

**BEFORE
THE FEDERAL TAX OMBUDSMAN
ISLAMABAD**

COMPLAINT NO.3174/KHI/IT/2022

Dated: 18.07.2022* R.O, Karachi.

Syed Mumtaz Alam,

Plot No. C-11-C, 3rd Floor, Flat No. 05
Khayaban-e-Sehar, Phase-7, DHA
Karachi.

...Complainant

Versus

The Secretary,
Revenue Division,
Islamabad.

...Respondent

Dealing Officer	:	Ms. Seema Shakil, Advisor
Appraised by	:	Mr. Muhammad Tanvir Akhtar, Advisor
Authorized Representative	:	Mr Moaz Mehmood, Advocate.
Departmental Representative	:	Mr. Saad Ali Hassain. (ADC)

FINDINGS/RECOMMENDATIONS

The above-mentioned complaint has been filed against the Commissioner-IR, Appeal-VII, CTO, Karachi and Assistant Commissioner-IR Audit CTO Karachi in terms of Section 10(1) of the Federal Tax Ombudsman Ordinance, 2000 (FTO Ordinance), for passing arbitrary, harsh order ex-parte & for confirmation thereof ignoring all the grounds of appeal.

2. The Complainant is an individual engaged in textile manufacturing. The case for Tax Year 2015 was selected for audit by the Board under Section 214C, of the Income Tax Ordinance 2001. Due to non-compliance of several notices, ex-parte order was passed, creating demand of Rs. 3.2(M). Bank accounts were attached & recovery of tax was also made through attachment. Being aggrieved, complainant filed appeal to Commissioner IR Appeals-VII, who vide his order dated 7th June 2022 rejected the appeal on the ground of non-availing opportunity of hearing given by the

department. As no other grounds were adjudicated by Commissioner-IR Appeal, the instant complaint has been filed.

3. The complaint was referred to the Secretary, Revenue Division for comments in terms of the FTO Ordinance read with Section 9(1) of the Federal Ombudsmen Institutional Reforms Act, 2013. In response, parawise comments were also filed by Commissioner-IR Appeals-VII vide his letter dated 28.7.2022. At the outset, jurisdiction of FTO has been challenged in terms with Section 9(2)(b) of the FTO Ordinance 2000, as option of filing 2nd Appeal has been provided to the appellant. On other grounds of complaint, the relevant extract of reply are reproduced below;

"The complainant's objection that the impugned order under Section 121 of the I.T Ordinance 2001 dated 28.6.2021 was passed on the basis of single show cause notice is totally unwarranted, uncalled for, devoid of merit and unlawful. It is clearly mentioned in this office appellate order dated 7.6.2022 that audit proceedings in the complainant's case were carried out as under:-

S.No.	Notice U/S	Date of issuance	Date of compliance	Remarks
01.	IDR/177(1)	7.2.2017	14.2.2017	No compliance
02.	REMINDER		8.11.2021	No compliance
03.	REMINDER		21.2.2021	No compliance
04.	SHOW CAUSE NOTICE	14.6.2021		No compliance
IMPUGNED ORDER PASSED EXPARTE U/S 121 OF THE I.T ORD., 2001 ON 28.6.2021				

From the above table, it is apparent that appellant was provided reasonable and sufficient opportunity of being heard during the time period (2017 to 2021), but all in vain which finally resulted in completion of audit proceedings on exparte basis Under Section 121 of the Income Tax Ordinance 2001, in the complainant's case and the same was subsequently confirmed by this office. The above table also speaks itself of the volume of non-adherence to statutory provisions of law by the complainant.

The complainant's allegation that documentary evidence submitted at this forum regarding purchase of property in the year 1986-87 for claiming exempt capital gain on disposal of

immovable property is totally devoid of merit as well as against the facts of the case, as the complainant did not make compliance to statutory notices (as tabulated above) and failed to furnish supporting documentary evidence for claiming exempt capital gain on disposal of immovable property during the audit proceedings to the audit officer concerned.

Secondly, Section 128(5) of the Income Tax Ordinance 2001, binds the Commissioner-IR (Appeal) not to entertain any new evidence which was not produced before the adjudicating authority / assessing officer without identifying & establishing 'sufficient cause'.


In this respect, your kind attention is also invited to the fact that through grounds of appeal, the appellant did not explain his non-compliance to statutory notices, as discussed in the above table.

Therefore, looking to the bindings placed under Section 128(5) of the Income Tax Ordinance 2001 on the Commissioner-IR Appeal (as discussed supra), the AR contention / submission could not be examined or re-verified at this forum. Verification process is entirely related to adjudicating authority / audit officer. "

4. In his rejoinder vide letter dated. 15.8.2022 & during hearing, complainant rebutted the arguments of both the Assistant Commissioner as well as Commissioner Appeal. The relevant portion of rejoinder is reproduced below;

"The complainant has filed the complaint for the treatment meted out against him. Please appreciate that the complainant has not brought any question of law before this august forum rather all the grounds submitted points out towards facts of the case, which were apparent from the case records already available with the office of the Respondent, yet the Add Commissioner-IR chose to pass the order against the complainant based on his whims and fancies without referring to any definite information or legal reference and the CIR(A) further upheld it. Hence, the impugned order lacks legal sanctity, devoid of merits and biased and discriminatory towards the complainant. Therefore, it completely falls within the ambit of maladministration as defined under Section 2(3) of the FTO Ordinance.

Regarding maladministration, following submissions need your kind attention:

- 
- (1) *That the Commissioner-IR Appeal upheld the order without offering any comments over the facts of the case and simply upheld the order of the ADCIR by stating that sufficient opportunity of being heard was provided.*
 - (2) *It was duly apprised to the CIR(A) that the complainant did not receive the show cause notice to be able to respond the issues. The complainant was not provided to defend on the alleged discrepancies confronted vide show cause notice.*
 - (3) *The complainant duly apprised the CIR(A) that show cause notice and the order was not properly served on him. Even the complainant did not receive any notification via email or sms regarding issuance of show cause notice or passing of exparte order. The complainant came to know about passing of the order when he accessed his IRIS account at the time of filing of annual return of income. Please note that by that time the time to file the appeal had lapsed and the complainant had to request the CIR(A) to condone the time limit, which was granted after hearing of the reasons.*
 - (4) *It is to inform your worthy office that CIR(A) did not bring the matter of sufficient cause in light of Section 128(5) of the Ordinance before accepting the documents submitted to him. It is to point out that he has also not mentioned the same in his order that he ever inquired to submit a sufficient cause for admissibility of evidence.*
 - (5) *That the Commissioner-IR Appeal upheld the order of ADCIR and disposed of the appeal through a single para, which is vague and having imprecise reasoning/rationale. The CIR(A) had no authority to block the vested right of the complainant to appeal rather he was under obligation to hear the merits of the case and decide accordingly even if he was of the alleged view that opportunity was provided, and the complainant was non-responsive. No law prohibits a taxpayer from being heard at any stage. Hence, such maladministration requires attention of your worthy office to investigate as to why the due consideration was not given to the case."*

It is evident that Commissioner-IR Appeal allowed condonation of time limit to file appeal after expiry of limitation. However, he refused to entertain the grounds of appeal on merit with the plea that complainant was provided sufficient opportunity of hearing by the AC, which he failed to avail. In order to provide opportunity of hearing to Commissioner-IR Appeal, the respondent No.2 in complaint, fresh notice of hearing in the back drop of rejoinder was issued. However, neither anybody attended nor any response was received. Therefore, the investigation is completed on the basis of departmental reply & complainant's arguments & rejoinder.

FACTS OF THE CASE:

7 The complainant's case was selected for audit under Section 214-C for Tax Year 2015. Notice under Section 177 were issued for compliance on 14.2.2017, 8.11.2017 & 21.2.2019, and served through IRIS, which is claimed to be a valid service in terms with the provisions of Section 218(d) of the Income Tax Ordinance 2001, read with Rule 74 of the ITR 2002. Due to non-compliance, final show case notice under Section 122(9) was issued on 14.6.2021 for compliance on 20.6.2021, i.e. only 7 days as the case was getting time barred on 30th June 2021. Order was passed ex-parte due to non-compliance. Complainant submitted that he remained unaware of any notice being issued as neither the notice served though post, nor any SMS received on his mobile phone. It is further submitted that IRIS profile is duly updated, whereby the mobile number currently in use of complainant has been given. Copy of form 181 also produced by the complainant which is updated on 20.8.2020. It is only when IRIS was logged in, that the order came into the knowledge of complainant. Accordingly certified copy was obtained from Assistant Commissioner-IR & Appeal was filed to Commissioner-IR Appeals

P with request for condonation of delay on above ground. Condonation was either allowed by Commissioner-IR Appeals under Section 127(6) which is evident from the fact that the date of order is 28.6.2021 & date of institution of appeal is 14.1.2022 i.e. more than six months of the order. Whereas the time for filing of appeal as per Section 127(5) is one month from the date of service of order. Alternatively, the Commissioner-IR Appeal has admitted appeal on the basis of date of service of certified copy of order. In either case, he has accepted the plea that order placed in IRIS was not received by the complainant or appellant was prevented by sufficient cause from lodging the appeal within the specified period of one month. However, he rejected the appeal with the observation that sufficient opportunity was provided to appellant while he failed to make any compliance. No other ground of appeal was adjudicated in the order. Whereas in para-wise reply to instant complaint, the Commissioner-IR Appeals have taken the plea that evidence not furnished to officer can not be entertained in appeal under Section 128(5) of the Income Tax Ordinance 2001, unless the person is prevented by sufficient cause from producing such material or evidence before the commissioner. It is further argued that from the grounds of appeal & written arguments, it is evident that appellant failed to identify any sufficient cause which prevented the complainant from producing such material or evidence during the course of audit proceeding. Therefore, the AR's contention could not be examined or re-verified at this forum. Verification process is entirely related to adjudicating authority / audit officer.

FINDINGS:

6. The objection has been raised under Section 9(2)(b) of the FTO Ordinance 2000 as the issue is appealable. Whereas maladministration is evident in this case at both the levels of Audit

Officer & Commissioner Appeal which renders the complaint fit to be entertained.

- (i) Case was selected for audit of Tax Year 2015 in the year 2017. Order has been finalized on 28.6.2021 on the basis of a hurriedly issued show cause issued on 20.6.2021 when case was getting time barred. The passing of order / conducting of audit spanning over a period of four years from the year of selection without approval of the Board is clear cut violation of Audit Policy for 2015, Supreme Court judgment on CP No. 2370-L and pursuant guidelines of the Board issued vide letter dated. C.No.I(I)Chief(Legal-I) 2018, issued specifically for audit of cases of Tax Year 2015. It is directed through the above letter to take approval from Board for conducting audit which was not finalized within one year from the date of selection.
- (ii) Service of notice was not ensured & it is assumed that uploading on IRIS is valid service. Complainant's duly updated profile is available on record with mobile number and email address. Complainant denied receipt of any SMS or email through which he can be alerted about the placement of any notice or order. Neither has the department placed anything on record in this respect. Service under Section 218(d) on the basis of mere placement of notice or order on IRIS profile is not a valid service as per Rule 218(I)(d) which is reproduced for reference;

P

"218. Service of notices and other documents.-

(1) Subject to this Ordinance, any notice, order or requisition required to be served on a resident individual (other than in a representative capacity) for the purposes of this ordinance shall be treated as properly served on the individual if

(d) Served on the individual electronically in the prescribed manner."

The prescribed manner as per Rule 74 is also reproduced for reference;

"74. Service of documents electronically.-

(1) This rule applies for the purposes of the service of documents under the Ordinance or these rules.

(2) Where a person has notified the Commissioner in writing of an electronic address for service of documents under the Ordinance or Rules, a document required to be served on the person by the Commissioner or Chief Commissioner shall be considered sufficiently served if sent to that address.

(3) For the purposes of sub-rule (2), a document is considered sent to an electronic address if the sender receives.-

- (a) *in the case of a message sent to a facsimile number, confirmation from the sending facsimile machine that the transmission is sent;*
- (b) *in the case of a message sent to an electronic mail address, confirmation from the server of the recipient that the message has been received”.*

It is thus clear that mere placement of notice on the IRIS does not constitute valid service within the meaning of Section 218(l)(d) read with Rule 74 of the Income Tax Rules 2002. Even otherwise the department IT system is expected to ensure that the taxpayers are informed about any event through an SMS or email rather than expecting every taxpayer to keep checking his IRIS profile on daily basis, which is against the principles of natural justice & fair play

9

- (iii) Commissioner-IR Appeal accepted the plea of complainant regarding non-receipt of order which was merely placed in IRIS and not served through post, when he allowed condonation of time under Section 127(6) on application filed by the appellant. On the other hand he rejected the appeal with the sole remark that sufficient opportunity was provided by the officer before passing ex-parte order. Whereas the notice were also not properly served & merely placed on IRIS. The Commissioner-IR Appeal cannot blow hot and cold at the same breath.
- (iv) Commissioner-IR Appeals contended that no sufficient cause for non-compliance was taken up in grounds of appeal which prevented appellant from filing evidence to the officer. However, grounds No. 3 to 5 of appeal are clearly stating that the notices were never served on the

complainant. If notices were not served then there is no question of submission of any details or evidence. Whereas the Commissioner-IR (Appeal) not considered that non-receipt of notice is sufficient cause which prevented the appellant from furnishing the evidence. Additionally the order of Commissioner-IR Appeal does not indicate that the issue of 'sufficient cause' within the meaning of Section 128(5) was taken up during appeal proceedings. Nor is there any finding regarding the same in his order which the complainant can assail in of appeal to ATIR. The argument is therefore not only perverse, arbitrary & not in accordance with principles of natural justice but also neither confronted to the appellant nor incorporated in appeal order.

- (v) Commissioner-IR (Appeal) has not adjudged any ground of appeal on its merit with the contention that the A.R's contention / submission could not be examined or re-verified at this forum. Verification process is entirely related to audit officer. The argument is contrary to law as per the provisions of Section 129(1)(a), reproduced below;

“(1) In disposing of an appeal lodged under Section 127, the Commissioner (Appeals) may-

- (a) *make an order to confirm, modify or annul the assessment order, after examining such evidence as required by him respecting the matters arising in appeal or causing such further enquiries to be made as he deems fit; or*
- (b) *in any other case, make such order as the Commissioner (Appeals) thinks fit”.*

P

The Commissioner-Appeal should have either examined the evidence as per law or if it was evident that the notice were not validly served, the order could have been remanded back to the officer for denovo proceedings after providing proper opportunity of hearing, which was not done. Ex-parte orders are invariably passed due to non-availability of record / evidence. If the contention of Commissioner-IR (Appeals) is accepted then no ex-parte order can be assailed / adjudicated in appeal on merits of the case as the appellate authority would not accept any evidence which was not

produced before the officer, even if the notice was not properly served. The act of non-consideration of all grounds of appeal by the Commissioner-IR (Appeals) tantamounts to maladministration in terms of Section 2(3)(i)(a)(b)&(ii) of the FTO Ordinance. As all grounds of appeal have not been considered, it is a mistake apparent from record liable to be rectified under Section 221 of the Income Tax Ordinance 2001. The complainant may file miscellaneous application to the Commissioner-IR (Appeal) for rectification as per law.

RECOMMENDATIONS:

9. FBR to:-

- (i) direct the Commissioner-IR Appeal-VII, Karachi to rectify the order on his own motion or an application filed by complainant & consider all grounds of appeal as per law & after providing opportunity of hearing; and
- (ii) report compliance within 45 days

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

Dated: 16/09/ 2022

Approved for reporting