

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

Federal Board of Revenue  
Versus  
M/s Mehboob Tube Mills, Lahore

SUB: REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE, ISLAMABAD  
AGAINST FINDINGS / RECOMMENDATIONS DATED 06.04.2017 PASSED BY THE FTO IN  
COMPLAINT NO. FTO-KHI/000038/2017

I am directed to refer to your representation No. 1(38)S(TO-II)/2017 dated 24.04.2017 on the above subject and to say that the President has been pleased to pass the following orders:

2. This Representation dated 24.04.2017 has been filed by the Agency-FBR against the findings of the FTO dated 06.04.2017, whereby it has been held:

“FBR to direct MCC Appraisement (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 this complaint has been filed in terms of Section 10(1) of the FTO Ordinance 2000 against MCC Appraisement (East) Karachi, for failing to refund differential amount of duty and taxes secured under Section 81 of the Custom Act, 1969.

4. The complaint was referred for comments to the Secretary Revenue Division, in terms of Section 10(4) of the Ordinance. In response, MCC (Appraisement) 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 provision of Section 19A and proviso to Section 33 of the Act, read with the dictum settled by the 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 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 and taxes is subject to the non passing of the incidence of duty and 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 Declaration during the period 08.10.2013 to 12.02.2015 for clearance of goods. The department 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 04.05.2015 in C.P No. D-3816 of 2013 read with the test reports, the department vide Assessment Order dated 05.11.2015 advised the Complainant to file refund claim for release/ refund of the differential amount with corroborative documents so as to 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 13.11.2015 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 11.05.2015 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, that as 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. Converting 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. More, that the Complainant be directed to provide necessary documents required for processing the refund application as per law.

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FBR e-Box No. 97469  
Received in Chief (Legal) Office  
on 9-8-17

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8. During hearing, the AR filed rejoinder dated 03.03.2017 challenging the contention of the department regarding invoking Section 19A read with Section 33 of the Act. Reliance was placed upon the decision of the Supreme Court of Pakistan in case of Collector of Customs Vs 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. Thus, FTO has issued aforementioned findings.

9. The instant Representation has been filed by the Agency. The Agency has taken ground that 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 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 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 196, the proceedings of the Complainant's case are to be undertaken in accordance with the order of the High Court passed in CP No. D-381/2013.

10. The Agency has pointed out that admittedly an AMOUNT OF Rs. 20,082,572/- 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. 20,082,572/-) also under the 'maladministration' being alleged to the Custom 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 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 the matter is still in a competent court of law and, thus, in terms of Section 9(2) of the FTO Ordinance, 2000 the subject complaint was not maintainable. The FTO has totally ignored this very important aspect of the case.

11. The Agency has stated that High Court's order dated 04.05.2015 in C.P No. D-3816/2013 is in the field 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 Supreme Court of Pakistan's judgment dated 25.11.2016 passed in the case of Collector of Customs Vs/ Gul Rehman (PTCL 2017, CL 130) with greatest respect, cannot be given effect retrospectively on the aforesaid consented order of the High Court which was never challenged before the Supreme Court of Pakistan in the specific case referred to by the Respondent before the FTO.

12. The Agency has mentioned that without prejudice to the above, it is submitted that the aforesaid Supreme Court of Pakistan's judgment (PTCL 2017 CL 130) is otherwise not applicable on the Complainant's case. Admittedly, the provision of Section 33 and 19A of the Act, are independent of each other and the Section 33 of the Act, have no over-riding effect over the provisions of Section 19-A of the Act, in view of the dictum settled by the 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 here that the Division Bench, consisting of the Chief Justice of the 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 emphasized 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 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 provision of Section 19-A of the Act, are applicable 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 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 Federal Tax Ombudsman being against the provisions of Section 33 read with Section 19A of the Custom Act, 1969 and in light

of the law settled by the Supreme Court of Pakistan through judgment in cases of Fector Belarus (2005 PLD, SC page 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 29.4.2017 through Mr. Imran Iqbal Khan, Advocate High Court and supported the impugned recommendations/findings of learned FTO with request that the representation of Agency may be rejected.

16. On the other hand, the complainant has filed his comments against the instant representation of FBR on 29.5.2017 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.

17. After perusal of record and examination of all documents, it has been observed that 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. 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.

19. 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.

20. 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)

The Chairman,  
Federal Board of Revenue,  
Islamabad.

No.89/FTO/2017 dated 07.08.2017

Copy for information to:

1. M/s Mehboob Tube Mills, Sreet No. 1, Near Jamia Masjid, Ravi Town, Saeed Park, Shahdara, Lahore.
2. Imran Iqbal, Advovate High Court, Imran Iqbal Law Associates, room No,410, 4<sup>th</sup> 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)

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