

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

No.167/FTO/2022

Dated:28.12.2022

*Federal Board of Revenue Vs M/s National Databasse and
Registration Authority*

Subject: **REPRESENTATION FILED BY FEDERAL BOARD OF REVENUE AGAINST THE
FINDINGS / RECOMMENDATIONS DATED 13.05.2022 PASSED BY THE LEARNED
FTO IN COMPLAINT NO. 0719/ISB/IT/2022**

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

This representation has been filed by Federal Board of Revenue on 07.06.2022 against the order of the learned Federal Tax Ombudsman (FTO) dated 09.05.2022, whereby it has been held that:

“In view of above FBR is directed to ensure that:

- (i) ***IR-Policy Wing issues necessary clarification for all IR field formations on the scope of 122(5A), vis-a-vis audit U/S 177, especially after amendment in the section 122(5A), vide Finance Act 2021 and Circular No. 2 of 2021-22;***
- (ii) ***pending aforementioned clarification the complainant may not be treated adversely; and***
- (iii) ***report compliance within 45 days.”***

2. This complaint was filed under Section 10(1) of the Federal Tax Ombudsman Ordinance 2000 (FTO Ordinance) against an amendment order U/S 122 (5A) of the Income Tax Ordinance (the Ordinance) on the basis of "enquiry" which was then discarded and abolished in the law.

3. M/s National Database & Registration Authority (NADRA) (the complainant) alleged that its assessment for Tax Year 2018 had been amended U/S 122 (5A) of the Ordinance on 4th February, 2022. The complainant challenged the power of the Assessing Officer to amend the assessment on the basis of "enquiry" despite the fact that the power of "enquiry" was withdrawn through the Finance Act 2021.

4. The learned Federal Tax Ombudsman called the comments of the Secretary, Revenue Division, Islamabad. In response thereto, the Chief Commissioner-IR, LTO, Islamabad submitted reply vide letter dated 04.04.2022. It was averred that amendment order was passed after providing proper opportunity of hearing. Moreover, that the amendment order was appealable before the CIR (Appeals) which the taxpayer had already filed. Thus, in such situation the bar of jurisdiction under Section 9(2)(b) of the FTO Ordinance applied in this case.

5. Considering the respective stances, the learned FTO proceeded to pass the above mentioned order. Hence, the representation by the FBR.

6. The hearing of the case was fixed for 06.12.2022 when Ms. Nafeesa Bano, Additional Commissioner-IR has appeared, whereas, the complainant has not appeared despite notice. Today, 13.12.2022. Mr. Muhammad Khurram, Additional Commissioner LTO has represented the FBR, whereas Mr. Amer Javed, FCA and Mr. Shahzad Akhtar, Director Accounts NADRA have appeared.

7. The learned Federal Tax Ombudsman thrashed the matter vide Para 5 of the order as follows:
"5. Though the department has not furnished Para-wise comments with reference to the core allegation i.e. action U/S 122(5A) of the Ordinance on the basis of fishing inquiry, which has no legal legs to stand upon, yet the following aspects of the case need to be thrashed before any discussions on preliminary objection.

i. Section 122(5A) reads;

"Subject to sub-section (9), the Commissioner may amend or further amend, an assessment order, if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue."

Through Finance Act, 2021 the above provision has been modified and the earlier provision allowing the Commissioner, "after making, or causing to be made, such enquiries as he deems necessary" was deleted. Meaning thereby, after 1st July 2021 Section 122 (A) of the Ordinance is strictly restricted to the cases wherein only a visible and definitive instance of an error in assessment order, which is simultaneously prejudicial to the interest of revenue as well, can be taken up under this amended provision. The scope of any further enquiries is no more there. Whereas in the instant case notice u/s 122(9) of the Ordinance dated 13th December, 2021 raises multiple issues which are subject matter of legal interpretation currently being contested by the complainant at various fora. Thus scope of 122 (5A) of the Ordinance has been stretched beyond plain erroneous aspects of the case to the legally debatable issues.

ii. FBR vide Circular No. 2 of 2021-22 dated 1st July, 2021, through Note-22 had clarified that;

"Tax authorities can conduct inquiry under 122(5A) in certain matters regarding amendment of assessment without selection of case for audit u/s 177 of the Ordinance. This power to conduct inquiry has been withdrawn."

Therefore, when the department has the power to select a case for Audit then raising audit issues in the guise of 122 (5A) of the Ordinance is against the spirit and intent of the law. While audit of a case is a wholesome exercise action U/S 122(5A) of the Ordinance has to have issues specific, definitive, erroneous and prejudicial to the interest of revenue.

iii. While the instant complaint was pending, LTO Islamabad started similar proceedings for TY 2019 as well, despite the fact that Member-IR, Operations-IR had circulated instructions on 4th February 2022 to all field formations that pending complaint at FTO Office no fresh audit proceedings shall be initiated against the taxpayer. Defiance of the FBR's instructions is glaringly visible.

iv. Finally departmental stance that an appealable order has been passed and the taxpayer has already filed appeal before the CIR (Appeals), the instant complaint suffers from bar of jurisdiction in terms of Section 9(2)(b) of the FTO Ordinance, 2000. Notwithstanding the fact that unending litigation is adversely affecting the state exchequer, the complaint in the instant case has been entertained on the basis of allegation that the order u/s 122(5A) of the Ordinance for TY 2018 is contrary to the law. For fair and judicious proceedings any provision of law, quoted by the litigant parties has to be read in line with the statute in question, as a whole. Mere selective references, ignoring the spirit of said law goes counter to the ends of justice. Sub-Section (3) of section 2 of FTO Ordinance reads;

(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.

The order passed u/s 122(5A) of the Ordinance appears to be contrary to the law."

8. At the outset, the Departmental Representative (DR) has stated that the directions regarding issuing clarification on scope of Section 122 (5A) are unnecessary as the Section itself define its scope of action i.e. Section 122 (5A) of the Ordinance – "*Subject of subsection (9), the Commissioner may amend or further amend, an assessment order, if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue*". Accordingly, its scope is, therefore, to work in the ambit of twin conditions i.e. (i) the assessment should be erroneous, (ii) the assessment should be prejudicial to interest of revenue. Further, the Superior Courts have also defined scope of this Section, thus, no further clarification is required. Moreover, an amendment order was passed after providing opportunity of hearing.

9. The order was appealable, and the complainant has already filed appeal before the Commissioner (Appeals) which is pending adjudication. Suffice it to observe that the complainant having already filed appeal before the relevant forum i.e. Commissioner (Appeals) who will decide the matter as per law. Thus, the representation is liable to be disposed of accordingly.

10. Accordingly, the Hon'ble President, as per his decision above, has been pleased to dispose of the representation of the FBR.

-Sd-
(Muhammad Saleem)
Director (Legal)

The Chairman,
Federal Board of Revenue,
Islamabad.

Mr. Rashid Javid,
M/s. National Database and Registration Authority,
State Bank of Pakistan, Shahrah-e-Jumuriat, Sector G-5/2,
Islamabad. 0300-8635443

Copy for information to:

1. The Registrar, Federal Tax Ombudsman, Islamabad.
2. The Chief (Legal-III), Federal Board of Revenue, **Islamabad.**
3. The Commissioner-IR (Audit-I), LTO, Plot No.20, Mauve Area, G-9/1, Islamabad.
4. Rafaqat Babar & CO, Chartered Accountants, Office No. 2, 1st Floor, Panther Plaza Near Meezan Bank, F-8 Markaz, **Islamabad.** 2656606-07
5. Master file

-Sd-
(Muhammad Saleem)
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