis of the "Red Alert" without obtaining prior approval from the competent authority and even without a conscious application of his mind.
- vi. As the substratum on which the FTO had taken Suo Moto Notice was apparently a void Order also on the score that neither the Taxpayer [against whom the ex-parte Order U/S 122(5A)(ibid) had been passed] was summoned and heard nor any of the officers allegedly involved in making and vetting the Refund Orders U/S 170(4) of the Ordinance, 2001 was summoned and heard by the FTO. As such the impugned Order of the FTO is in flagrant violation of the cardinal principle of natural justice: *audi alteram partem*, which render the impugned Order *void ab initio*, illegal and without lawful authority, as held by the Hon'ble Supreme Court of Pakistan vide judgments i.e.- PLJ 2008 SC 1088; 2007 SCMR 330; 2005 SCMR 678; 2005 SCMR 1814; and PLD 2004 SC 441. Consequences of non-adherence to the above said canon of natural justice have been laid down as under:-
- a. An adverse order made without affording an opportunity of personal hearing is to be treated as a void order [2005 SCMR 1814]; and
 - b. Its violation is always considered enough to vitiate even the most solemn proceedings [2005 SCMR 678].

The impugned Order is, *thus*, liable to be set at naught on this score alone.

- vii. The impugned Order of the FTO is also un-sustainable on the point of jurisdiction as Section 9(2)(b) of the FTO's Ordinance bars the FTO 2000 invoking jurisdiction into the matters relating to assessment of income, and determination of liability of Tax, which certainly includes determination and issuance of refund. Needless to mention that although pilferage of Tax by making illegal refunds must be curbed but it is equally important to give fair trial to a person against whom an adverse order is passed. Though the learned FTO is empowered to 'diagnose, investigate, redress and rectify any injustice done to a person through maladministration by functionaries administering Tax laws', yet he can neither be allowed to ignore the rule of fair trial enshrined in Art. 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 while exercising his jurisdiction under the FTO Ordinance 2000, nor he can be permitted to enter into the arenas specified by Section 9(2)(b)(ibid). Whereas, making recommendations against the officers of the FBR without giving them personal hearing and reasonable opportunity for putting forth their defence is a negation of the due process and fair trial, which renders the impugned recommendations, illegal and without lawful authority.
- viii. However, the recommendations at Sr. Nos. (i)&(iii) of para 12 of the impugned Order should, however, be adhered to by the Chairman FBR for ensuring proper service of the Order U/S 122(5A)(ibid) upon the Chinese Company M/s China National Wire & Cable Import & Export Corporation (RP) before starting recovery proceedings; as the requirement of due process and fair trial becomes utmost necessary in case of a Non-Resident in order to demonstrate that justice must not only be done but also seen to be done. Moreover, making arbitrary and unjust orders without following the rule of due process and fair trial must be avoided at every cost. So far as recommendations of the learned FTO in para 12(ii) of the impugned order for initiating disciplinary proceedings against the CIR and CCIR of the CRTO, Lahore who initiated and submitted report before the learned FTO is concerned, it may be unfair to hold them responsible. It is evident from the facts of the case and documents presented that the report was forwarded only on the basis of record available at the material time and no malafide has been observed as such.
- ix. Additionally, Section 214B of the Income Tax Ordinance, 2001 is meant to be attracted to such a situation when two contradictory orders are in the field, it seems imperative that a higher authority namely Federal Board of Revenue should have called for the record of the proceedings and evaluated the legal correctness/veracity of the orders and make appropriate order accordingly. Further, FBR has

been conferred enormous powers under Section 214A to condone statutory time limit for any action or thing to be done. Both the aforesaid provisions combined together provide an ample mechanism to the FBR to rectify the wrongs if any involving the proceedings. Section 214-B of the Ordinance 2001 is as follows:

“Power of the Board to call for records – (1) The Board may, of its own motion, call for and examine the record of any departmental proceedings under this Ordinance or the rules made thereunder – under for purpose of satisfying itself as to the legality or propriety of any decision or order passed therein and may pass such order as it may think fit:

Provided that no order imposing or enhancing any tax or penalty then the originally levied shall be passed unless the person affected by such order has been given an opportunity of showing calls and of being heard.

(2) No proceeding under this Section shall be initiated in a case where an appeal is pending.

(3) No order shall be made under this Section after the expiry of three years from the date of original decision or order.”

8. In view of such variety of objections to the proceedings before the learned FTO including legal issues as to the extent and scope of jurisdiction and authority reference to the various provisions of the Ordinance is necessary. The Establishment of Office of the Federal Tax Ombudsman Ordinance, 2000 shows that under S.9(1) the FTO may on a complaint by any aggrieved person or of his own motion, investigate any allegation of maladministration on the part of the Revenue Division or any Tax Employee. S.2(3) defines “mal-administration” and includes (iv) willful errors in the determination of refunds, rebates or duty drawbacks unless it is bonafide and for a valid reason. The law lays down the procedure for investigation and collection of evidence and formulation of the recommendation for implementation. S.11 envisages “If the Federal Tax Ombudsman is of opinion that the matter considered amounts to maladministration, he shall communicate his finding with a recommendation to the Revenue Division”. The powers of FTO include further that if he has reason to believe that any Tax Employee has acted in a manner warranting criminal or disciplinary proceedings against him, he may refer the matter to the appropriate authority for necessary action to be taken within the time specified by the FTO (S.14). Regulations called Federal Tax Ombudsman Investigation and Disposal of Complaints Regulations, 2001 have been framed which though do not specifically deal with own motion cases yet there are some provisions dealing with the complaints and hearing thereof. R.6 empowers the Ombudsman to hold personal hearing. R.9 empowers the Ombudsman to authorize any officer of the Secretariat for carrying out inspection or investigation by order in writing, generally or in a particular case. R.10 (5) is of some importance which reads as follows:-

“If a complaint is complete in all respect and falls within the Ombudsman’s jurisdiction and prima facie a case of mal-administration is made out, the Officer dealing with the complaint or Authorized Officer shall proceed to issue a notice to the Secretary Revenue Division and the person who is alleged in the complaint to have taken or authorized the action complained of calling upon him to reply to the allegations contained in the complaint.”

In **Federation of Pakistan through Secretary, Establishment Division, Government of Pakistan, Islamabad v. Muhammad Tariq Pirzada and others [1999 SCMR 2744]** and **Federation of Pakistan through Secretary, Establishment Division, Government of Pakistan, Islamabad v. Muhammad Tariq Pirzada and others [1999 SCMR 2189]** the Hon’ble Supreme Court of Pakistan has held that the functions performed by the Mohtasib are quasi-judicial and that the jurisdiction vested in the President under Article 32 (Representations) partakes of appellate jurisdiction. Similar view has been expressed recently by the Hon’ble Supreme Court of Pakistan in **Dr. Zahid Javed v. Dr. Tahir Raiz Chaudhary and others [PLD 2016 SC 637]** emphasizing further that in the case of quasi-judicial power, the *Persona Designata* is required to act personally and not on the basis of any advice by any other person or authority.

9. Visualized in this perspective and background of the instant matter the grievance of the Agency and its Officers who were alleged to have been responsible for the unauthorized refund is that they had passed the order according to law in bonafide discharge of duty and such orders were not agitated or appealed against by any one as per the statutory remedies provided by the Ordinance. Their further grievance is they were not issued any notice nor afforded any opportunity of hearing and were condemned unheard in violation of all established norms and rules of natural justice, and even R.6 of the Regulations was not kept in view.

10. It is now well settled and there can be no cavil with such a proposition that no order adverse to any body's rights or interest can be legally passed without affording an opportunity of defense/ hearing. The principle is so firmly established that even where the law does not provide for notice/ opportunity of hearing it is deemed to be a part of every statute/ law and to be observed by the functionaries concerned. Administrative Law [Eighth Edition] by SIR WILLIAM WADE and CHRISTOPHER FORSYTH has stated the principle in one sentence that "*Natural justice has achieved something like the status of a fundamental right*"(P.491). Further it is stated that "*Where there is a charge of serious misconduct it is especially important, as the Court of Appeal has emphasized, that procedural fairness should be carefully observed*" (P.513).

11. A Division Bench of Lahore High Court in **Crescent Sugar Mills & Distillery Ltd v. Central Board of Revenue (PLD 1982 Lah 1)** had dealt with a case where a Member of the Board of Revenue had heard the matter but did not pass any order and his successor on the basis of notes on the file passed the order. The learned Bench noted that "*It is now well settled that a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly. It must, in a proper case, give a party a chance to be heard*". ... "*We are of the view that even the note left by Mr. Hafeez-ud-Din Ahmad on the last hearing on 27-6-1977 for the consideration of passing the order by Mr. Fazalur Rahman on 27-5-1978 cannot be considered to be a fair opportunity of hearing provided to the appellant-Company, for, in the first place the officer who heard the matter did not decide it himself*". Accepting the petition remanded the matter to the Board for its decision in accordance with law.

It is thus established that such a lapse in the matter does vitiate the proceedings and the consequent order.

12. Another important aspect of the matter is about the mode and manner of the proceedings in the own motion matter. An Advisor to the learned FTO initiated a note about a matter of processing, sanctioning and issuing of bogus Sales Tax refund about which 'red alerts' had been issued by the Directorate General (I&I), IR. According to him the organization had not taken action in the matter, nor the connivers were proceeded against. He however noted that some of the units were black listed and some inquiries were initiated to be shelved later on. He recommended taking of *Suo moto* action by the learned FTO. The Registrar put up the matter before the learned FTO for taking cognizance under S.9 of the FTO Ordinance, 2000. Accordingly, on 07.03.2019, the action was approved by the learned FTO and process was begun. Initially Khawaja Umar Mehdi, Advisor was entrusted the handling of this matter who on 23.09.2019 opined that "*after careful study of own motion case and examination/ comments submitted by the department on different hearing it has transpired that the issues involved in the case related to income tax which are technical in nature. It is therefore proposed that the case may be assigned to the Advisor having adequate experience and background of income tax law*". On this reference for transfer of the matter to some other functionary it was transferred to Mian Munawar Ghafoor, Advisor Lahore. He conducted the investigation and eventually as per order sheet dated 31.12.2019 initiated draft order for approval. But there is nothing on the record to show its fate.

13. In view of the various objections to the proceedings before the learned FTO by the FBR and the Officers who have filed the representations the original record of the proceedings was sent for which has been produced and perused.

14. During the course of hearing of the representations questions were raised *inter-alia* that no formal opportunity of hearing was afforded to the Department / its Officers during the proceedings before the learned FTO and; that the officers dealing with the matter and investigating therein had been changing from time to time; and the learned FTO had not dealt with matter himself. Therefore, the perusal of the original record of the proceedings conducted by the FTO Secretariat was found necessary and has been examined.

15. It may be observed that proceedings before the FTO under Ordinance, 2000 are of quasi-judicial nature as held by the Supreme Court in case **Federation of Pakistan through Secretary, Establishment Division, Government of Pakistan, Islamabad v. Muhammad Tariq Pirzada and others [1999 SCMR 2744]** and it is expected that a minimum requirement of fairness and dispensation of justice is kept in view and is followed.

16. In the instant matter though the order was issued with the signature of the learned FTO, yet it is evident from the record that not a single hearing was given to the parties by himself and merely the draft findings prepared by one of the investigating officers were approved/ signed. There are serious flaws in the whole process of proceedings vitiating the ultimate order passed by the learned FTO. A material aspect of the proceedings is that though initially the matter was being dealt by the advisor of the name Khawaja Umar Mehdi on whose reference it was transferred to another advisor Mian Munawar Ghafoor who on 31.12.2019 prepared and initiated a "*draft own motion order*" for appraisal. The fate of this draft order is not known however the proceedings chart shows that the matter was taken up thereafter by Mr. Abdul Rehman Dogar, Advisor Incharge (without any order of FTO) and after some proceedings on 04.08.2020 he prepared a draft finding and submitted for appraisal. Another "*draft own motion order*" was submitted by the same officer

on 24.08.2020. The fate of these draft orders/ findings is not evident from the record. But what happens is that thereafter, Mr. Manzoor Hussain Qureshi also joins Mr. Abdul Rehman Dogar to investigate the matter. How and when he was ordered to associate with the proceeding being conducted by Mr. Abdul Rehman again is not known. The ultimate order that was signed by the learned FTO shows the dealing officer Mr. Abdul Rehman Dogar, Advisor and appraising officer Mr. Manzoor Hussain Qureshi, Advisor. Such a process of dealing with complaint is not contemplated by law. Suffice it to observe that in **Crescent Sugar Mills & Distillery Ltd v. Central Board of Revenue (PLD 1982 Lah 1)** such principle has been clearly laid down. Since the whole process under taken in the investigation of the complaint (Suo moto action) is contrary to established legal norms and contrary to the principles of natural justice and fairness the order is not sustainable and is liable to be set aside. As held in [**Crescent Sugar Mills & Distillery Ltd v. Central Board of Revenue (PLD 1982 Lah 1)**] remand of the matter to the learned FTO to decide it afresh by affording due opportunity of representation and hearing to all concerned or likely to be affected in the matter, is necessary.

17. The learned FTO while processing and hearing the matter will address to the objections taken and raised by the Agency and its Officers *inter-alia* also examine as to whether in a case when statutory remedies in the hierarchy were available, the matter can be opened/ adjudicated by a junior officer than the officer who had passed the order and even of a coordinate jurisdiction. The normal rule is that an officer lower in hierarchy or even of coordinate authority cannot countermand the orders passed by the other.

18. Accordingly, the Hon'ble President, as per his decision above, has been pleased to set aside the order passed by the learned FTO dated 17.12.2020 and direct the hearing and determination of the matter afresh by affording opportunity of representation/ defence to the Agency and its Officers.


(Anwar-ul-Haq)
Director General (Legal)

The Chairman,
Federal Board of Revenue,
Islamabad.

No.06/FTO/2021 dated 26.10.2021

Copy for information to:

1. Syed Nadeem Hussain Rizvi, Member, Federal Board of Revenue, Islamabad.
2. Ch. Muhammad Tariq, Member, Federal Board of Revenue, Islamabad.
3. Dr. Muhammad Sarmad Qureshi, Commissioner-IR, Legal Zone, Large Taxpayer Office, Lahore.
4. The Registrar, Federal Tax Ombudsman, Islamabad.
5. ✓ The Chief (Legal-III), Federal Board of Revenue, Islamabad.
6. Master file.


(Anwar-ul-Haq)
Director General (Legal)