

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

30 — 24

FBR, Versus M/s Mehboob Steel Pipe Industry

**REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE, ISLAMABAD
AGAINST FINDINGS / RECOMMENDATIONS DATED 06.04.2017 PASSED BY THE FTO IN
COMPLAINT NO. FTO-KHI/CUST/000039/2017**

I am directed to refer to your representation No. 1(39)S(TO-II)/2017 dated 26.04.2017 on the above subject and to say that the President has been to pass the following order:

2. This Representation dated 26.04.2017 has been filed by the Agency/FBR against the findings of the FTO dated 06.04.2017, whereby it has been held that:

"FBR to direct MCC Appraisalment (East), Karachi to:-

- i. **Decide the impugned refund claim as per law expeditiously after affording an opportunity of hearing to the complainant; and**
- ii. **Report compliance within 45 days."**

3. The brief facts of the case are that the complaint has been filed in terms of Section 10(1) of the Federal Tax Ombudsman Ordinance, 2000 (the Ordinance) against MCC Appraisalment (East), Karachi, (the deptt) for failing to refund differential amount of duty and taxes secured under Section 81 of the Customs Act, 1969 (the Act).

4. The complaint was referred for comments to the Secretary, Revenue Division, in terms Section 10(4) of the Ordinance. In response, MCC (Appraisalment) East, Karachi filed comments raising preliminary objection that the complainant has not attached the compulsory requisite documentary evidence regarding non-passing of incidence of duty and taxes to the buyer as per statutory requirement under Section 19A of the Act. It was also informed that considering the provisions of Section 19A and proviso to Section 33 of the Act, read with the dictum settled by the Honourable Supreme Court of Pakistan in the cases of CR. ORIG. P. No. 15 of 2002 & Cr. Misc. A. 179/2002 in civil review petition No. 80 of 1999 of M/s Fecto Belarus case and the Honourable High Court of Sindh in the case of M/s Orient Colour Lab (Pvt) Ltd. V/s The Director General, Customs Valuation, Karachi & 03 others (2011 PTC 1594), the return of PDCs refund of duty & taxes is subject to the non passing of the incidence of duty & taxes to the end consumer.

5. Statedly, the complainant had imported consignment declared to contain 'Hot Rolled Alloy Steel Sheets in Coil' and filed fifteen Goods Declarations during the period 8th October, 2013 and 12th February, 2015 for clearance of goods. The deptt assessed the subject goods provisionally under Section 81 of the Act, subject to test report from M/s A.Q Khan Research Laboratory to confirm whether the goods were 'alloy steel sheets' or non alloy steel sheets'. In the light of the High Court Sindh Order dated 04th May, 2015 in C.P.No.D-3816 of 2013 read with the test reports, the deptt vide Assessment Order dated 5th November, 2015 advised the Complainant to file refund claim for release / refund of the differential amount with corroborative documents so as discharge burden of proof that the incidence of differential amount of duty/taxes has not been passed on to the end consumers. The complainant accordingly filed refund application through the Refund Management Module on 13th November, 2015 which has not yet been settled.

6. During hearing, the parties reiterated the averments of their written pleadings and documents available on record. The AR averred that they have furnished certificates issued by M/s Zaheer Babar and Co., Chartered Accountants dated 11th November 2015 in respect of seven GDs, and certificate dated 21.01.2016 in respect of remaining GDs confirming that the incidence of duty and taxes has not been passed on to the buyers. Further as that they have completed all the legal formalities as well as compliance of discharge of burden of proof in terms of Section 19A of the Act, and were thus entitled for the refund.

7. Controverting the AR's contention, the DR stated that the complainant was required to furnish corroborative documents in terms of Section 19A read with Section 33 of the Act. In the absence of the requisite documents, the claim for refund could not be processed. The DR further documents required for processing the refund application as per law.

8. During hearing, the AR filed rejoinder dated 3rd March, 2017 challenging the contention of the deptt regarding invoking Section 19A read with Section 33 of the Act. Reliance was placed upon the decision of the Honourable Supreme Court of Pakistan in case of Collector of Customs v/s M/s. Gul Rehman reported in PTCL 2017 CL. 130 holding that application of Section 19A read with Section 33 ibid was not applicable in the case, as the differential amount of duty and taxes was secured in terms of Section 81, and not as result of any inadvertence, error or misconstruction. The complaint has been examined in the light of written and oral submissions of the parties and documents available on record by FTO. Thus FTO has issued aforementioned findings.

REGD. NO. 89573
ON 24-2-17

35 (TO-II)
See

(76)

9. The instant representation has been filed by FBR. The Agency has taken ground that in the Gul Rehman's case the Order-in-Appeal had attained finality in favour of the importer, whereas, in the instant complainant's case, the Honourable High Court's order has attained finality, whereby, the burden of incidence of duty/taxes is to be discharged by the importers / petitioners. In the complainant's case the Honourable Court has permitted the department to satisfy itself with reference passing on the incidence of duty / taxes to the consumer, thus, considering the provisions of Section 6 of the General Clauses Act, read with Section 221(1) of the Customs Act, 1969, the proceeding of the Complainant's case are to be undertaken in accordance with the order of the Honourable High Court, passed in CP No. D-3816/2013.

10. The Agency has pleaded that admittedly an amount of Rs. 11,108,308/- has been secured with Nazir of the High Court, however, neither any request has been made by the complainant to the Nazir of the Court nor Nazir was a respondent to the subject complaint but the complainant included that amount (i.e. Rs. 11,108,308/-) also under the "maladministration" being alledged to the Customs department. Non filing of any application to the Nazir of the Court clearly means that the complainants have to first comply the orders of the Honourable High Court dated 04.05.2015 passed in C.P No. 3816/2013. The security deposit lying with Nazir of the Court impliedly means that is still in a competent Court of Law and, thus, in terms of Section 9(2) of the Federal Tax Ombudsman Ordinance, 2000, the subject complaint was not maintainable. The Honourable FTO has totally ignored this very important aspect of the case.

11. The Agency has contended that as stated the Honourable High Court's order dated 04.05.2015 in C.P No. D-3816/2013, is in the filed and attained finality, thus, keeping in view Section 6 of the General Clauses Act, read with Section 221(1) of the Customs Act, 1969, the Honourable Supreme Court of Pakistan's judgment dated 25.11.2016, passed in the case of Collector of Customs v/s Gul Rehman (PTCL 2017, CL 130), with greatest respect, cant not be given effect retrospectively on the aforesaid consented order of the Honourable High Court which was never challenged before the Supreme Court of Pakistan in the specific case referred to by the respondent before the Honourable FTO.

12. The Agency sated that without prejudice to the above, it is further submitted that the aforesaid Honourable Supreme Court of Pakistan's judgment (PTCL 2017, CL 130) is otherwise not applicable on the complainant's case. Admittedly, the provisions of Section 33 and 19A of the Act, are independent of each other and the Section 33 of the Act, have no overriding effect over the provisions of Section 19A of the Act, in view of the dictum settled by the Honourable Supreme Court in the aforesaid judgments of Fecto Belarus (2005 PLD, SC-605) and Orient Colour Lab (2011 PTD 1594). It is pertinent to mention that the learned Division Bench, consisting of the Chief Justice of the Honourable High Court of Sindh in its recent unreported order dated 28.02.2016 in C.P No. D-1082/2016, has observed that:-

"In our opinion, none of the businessmen would take a risk of not passing the burden of the duties & taxes in accordance with the Valuation Ruling for the simple reason that in case challenge thrown to the valuation ruling remain unsuccessful then he would suffer loss, and in case the businessmen is ready to take such risk then of course he would maintain proper record to show that he has only passed on the burden of duties & taxes in accordance with the value declared and not by keeping cushion in consonance with the impugned Valuation Ruling."

13. The Agency has apprised that without prejudice to the above, it is submitted that the provision of sub Section (3) of Section 33 of the Act, only deals with the issue of computing the period for filing a refund application in a case where refund can be claimed due to the decision of the Court or the appellate authority. Therefore, in order to curb the undue enrichment and to apply the dictum settled in the case of Fecto Belarus (2005 PLD, SC page 605) and Orient Colour Lab (2011 PTD 1594), the applicant Collectorate is of the view that the provisions of Section 19A of the Act, are application on the cases which qualifies the period as prescribe in Section 33(3) of the Act. Thus, due to changed facts and circumstances of the case and in the presence of the Honourable High Court's order dated 04.05.2015 in the case of C.P No. D-3816/2013, the complainants have no case of claiming refund merely on the strength of the judgment of Gul Rehman's case (PTCL 2017, CL 130).

14. The Agency has prayed to set aside the impugned findings / recommendations of the Honourable Federal Tax Ombudsman being against the provisions of Section 33 read with 19A of the Customs Act 1969 and in light of the law settled by the Honourable Supreme Court of Pakistan, through judgment in cases of Fecto Belarus (2005 PLD, SC Pg 605) and Orient Colour Lab (2011 PTD 1594).

15. On the other hand, the complainant has filed his comments against the instant representation of FBR on 3.5.2017 through Mr. Imran Iqbal Advocate High Court and supported the impugned recommendations/findings of learned FTO with request that the representation of Agency may be rejected.

16. After perusal of record and examination of all documents, it has been observed that Section 9(2)(a) of the FTO Ordinance 2000 provides that FTO shall not have jurisdiction to investigate or inquire into matters which are subjudice before a court of competent jurisdiction or tribunal or board of authority on the date of the receipt of a complaint, reference or motion by him.

75

17. In terms of Section 9(2)(b) of the FTO Ordinance 2000, the FTO has no jurisdiction to investigate or inquire into the matters which relate to the assessment of income, determination of liability of tax, interpretation of law, rules and regulations relating to the said assessment/ determination in respect of which legal remedies of an appeal, review or revision are available under the relevant legislation.

18. It is as clear as the crystal that FTO has made recommendations which are only to the extent to direct MCC Appraisalment (East), Karachi to decide the impugned refund claim as per law expeditiously after affording an opportunity of hearing to the Complainant within 45 days. It is just a harmless order and only the Agency has to decide the issue as per law which was never denied in its written reply even by the Agency. The Agency has full powers to decide the issue either way, on merits and in accordance with the provisions of law. Thus the findings of the learned FTO are quite sustainable and the Agency has unnecessarily filed this representation. In such circumstances, this representation is liable to be rejected having no merits and the recommendations are sustainable and unexceptional.

19. Accordingly, the President has been pleased to reject the instant representation of FBR-Agency and impugned recommendations/findings of FTO are upheld.

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

The Chairman,
Federal Board of Revenue,
Islamabad.

No. 92/FTO/2017 dated 17.07.2017

Copy for information to:

1. M/s Mehboob Steel Pipe Industry, Plot No. 4-5-6, Sector-G, H.I.T.E, Hub, Balochistan.
2. Mr. Imran Iqbal, Advocate, M/s Imran Iqbal law Associates, Room No. 410, 4th Floor, Commerce Centre, Hasrat Mohani Road, 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)

74