

**THE FEDERAL TAX OMBUDSMAN  
ISLAMABAD**

**COMPLAINT NO.3535/ABD/IT/2022**

Dated: 09.08.2022\*RO, Abbottabad

**Raja Adalat Khan & Sons,**  
C/o Sajid Khan, Advocate,  
Office No 1, Al- Basit Plaza,  
The Mall Abbottabad.

...Complainant

**Versus**

The Secretary,  
Revenue Division,  
Islamabad.

...Respondent

Dealing Officer	:	Mr. Ziauddin Wazir, Advisor
Appraisal Officer	:	Mr. Muhammad Tanvir Akhtar, Advisor
Authorized Representatives	:	Mr. Sajid Khan Advocate.
Departmental Representative	:	Mr. Muhammad Alam, DCIR & Mr. Muhammad Abdullah DCIR, RTO Abbottabad

**FINDINGS / RECOMMENDATIONS**

This Complaint has been filed under section 10(1) of the Federal Tax Ombudsman Ordinance 2000, which was referred for comments to Secretary Revenue Division in terms of Section 10(4) of the FTO Ordinance, read with Section 9(1) of the Federal Ombudsmen Institutional Reforms Act 2013. Parawise comments were received from Chief Commissioner-IR, RTO, Abbottabad vide letter dated 17.08.2022.

2. Precisely speaking facts of the case as evident from the complaint and Parawise are summarized hereunder;

- a. The taxpayer's case for refund of Tax Year 2019 was processed, Order 170 (4) was passed on 22.09.2020 and refund amount was credited into taxpayer's bank account.
- b. Later on, the taxpayer revised his return, claiming enhanced amount of refund and once again the return was accepted and refund issued by passing order u/s 170(4).
- c. Later on, realizing some mistakes the department passed an order u/s 122 (5A) on 7<sup>th</sup> April, 2021, but here too, soon after the said order Department found some legal lacuna in this later order therefore an order u/s 221(1) was passed on 20<sup>th</sup> April, 2021, for the same tax

year, whereby the demand created vide order u/s 122(5A) was repeated.

- d. Meanwhile the taxpayer filed appeal before CIR (A-II) Islamabad against earlier order u/s 122(5A), and deposited Rs.3,582,700, being 10% of the total demand, for availing automatic stay vide CPR No. IT-20210610-0301-1195620 dated 10-06-2021.
- e. CIR Appeals vide order dated 19.11.2021, annulled the order passed u/s 122(5A). As the order passed u/s 122 (5A) was annulled therefore, the taxpayers claims refund of the amount, deposited to obtain automatic stay order.
- f. Department pleads that as the taxpayer has not contested order u/s 221(1) therefore demand created is recoverable. The Unit officer unit-3, Zone-I, RTO Abbottabad issued recovery notice for Rs.32,244,303/- on 03.08.2022.
- g. The Addl: CIR Zone, I, RTO Abbottabad on 05-08-2022, passed appeal effect order u/s 122(5A) by restoring the original order u/s 120/114(6)/122(3) of the Income Tax Ordinance, 2001. Thus the taxpayer recovery move as illegal because original order u/s 122(5A) was already annulled by CIR Appeals and the department had not filed 2<sup>nd</sup> appeal.
- h. Department advocates that order under section 221(1) of the ordinance, passed on 20/04/2021 whereby a demand Rs.35,827,003/- was raised against the taxpayer, was never challenged by the complainant. In the presence of such an order taxpayer was not entitled for any refund.
- i. The Commissioner-IR Zone-I has filed a Miscellaneous Application dated 22/12/2021 vide letter No. 4762 requesting the learned CIR (A) to revisit his order dated: 19/11/2021, which is pending for adjudication

3. Mr. Sajid Khan Advocate AR and Mr. Muhammad Abdullah DR joined the hearing and presented their respective points of view as per the written complaint and parawise comments.

4. After considering arguments of the parties and perusing the record, it emerges that;

- (i) *Complainant's refund application for tax year 2019 was processed, order u/s 170(4) was passed and refund was credited to his bank account. Later on, the department passed an order u/s 122 (5A) whereby earlier refund order was amended. CIR (A) annulled the said order stating;*

*"To look into the legality of the impugned order passed u/s 122(5A) of the Ordinance it is imperative to reproduce the provisions of section 122(5A) as under;*

*[5A 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.*

*Plain reading of the above provisions clearly indicates that said provisions empowers the Commissioner to amend or further amend an assessment order which he considers as erroneous in so far as prejudicial to the interest of revenue. This provision relates to amendment of assessments. Order u/s 170 of the Ordinance is not an assessment order. The assessing officer has therefore invoked a wrong provision of section 122(5A) to amend the refund order. Section 122(5A) does not empower the assessing officer to amend a refund order passed u/s 170 of the Ordinance."*

- (ii) *The department instead of invoking amendment assessment provisions, erroneously rectified the earlier order u/s 122(5A), dated 7<sup>th</sup> April, 2021. Plain reading of rectification order u/s 221(1) dated 20<sup>th</sup> April, 2021 reveals that through this order the department went beyond the rectification rather entered into the domain of assessment, redefining nature of income, recalculating tax payable.*
- (iii) *When the original order u/s 122(5A) dated 7<sup>th</sup> April, 2021 was held ab initio illegal then how the rectification dated 20<sup>th</sup> April, 2021 of said illegal order is tenable.?*
- (iv) *Section 221(2) reads "No order under sub-section (1) which has the effect of increasing an assessment, reducing a refund or otherwise applying adversely to the taxpayer shall be made unless the taxpayer has been given a reasonable opportunity of being heard." Notwithstanding the legality of order u/s 221(1) no such opportunity of being heard was provided to the complainant in terms of section 221(2) of Income Tax Ordinance, 2001.*
- (v) *Non filing of 2<sup>nd</sup> appeal and Filing of Misc Application by the department for TY 2019 and filing of appeal by the taxpayer against order u/s 221(1) are rendered meaningless in the face of patent illegalities, surfacing in departmental orders u/s 122(5A) and its rectification u/s 221(1).*

### **FINDINGS:**

5. In view of above serious instances of maladministration are established in the instant case, in terms of section 2(3) of FTO Ordinance, 2000 i.e.;

- (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;*
  - c) *is based on irrelevant grounds;*

**RECOMMENDATIONS:**

6. FBR is directed to ensure that Commissioner concerned;
- (i) revisits the order passed u/s 221(1) for TY 2019 and a speaking order is passed invoking appropriate provisions of law;
  - (ii) disposes of the refund application as per law and after giving proper hearing;
  - (iii) reprimand the officer who has bye-passed legal provisions by passing a patently illegal and unjust orders u/s 122(5A) and 221(1); and
  - (iv) report compliance within 45 days.

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

Dated: 10.04.2023

*Approved for reporting*