

**BEFORE
THE FEDERAL TAX OMBUDSMAN
ISLAMABAD**

Complaint No.0715/ISB/IT/2022

Dated: 01.03.2022* HQ, Islamabad

Mr. Rashid Javid,
M/s. National Database and Registration ...Complainant
Authority, through Rafaqat Babar & CO,
Chartered Accountants, Office No. 2, 1st Floor,
Panther Plaza, F-8 Markaz, Islamabad.

Versus

The Secretary, ...Respondent
Revenue Division,
Islamabad.

Dealing Officer	: Mr. Muhammad Majid Qureshi, Advisor
Appraisal Officer	: Mr. Muhammad Tanvir Akhtar, Advisor
Authorized Representative(s)	: Mr. Amer Javed Ahmad, FCA
	: Mr. Wajid Hayat Khan
Departmental Representative	: Mr. Kamran Ullah, ADCIR, LTO, Islamabad

FINDINGS/RECOMMENDATIONS

This complaint has been 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 is now discarded and abolished in the law.

2. Brief facts of the case are that M/s. National Database & Registration Authority (NADRA) has alleged that its assessment for Tax Year 2018 has been amended u/s 122 (5A) of the Ordinance on 4th February, 2022. The Complainant is challenging the power of the assessing officer to amend the assessment on the basis of "enquiry" despite the fact that the power of "enquiry" has been withdrawn through Finance Act 2021.

3. The complaint was referred for comments to the Secretary, Revenue Division in terms of Section 10(4) of the FTO Ordinance, read with Section 9(1) of the Federal Ombudsman Institutional Reforms Act, 2013. In response thereto, the Chief Commissioner-IR, LTO, Islamabad submitted the reply vide letter dated 04.04.2022.

4. Hearing notice was issued u/s 9(2) of the FOIR Act 2013, in response to which Mr. Amer Javed Ahmed, AR of the Complainant and Mr. Kamran Ullah, DR attended. The DR contested that amendment order has been passed after providing proper opportunity of hearing. He further stated that the amendment order was appealable before CIR's (Appeals) which the taxpayer has already filed. He pleaded that in such situation the bar of jurisdiction under section 9(2)(b) of the FTO Ordinance applies in this case.

FINDINGS:

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 was 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(5A) 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 and 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 various 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 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 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.

RECOMMENDATIONS:

6. 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-à-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.*

Certified to be True Copy

Approved for reporting and
Registration

FTO Secretariat

Dated: 09/05/2022
U.f

Islamabad

(Dr. Asif Mahmood Jah)
(Hilal-i-Imtiaz)(Sitara-i-Imtiaz)
Federal Tax Ombudsman