

PRESIDENT'S SECRETARIAT (PUBLIC)
AIWAN-E-SADR, ISLAMABAD

FBR, Versus M/s HSM Packages (Pvt) Ltd, Karachi

**REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE, ISLAMABAD
AGAINST FINDINGS/ RECOMMENDATIONS DATED 24.11.2016 PASSED BY THE FTO IN
COMPLAINT NO. 738/KHI/ST/2016**

I am directed to refer to your representation No. 1(738)S(TO-II)/2016 dated 27.12.2016 on the above subject and to say that the President has been to pass the following order:

2. This Representation dated 27.12.2016 has been filed by the Agency/FBR against the findings of the FTO dated 24.11.2016, whereby it has been held that:

"FBR to direct the Chief (CSTRO)-

- i. to issue refund cheque to the Complainant for already issued RPO along with compensation for the period exceeding 7 working days between the dates of issue of RPO and refund cheque, as per law; and
- ii. Report compliance within 30 days."

3. The brief facts of the case are that The complaint is filed against the Chief, Centralized Sales Tax Refund Office (CSTRO), FBR Islamabad, in terms of Section 10(1) of Federal Tax Ombudsman Ordinance, 2000 (the Ordinance), for delay in issuance of cheque in respect of Refund Payment Order (RPO) No. 8044866 dated 19.02.2016.

4. The complaint was referred to the Secretary, Revenue Division for comments in terms of Section 10(4) of the Ordinance. In response, the FBR vide letter C.No.1(738)TO-II/2016 dated 31.10.2016 submitted Para wise comments of the Chief.(CSTRO), FBR, Islamabad vide letter dated 25.10.2016. It was contended that RPO No. 8044866 dated 19.02.2016 for Rs. 1.377 million was in queue and cheque would be issued in due course of time. It was informed that after sanctioning of refund claim, cheque was to be issued on 'first come first serve' basis as per date of RPO. The system of following the queue has been [put in place by FBR management to bring uniformity and transparency in the refund payments. Now no one in the hierarchy of FBR was authorized to make payment of refund to anyone on pick and choose basis, rather every RPO issued for refund payment is placed in line and cheques are issued strictly following the queue. The office of Federal Tax Ombudsman may appreciate that the FBR has improved the administration of refund payment by introducing this system. It was averred that non issuance of cheque against pending 'PO does not amount to maladministration as has been upheld by the Honourable President Republic of Pakistan in a representation filed by FBR in case of M/s Rajwani Apparel (Pvt) Ltd, Karachi vide order No. 41/FTO/2015 dated 04.05.2016.

5. The Authorized Representative (AR) filed rejoinder dated 08.11.2016 disputing contention of the deptt as under:

- i. That Rule 26A(7) of the Sales Tax Rules 2006 (the Rules) clearly stipulates, that after the refund was sanctioned through RPO, the deptt is required to issue refund cheque within 7 working days of the receipt of e-RPO.
- ii. That in the instant case after completing verification the refund was sanctioned and e-RPO No. 8044866 was issued on 19.02.2016. However, even after protracted delay of more than 8 months, the refund cheque has not been issued by the Chief(CSTRO).
- iii. That the referred presidential order No. 41/FTO/2015 dated 04.05.2016 was passed without considering Section 10 and 66 of the Sales Tax Act, 1990 (the Act) and Rule

26A(7) of the Rules hence is not applicable. Therefore deliberate violation of law on the part of the deptt is evident which clearly fall within the ambit of maladministration.

6. The averments of both the parties have been given due consideration and record perused by FTO. Thus FTO has issued aforementioned findings.

7. The Agency has taken ground that M/s Packages (Pvt) Ltd., Karachi have claimed the sales tax refund under Section 66 of the Sales Tax Act, 1990 of Rs. 1,377,757/- recovered against Order-in-Original No. 06/2013 dated 23072013, whereby, the O-i-No. 06/2013 was annulled by the Commissioner Inland Revenue (Appeals-II), Karachi vide Order-in Appeal No. 96 of 2014 dated 31-03-2014. Accordingly, the amount of Rs. 1,377,757/- has been sanctioned through RPO No. 8044866 dated 19-02-2016. It is submitted that after sanctioning of refund claims, cheques are issued on 'first come first serve' basis as per date of RPO. The system of following the queue has been put in place by FBR management to bring uniformity and transparency in the refund payments. No one in the hierarchy of F BR is authorized to make payment of refund to anyone on pick and choose basis, rather every RPO issued for refund payment is place in line and cheques are issued strictly following the queue.

8. The Agency has pointed out that the Learned Federal Tax Ombudsman in his findings/recommendations held that the complainant is entitled to compensation under Section 67 of the Sales Tax Act, 1990 and directed the department to issued refund cheque along with compensation for the period exceeding 7 working days between the dates of issue of RPO and refund cheque as per law.

9. The Agency has contended that in this regard, it is submitted that M/s HSM packages (Pvt) Ltd Claimed the amount of refund under Section 66 of the Sales Tax Act 1990 which was duly been sanctioned after necessary verifications The provision of Section 67 does not apply in the instant case. The relevant provision is reproduced as under for ready reference.

"67. Delayed refund. -- Where a refund due under section 10 is not made within the time specified in this behalf, there shall be paid to the claimant in addition to the amount of refund due to him, a further sum equal to KIBOR per anum of the amount of refund due, from the date following the expiry of the time specified as afore said, to the day preceding the date of payments of refund:

Provided that where there is reason to believe that a person has claimed the refund which not admissible to him, the provisions regarding the payment of such additional amount shall not apply till the investigation of the claim is completed and the claim is either accepted or rejected."

10. The Agency has mentioned that the provisions of Section 67 applies to the case where refund due under Section 10 of the Sales Tax Act. 1990 is not made with the stipulated time specified in Section 10 of the Act, whereas, in the instant case refund claimed and issued to the complainant under section 66 of the Sales Tax Act, 1990, therefore the question of compensation under Section 67 of the Sales Tax Act, 1990 does not arise. In the prejudice to above, it is further submitted that FBR has started the electronic transfer of refund payments against the RPOs into the bank accounts of the claimants instead of issuing refund cheques since last month. For that purpose, International Bank Account Number (IBAN) is mandatory which is to be updated by the claimant in his/her Sales Tax profile as per requirement of State Bank of Pakistan. In the instant case, the refund payment could not be transferred in last month as the IBAN was not updated by the complainant in system despite the request for providing the same by e-mail and placement of a banner on FBR's website.

11. The Agency has stated that however, the Honourable Federal Tax Ombudsman decided the subject complaint on the basis of under Rule 26A(7) of Sales Tax Rules, 2006 by incorrectly holding that CSTRO is bound to issue cheques within 7 days from the date of issuance of RPO under the aforesaid rule whereas the said rule doesn't govern the manner of issuance of cheque by CSTRO. The said rule is applicable only when the cheques are issued by RTO/LTU. The manner of issuance of cheque and related function have been prescribed under Rule 30(4) to 30(7) of Sales Tax Rules, 2006 and nowhere under the aforesaid rule 30(4) to 30(7) the office of CSTRO has been bound in terms of number of days to issue cheque. Further, the issuance of out of queue cheque in compliance of Honourable FTO's orders creates a practical difficulty in terms of section 23 of the Federal Ombudsman Institutional Reforms Act, 2013, which results in discrimination against other claimants.

12. The Agency has expressed that it is further submitted that in case of M/s. Rajwani Apparels (Pvt) Limited, the Honourable FTO vide recommendations dated 06.05.2015 in complaint No. 63/KHI/ST(26)/207/2015 had recommended inter alia. that CSTRO should issue cheques against already generated RPOs and that compensation be paid under section 67 of Sales Tax Act, 1990. However, while disposing of FBR's representation against the said findings, the Honourable President vide No. 41/FTO/2015 dated 04.05.2016 observed that refund claim has been accepted by the agency and the cheques are in queue on payment so the main grievance of the complainant was settled. Accordingly, the president was pleased to set aside the impugned findings. On similar grounds, in this case too, no maladministration has occurred and no compensation is payable. Hence the basis of findings of Honourable FTO is totally unlawful and since the Honourable FTO erred in law in concluding his findings, his recommendations are also unjustified not involving any maladministration in view of the following facts and grounds.

13. The Agency has illustrated that after sanctioning of refund claim, cheques for RPOs are issued on first come first served basis as per date of RPOs as per standard policy in issuance of cheque and no one in the hierarchy of FBR is authorized to make payment of refund to anyone on pick and choose basis. That rather every RPO issued for refund payment is placed in line and cheques are issued strictly following the queue. The manner of issuance of cheques by CSTRO and related functions have been prescribed under rule 30(4) to 30(7) of Sales Tax Rules, 2006. The Rule on issuance of cheque by office of CSTRO is Rule 30(7) of Sales Tax Rules, 2006 which doesn't bind the office of CSTRO to issue cheques in terms of number of days and thus the findings/recommendations of the Honourable FTO is based on incorrect reading of law. Because of policy of issuing cheques on queue basis, there is practical difficulty in implementing the order of Honourable FTO in terms of section 23 of the Federal Ombudsman Institutional Reforms Act, 2013, and therefore the said order may not be implemented.

14. The Agency has prayed that President of Islamic Republic of Pakistan may annul the findings/recommendations of the Honourable Federal Tax Ombudsman and allow office of the CSTRO to issue cheque to complainant as per standard policy and discourage issuance of cheques on priority basis.

15. On the other hand, the Complainant has filed comments against the instant representation of Agency on 17.01.2017 and supported the impugned recommendations/findings of learned FTO with request that the representation of Agency may be rejected.

16. There is no question on the facts that the jurisdiction of the FTO is barred u/s 9(2)(b) to investigate or inquire into the matter which relate to assessment of income or wealth, determination of liability of tax, interpretation of law, rules and regulations relating to such assessment / determination in respect of which legal remedy of appeal or review or revision is available under the relevant legislation. In case the complainant was

aggrieved of any action or inaction of the Agency, the complainant has the remedy to file an appeal to the Commissioner Appeals, Income Tax Tribunal, the High Court and the Supreme Court of Pakistan. Hence the matter was not within the jurisdiction of FTO, which is not an appellate forum. In such circumstances, where remedy of appeal was available, FTO could not interfere with and could not pass orders under garb of maladministration.

17. It has already been held vide order No. 88/FTO/2013 dated 05.06.2013 (corresponding Law Division's Summary No.73/2011-Law(FTO) dated 12.06.2013 in Complaint No. 90/LHR/IT(79)/204/2011), that: "matter pertained to assessment of income and determination of liability of tax as also interpretation of law and there is no dispute that legal remedy of appeal as well as revision was available under the Income Tax Ordinance 2001. Findings and recommendations of FTO are not sustainable." In another case No. 384/FTO/2013 dated 09.09.2013 (corresponding Law Division's summary No.50/2012-Law (FTO) dated 24.07.2013 in Complaint No. 181/LHR/IT (128)/ 355/ 2012), it has been held that: "there is no manner of doubt that the matter pertained to determination of liability of tax also involving interpretation of law/ rules relating to such determination and legal remedies of appeal are available under the said Ordinance 2001. . . . Findings do disclose that FTO has assumed unto himself the jurisdiction of appellate authority which is not permissible under the provisions of FTO Ordinance 2000. Findings and recommendations of FTO are therefore not sustainable."

18. It is an admitted position that the matter involves the determination of tax liability and refundable amount on account of tax. Such matters are appealable before the Commissioner (Appeal), Appellate Tribunal (IR), the High Court and the Supreme Court. Where remedy of appeal is provided under the law the FTO has no jurisdiction to investigate the matter in the name of maladministration. In case the complainant was aggrieved of any action or non action on the part of official(s) of the Agency, it has the remedy to file an appeal at appropriate forum under the relevant law.

19. It has been settled by the Supreme Court of Pakistan in case of Mst. Kaniz Fatima reported in 2001 SCMR 1493, that where a particular statute provides self contained machinery for determination of questions arising under the statute and law provides a remedy by appeal or revision to another forum fully competent to give any relief, any indulgence to the contrary by any other forum is bound to produce a sense of distrust in statutory forums and writ petition will not be maintainable without first availing the alternate statutory legal remedy. The FTO has no jurisdiction to set aside the order where the forum of appeal is available to the complainant. Thus the impugned findings are not sustainable and the representation is liable to be accepted.

20. It is pointed out that recommendation (ii) of the learned FTO in the instance case indicates compliance report within 30 days. FTO used to give 7/14/21/30 days for compliance of his orders to FBR/ Agency. On the contrary, thirty (30) days are allowed as per FTO Ordinance, 2000 to file an appeal before the appellate forum by an aggrieved party. Moreover, Section 14(2) of the Federal Ombudsmen Institution Reforms Act, 2013 (XIV of 2013), provides that in case a representation is made, operation of the impugned findings/recommendations shall remain suspended for a period of 60 days. Thus, FTO has practically made the right of making representation against the recommendations before the appellate forum as in-fructuous. Even powers of the appellant forum have been confined by giving unreasonable timeframe for implementation of the findings in hasty manners. It would be more appropriate while specifying timeframe for compliance report, logical sequence should be observed by the Office of learned FTO.

21. In such circumstances, where remedy of appeal was available FTO could not interfere with the matter of assessment of tax and interpretation of law. The Agency has assured that as per SOP refund claim are being issued on first come first serve basis as per date of RPOs. Every RPO issued for refund payment is placed in line and cheques are issued strictly following the queue. Moreover, Rules 30(4) to 30(7) of Sales Tax Rules 2006 are being followed in letter and spirit. In the circumstances, FTO having gone beyond the scope and powers, the impugned findings are not sustainable. Consequently, the Agency's representation is liable to be accepted. However, the complainant can seek remedy available to him from the relevant forums under the law, if so advised.

22. Accordingly, the President has been pleased to accept Representation of the FBR/Agency and to set aside the findings / recommendations of FTO to the extent of payment of compensation to the Complainant.

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

The Chairman,
Federal Board of Revenue,
Islamabad.

No.01/FTO/2017 dated 16.03.2017

Copy for information to:

1. Mr. Umer Habib, M/s HSM Packages (Pvt) Ltd, A/11, S.I.T.E, Karachi.
2. Mr. Iftikhar Hussain, Advocate, M/s Iftikhar Hussain Law Associates, 135/F, Block-2, PECHS, Karachi.
3. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
- ✓ 4. The Chief (Legal-I), Federal Board of Revenue, Islamabad.
5. Director to Secretary to the President.
6. Master file.

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)