

**FEDERAL TAX OMBUDSMAN SECRETARIAT
REGIONAL OFFICE, LAHORE**

COMPLAINT NO.523-L/2009

Dated 10.08.2009

Mr Sirajuddin Khalid
20-G Hajvery Complex
2-Mozang Road, Lahore

... Complainant

Versus

The Secretary
Revenue Division
Islamabad

... Respondent

FINDINGS/RECOMMENDATIONS

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| Dealing Officer: | Mr. Muhammad Munir Qureshi, Advisor |
| Authorized Representative: | Mr. Sirajuddin Khalid, Advocate |
| Departmental Representative: | Ms. Samia Ejaz, DCIT |

The facts in this case are that the income tax assessment for the Assessment Year 2002-2003 in respect of Messrs Honda, Shahrah-e-Faisal, Karachi, an Association of Persons (AOP), deriving income from sale of auto spare parts and workshop receipts, was finalized on 20.5.2003 by the Income Tax authorities under Section 59(1) of the Income Tax Ordinance 1979 (hereinafter referred to as the repealed Ordinance). Thereafter, consequent to enactment of Finance Act 2003, the Income Tax authorities sought to amend the aforesaid assessment by recourse to the provisions of sub-section 5A of Section 122 of the Income Tax Ordinance 2001 (hereinafter referred to as the Ordinance). This was contested by the AOP on the ground that as sub-section 5A of Section 122 was inserted by the Finance Act 2003, it was required by law to be applied 'prospectively' after 1.7.2003, not retrospectively to amend the AOP's income tax assessment for assessment year 2002-2003 which had already been finalized on 20.5.2003 under the repealed Ordinance.

2. As the Departmental view in the matter was quite opposite to the view taken by the Complainant, the latter invoked the constitutional writ jurisdiction of the Sindh High Court. The High Court vide judgment dated 2.3.2005 decided in

favour of the petitioner and held that sub-section 5A of the Ordinance inserted through Finance Act, 2003 took effect from 1.7.2003, and it was not retrospective in its operation. The decision of the Sindh High Court was followed in a large number of similar petitions disposed of by other High Courts across Pakistan. Resultantly, the Departmental effort to re-open the already completed income tax assessment for assessment year 2002-2003 u/s 59(1) of the repealed Ordinance failed.

3. It is the Complainant's contention that instead of accepting a plain and simple decision of the Sindh High Court which was prima facie correct beyond any shade of doubt, the FBR perfunctorily filed appeal before the Hon'ble Supreme Court of Pakistan which appeal also failed and the apex Court not only maintained the Order of the High Court but extended its scope by observing:

“..... the assessment of any year ending on or before 30-6-2002 would be governed by the repealed Ordinance and shall be dealt with as if the Ordinance had not come into force.”

4. The Complainant contends that the present complaint filed by him under the FTO Ordinance, 2000 is in the category of “Public Interest Litigation.” It is within the jurisdiction of the Federal Tax Ombudsman as it is directed against the alleged systemic maladministration by functionaries of the Federal Board of Revenue, who needlessly and at times mindlessly file appeals before the Courts on issues which even on the basis of ordinary common sense would not justify Departmental appeal. It is alleged that because of their misconceived decisions to file references/appeals before the higher courts, a great deal of time, energy and public funds are routinely wasted every year. The Complainant goes on to explain that billions of rupees of revenue was irretrievably lost in this particular case, which otherwise could have been used for purposes of economic development, uplift of the people and the security of the country, etc. As a concerned citizen the Complainant holds that such loss of much needed revenue is due to systemic neglect and inefficiency of the Federal Board of Revenue for which the FBR officials are individually and severally responsible, and the same amounts to ‘maladministration’ as defined in Section 2(3) (i) and (ii) of the Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000.

5. In written reply filed by the FBR, it has been contended that the Federal Tax Ombudsman has no jurisdiction to hear the complaint which is concerned with assessment of income, determination of tax liability and interpretation of law. FBR has also referred to the decision of the President of Pakistan on a

Representation in Complaint No. 979- K/2001 holding that the jurisdiction of Ombudsman is confined to cases of maladministration and does not extend to decisions reached on merit. FBR has also referred to another decision of the President in Complaint No 552/2002 in which it has been held:

“Where a question raised in a complaint is a question of fact determinable by tax authorities, the Mohtasib ought not to interfere with the tax authorities findings unless he finds that the fact finding authority has been guilty of some misbehavior.”

6. The FBR goes on to assert that the Complainant is personally not an ‘aggrieved’ person and denies any ‘criminal negligence’ on its part leading to ‘loss of revenue.’ During hearing of the complaint, the DR reiterated what is stated in the written reply filed by the FBR.

7. The Complaint has been examined in the light of the written and oral submission of the parties. As regards the FBR’s contention that the Federal Tax Ombudsman is not competent to look into complaints that involve interpretation of income tax law, assessment of income and determination of tax liability, it is correct that these areas, per se, do not fall in the FTO’s jurisdiction. However, where systemic inefficiency of tax functionaries falling in the category of tax maladministration as defined in Section 2(3) of the FTO Ordinance, 2000 is evident, the Federal Tax Ombudsman is fully competent under the aforesaid Ordinance to look into the same on his own motion even when no complaint is filed before him.

8. The Complainant in this case is actually alleging systemic inefficiency on the part of FBR while dealing with decisions whether or not to file purposeless appeals against the taxpayers. It is the Complainant’s contention that by choosing to file appeal before the Hon’ble Supreme Court of Pakistan against the judgment of the Sindh High Court, the concerned tax officials made a wrong decision involving avoidable waste of time, effort and scarce financial resources. The Complainant also claims that during the course of appeal proceedings before the Supreme Court, the representative of FBR admitted that as a result of its inability to proceed further in these cases, a revenue loss of Rs. 5 billion was estimated to have taken place, whereas the actual loss was much higher.

9. The Complainant also holds that FBR has ignored the crux of the matter and has failed to appreciate that the complaint falls in the area of ‘public interest litigation’ and in this specific context the Complainant is an ‘aggrieved person’ as

envisaged under Section 9(1) of the Establishment of Federal Tax Ombudsman Ordinance, 2000. He is, therefore, competent to file complaint and raise the matter before the Federal Tax Ombudsman. The law enshrined in section 9 of the FTO Ordinance, 2000 does not restrict any person from being aggrieved by any systemic maladministration. To feel aggrieved by any act of omission or commission of a public functionary is natural for the citizens. The citizens who articulate their grievances against an act of maladministration are as deserving to be heard as those whose concerns do not extend beyond their own persons. Contending that the Complainant is not personally aggrieved in this case seems to suggest that no citizen should feel aggrieved from systemic deficiencies of tax administration. It also seems to suggest that no individual citizen should own public causes and raise his voice against systemic malfunctioning because such malfunctioning is not hurting him personally. Does that mean that public causes are nobody's concern, and these should not be owned unless these hurt an individual citizen personally? This kind of mindset does not in any way serve the public interest. Therefore, the contention that since the Complainant is not an aggrieved person, the issue of systemic malfunctioning should not be taken up by the FTO Office suffers from obvious rationality deficit.

Findings:

10. While all the allegations leveled in the present complaint may not be correct, what is obvious is that the existing system of screening requests for filing references or appeals to superior fora by the FBR needs a comprehensive review. It appears that many references/appeals/petitions before higher fora are pushed by officers who believe that passing the buck would absolve them of any liability. This 'save your skin strategy' is indeed a major cause of lot of avoidable legal battle. In theory, a report is generated after adjudication at each appellate forum and the same is put up before the concerned authorities in the departmental hierarchy. In practice, however, that report merely attracts the attention it deserves. And more often than not, whatever recommendation has been made at the initial tier is routinely approved at the next higher tier.

Recommendations:

11. In view of the forgoing, it is recommended that:

- (i) Legal Wing of FBR should have teams of professional tax lawyers of exceptional competence and highest integrity to scrutinize all cases recommended for appeals;
 - (ii) FBR should lay down detailed criteria that would make it possible to rigorously evaluate the legality and propriety of filing departmental appeals in individual cases;
 - (iii) The criteria laid down in this regard be included in the training modules of the Training Institutes under the FBR;
 - (iv) The success or failure of references and appeals before superior courts be regularly monitored and officials routinely seeking to file such appeals be strictly disciplined; and
 - (v) The mindset of the dealing officers to 'pass the buck' needs to be changed in the interest of better tax administration.
12. Compliance report be submitted within three months.

(DR. MUHAMMAD SHOAIB SUDDLE)
FEDERAL TAX OMBUDSMAN

Dated: -2010
MQ/ M.R./my