

**THE FEDERAL TAX OMBUDSMAN  
ISLAMABAD**

**COMPLAINT NOs.2011 & 2503/LHR/IT/2022**

Dated:28.05.2022\*RO Lahore

**Mr. Bashir Ahmed,**

Basti Vadore, Mauza Alyani,  
Dak Khana Vadore,  
Dera Ghazi Khan.

... Complainant

**Versus**

The Secretary,  
Revenue Division,  
Islamabad.

... Respondent

Dealing Officer

Appraisal by

Authorized Representative

Departmental Representative

: Dr. Tariq Mahmood Khan, Advisor

: Mr. Muhammad Tanvir Akhtar, Advisor

: Mr. Khalid Hussain Ghauri, Advocate

: Dr. Muhammad Athar Ishaq, Addl CIR  
RTO, Multan

**FINDINGS/RECOMMENDATIONS**

Both the above-mentioned complaints were filed under Section 10(1) of the Federal Tax Ombudsman Ordinance, 2000 (FTO Ordinance) against alleged illegal orders dated 23.05.2022 & 16.06.2022 passed u/s 170(4) of the Income Tax Ordinance, 2001 (the Ordinance) for Tax Years 2018 & 2019, respectively.

2. Brief facts of the case are that the Complainant filed earlier C.No.1104 & 1106/MLN/IT/2022 which was disposed of vide order dated 20.05.2022 directing the CIR Multan Zone to allow appeal effect to the order of CIR (Appeals) dated 09.12.2021 and dispose of Complainant's refund applications for Tax Year 2018 & 2019 after providing hearing opportunity to the Complainant as per law.

3. Earlier in 1<sup>st</sup> round Department had rejected the claim of refund on the ground that tax deduction u/s 236A on lease rights is final discharge. However, CIR (Appeals) remanded back the orders with the directions "to conduct physical enquiry of business premises and call

for record/documents to ascertain nature of business by providing ample opportunity of being heard". In compliance with the appellate orders the Assessing officer deputed 02 Inspectors-IR vide his office order No.167 dated 18.10.2021 to conduct inquiry and report by 20.10.2021. Enquiry report as reproduced in the orders u/s 170(4) dated 02.11.2021 for Tax Years 2018 & 2019 is given hereunder:

- i. That the business premises of the above-mentioned taxpayer is in the form of Picket which has been established at Habib Abad near Habib Hotel on the main road between Sakhi Sarwar and Dera Ghazi Khan. At that picket, a few private employees are deputed to collect excise duty/tolls.
- ii. That at the picket the private employees of the taxpayer stop every vehicle loaded with Minerals. The loaded vehicles are allowed to cross the picket only on their payment of Excise duty / tolls.
- iii. That it has been clearly observed that Excise Duty is being collected in the same manner as toll tax is collected on highways from vehicles for crossing the Toll Plazas".

On the basis of above the Assessing officer has opined in the order that Excise duty is being collected from carriers of specific minerals for crossing of Picket in the same manner as toll tax is collected on highways from vehicles for crossing the Toll Plazas and the claim of refund was once again rejected.

4. In the 2<sup>nd</sup> round CIR appeals vide orders u/s 129(1) of the Ordinance dated 09.12.2021 annulled the orders passed u/s 170(4) of the Ordinance for Tax Years 2018 & 2019 and observed that there is no doubt that lease for collection of **Provincial Excise Duty** cannot be treated as "**Toll**" as both differ materially. The department instead of filing 2<sup>nd</sup> appeal before ATIR once again rejected the refund claims of the Complainant for Tax Years 2018 & 2019 vide orders passed u/s 170(4) of the Ordinance dated 23.05.2022 & 16.06.2022, respectively, on the same grounds which has earlier been adjudicated by the CIR (Appeals) vide order dated 09.12.2021, hence these complaints.

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5. The complaints were sent 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 Ombudsmen Institutional Reforms Act, 2013. In response thereto, the Deptt submitted parawise comments vide letter dated 27.06.2022 contending that after physical verification it was concluded that tax deductions u/s 236A of the Ordinance against sale rights of excise duty on minerals is being collected in the same manner as toll tax is collected on highway from vehicle for crossing the toll plazas. Further contended that in the light of Finance Act 2016 the tax deduction for toll u/s 236A of the Ordinance is final discharge of tax liability, so Complainant is not entitled for any refund.

6. During hearing, AR and DR reiterated their respective stance taken in the complaint and parawise comments. AR of the Complainant provided copy of letters of Mines Labour Welfar Commissioner, Govt. of Punjab dated 13.04.2021 & 06.12.2017 indicating the nature of contract and collection of excise duty on the specified minerals.

7. Both sides heard and available record perused.

### **FINDINGS:**

8. i. Scrutiny of the record indicates that Complainant deals with the leasing contracts of Sand and Minerals which are governed under provincial law and administered by Mines Labour Welfare Commissioner, Govt. of Punjab. The said authority, vide letters dated 13.04.2021 & 06.12.2017 has already clarified the nature of contract and collection of excise duty on the specified minerals. While processing the claim of refund the nature of deduction has to be determined in the light of laws & rules of concerned provincial department.

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ii. Income Tax Ordinance, 2001 creates categorical defines and distinct **Toll, Fee and lease rights**. Section 236A explains;

(2) The credit for the tax collected under sub-section (1) in that tax year shall, subject to the provisions of section 147, be given in computing the tax payable by the person purchasing such property in the relevant tax year or in the case of a taxpayer to whom section 98B or section 145 applies, the tax year, in which the "said date" as referred to in that section, falls or whichever is later.

**Explanation. - For the purposes of this section, sale of any property includes the awarding of any lease to any person, including a lease of the right to collect tolls, fees or other levies, by whatever name called.]**

(3) Notwithstanding the provisions of sub-section (2), tax collected on a lease of the right to collect tolls shall be final tax.]

The above provisions confirm that through a comprehensive explanation to sub section (2) the legislature has envisaged different shades and forms of *awarding of any lease to any person: i.e.*

- *a lease of the right to collect tolls,*
- *lease to collect fees, (like parking) or*
- *leases to collect other levies,*

However, through sub section (3) **tax collected on a lease of the right to collect tolls** only has been categorized as **final tax**. Thus all leases cannot be treated u/s 236A(3).

iii. "Toll" is defined as **collection of a charge, fee payment for the usage of any bridge or road**. Toll comes from the Greek word for Tax "Telos". The Dept'l stance that tax deducted u/s 236A of the Ordinance on account of collection of provincial excise duty on minerals is similar as toll tax, is contrary to the factual position.

iv. Even otherwise mere **mode of collection of tax** can neither determine the nature of collection nor truly represents intent of the legislature.

v. It is pertinent to mention here that Complainant filed returns of income u/s 114 of the Ordinance under normal law and claimed refunds and the same was treated as deemed assessment u/s 120 of the Ordinance. If Deptt is satisfied with sufficient material evidence that receipts and tax collected thereon u/s 236A has to be treated under FTR in terms of section 236A(3) of the Ordinance, then this power lies with the Addl CIR

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and action is required to be taken u/s 122(5A) of the Ordinance to amend the deemed assessment order u/s 120 of the Ordinance. Section 170 gives no mandate to the Assessing Officer to take this step. In such a situation, level of authority is different for different proceedings under the Ordinance.

In view of above, action of refund Officer is not only beyond his legal jurisdiction and lawful authority his action tantamount to superseding CIR (Appeals) domain as well. Instead of filing 2<sup>nd</sup> appeal the department has over ruled CIR Appeals by passing the same orders on the same grounds. Further Deptt had not filed appeal before Appellate Tribunal Inland Revenue, (ATIR) therefore Deptt is bound to give appeal effect to the order of CIR (Appeals) within 60 days, which has not been done.

**Thus Neglect, inattention, inaptitude and inefficiency in discharge of duties while passing orders dated 23.05.2022 & 16.06.2022, respectively, u/s 170(4) of the Ordinance for Tax Years 2018 & 2019 is tantamount to maladministration in terms of Section 2(3)(ii) of the FTO Ordinance.**

**RECOMMENDATIONS: -**

13. FBR is directed to –

- (i) direct the Commissioner-IR Multan Zone RTO Multan to revisit the orders dated 23.05.2022 & 16.06.2022 passed u/s 170(4) of the Ordinance for Tax Years 2018 & 2019, respectively by invoking provisions of section 122A of the Ordinance;
- (ii) pass fresh orders u/s 170(4) of the Ordinance for Tax Years 2018 & 2019 after providing hearing opportunity to the Complainant, in accordance with law; and
- (iii) report compliance within 45 days.

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

Dated: 24 : 10 : 2022

*Approved for reporting*