

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

Federal Board of Revenue
Versus
Mr. A. Shaker Khan, Quetta

17 OCT 2017
M(L)

REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE AGAINST FINDINGS / RECOMMENDATIONS DATED 05.05.2017 PASSED BY THE FTO IN COMPLAINT NO. 07-09/OTA/CUST(03-05)/06-08/2017

I am directed to refer to your representation No. 1(06-08)S(TO-II)/2017, dated 16.06.2017 on the above subject and to say that the President has been to pass the following order:

2. This Representation dated 16.06.2017 has been filed by the Agency-FBR against the findings of the FTO dated 05.05.2017, whereby it has been held:

"FBR to direct:

- (i) Collector, MCC, Custom House, Quetta to get refund applications processed in accordance with law in terms of order passed by the Tribunal and upheld by Hon'ble High Court of Balochistan; and
- (ii) Report compliance within 45 days".

3. The brief facts of the case are that three identical complaints have been filed by same Complainant under Section 10(1) of the FTO Ordinance, 2000 against MCC, Custom House, Quetta for withholding refund of sale proceeds of three consignments of wheat four seized by FC which were confiscated through Order in Original No. 213/2008, No. 214/2008 and No. 349/2008 and auctioned by Department but subsequently the Customs Appellate Tribunal, Bench -1, Karachi vide common order in Appeal No. 116/2009 set aside orders of confiscation and ordered return of wheat flour or sale proceeds to the Complainant. The Commandant FC through Additional Collector Customs, MCC, Quetta filed reference applications under Section 196 of the Customs Act, 1969 which were dismissed by the High Court of Balochistan.

4. As the wheat flour had already been auctioned the Complainant filed applications for refund of sale proceeds but neither sales proceeds were refunded nor the applications were disposed of by Model Customs Collectorate, Customs House, Quetta whereupon the Complainant has sought intervention of the FTO for redress of his grievance.

5. In response to the notices issued under Section 10(4) of the Ordinance the Department has filed parawise comments wherein the facts stated by the Complainant were not denied. The Department pleaded that series of letters were written to HQRS FC, Quetta requesting for providing auction documents and information whether any appeal has been filed against the judgment dated 13.11.2013 of High Court of Balochistan but no reply has been received. The delay was on the part of the FC.

6. The Department contended that although final details of the case are yet to be received from FC, however, perusal of available record on file indicated that the claim of refund was not admissible in terms of Section 33 of the Act.

7. The Complainant on being supplied copy of parawise comments filed rejoinder, wherein the contentions of the Department have been rebutted contending that the Deputy Collector Customs has recorded a note on the file that no appeal had been filed against the judgment of High Court of Balochistan whereupon Collector Customs directed the concerned staff of R&R Section and treasury branch to recheck the calculation of refund amount. The Complainant pleaded that refund claim was not barred as copy of judgment was delivered on 20.05.2014 and refund application was filed on 18.02.2015.

8. During the course of hearing the parties supported averments of their pleadings and relied upon the documents filed in support thereof.

9. Submissions of the parties have been considered in the light of documents available on record and relevant law. At the very outset, it is observed that the objection raised by the Department about claims being hit by limitation provided under Section 33 of the Act on due consideration reflect that Section 33 of the Act does not apply to refund of sale proceeds of auctioned goods. Rather it deals with customs duties or charges claimed to have been paid or over paid through inadvertence, error or misconstruction. Hence, sub section 3 of Section 33 of the Act specify limitation for claiming refund of custom duties and charges referred to in sub section (1) of Section 33 of the Act.

10. The DR made an attempt to bring the matter within ambit of Section 201 of the Act, which though relates to procedure for sale of goods and application of sale proceeds but it also is found to be irrelevant as it regulates procedures for auction/ sale of goods, other than confiscated goods, whereas in the instant case the goods were confiscated and order of confiscation was vacated after goods were auctioned, therefore, the procedure provided in

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said section 11 of Section 201 of the Act was not followed at the time of auction of goods, in such view of facts the plea of DR has no substance.

11. Adverting to the merits of the case, it is observed that undisputed facts of the case reflect that after seizure during adjudication, the Complainant and others contested the Show Cause Notices issued to them. However, wheat flour was confiscated vide Orders in Original against which appeals were filed before Collector (Appeals) which were rejected. The Complainant as well as other filed appeals under Section 194-A of the Act, before the Tribunal which were allowed as prayed directing that wheat flour be returned to the appellants and if the same had been auctioned, sale proceeds so received be returned to them. FC filed reference applications through Additional Collector Customs, against the order of the Tribunal which were dismissed vide common judgments by the High Court of Balochistan.

12. The FC did not challenge the judgment of High Court before the Supreme Court. Thus, the order of the Tribunal attained finality whereby the Appellants i.e. the Complainant and others were held to be entitled to receive wheat flour or its sale proceeds. At this juncture, it is relevant to observe that in complaints No. 44-46/QTQ/Cust/(42-44)/1416-1418/2014 which too were filed for refund of sale proceeds of wheat flour in pursuance of order of the Tribunal upheld by High Court of Balochistan, the Department agreed to process refund applications in accordance with law on providing auction documents by FC. The Department on receiving the documents processed refund applications and issued refund vide Refund Payment Orders No. C.No. V-14(1)(66)Cus/2014/2688-92 and C.No. V-14(1)(64)Cus/2014/2698-2702 dated 03.08.2015. Similarly, four of the Respondents in reference applications dismissed by High Court of Balochistan upholding order of the Tribunal filed complaints No. 18-21/QTA/Cus(18-21)/327-330/2015 in FTO. The complaints were disposed of vide findings/recommendations dated 02.06.2015 in following terms:

“Withholding of auction documents and challan about deposit of sale proceeds of wheat flour by FC delayed processing refund applications by the Department. Maladministration as defined under Section 2(3) of the FTO Ordinance, on the part of FC stands established.

FBR to direct:-

- (i) **The Commandant Frontier Corps Balochistan, Quetta to provide auction documents required by the Customs as per letter dated 21.03.2015;**
- (ii) **The Collector of Customs Quetta to process/ decide applications submitted by the Complainants for refund of sale proceeds of wheat flour as directed by the Customs Appellate Tribunal vide order dated 11.03.2010; and**
- (iii) **Report compliance within 45 days”.**

13. The Department never raised issue of limitation under Section 33 or 201 of the Act in complaints referred to hereinabove. The case of Complainant is at par with the Complainants in complaints number 44-46/QTA/CUS(42-44)/1416-1418/2014 and complaints No. 18-21/QTA/CUS(18-21)/327-330/2015. Hence, entailment of the Complainant for refund of sale proceeds of wheat flour in pursuance of order passed by the Tribunal and upheld by High Court of Balochistan cannot be refused by treating him in discriminatory manner. Besides, the Department has withheld decision on refund applications for more than two years for which no reasonable justification has been advanced. Thus, FTO has issued aforementioned findings.

14. The instant Representation has been filed by the Agency. The Agency has taken ground that seizures of wheat flour were initiated by the FC Staff, who were in fact prime Respondents in this matter. The Customs were only required to proceed with the matter of refund claims of the Complainant on the basis of FC auction record. Therefore, the findings of the FTO are not in line with administrative channel.

15. The Agency has underscored that the cases of the Complainant were processed and as a result of scrutiny of claims, the same are/ were found barred by time as per Section 33 of the Customs Act, 1969. The reason being that consequent upon dismissal of Customs Reference Applications No. 21/2011, 25/2011 and 34/2011 vide high Court of Balochistan, Quetta orders dated 13.11.2013, the Complainant submitted applications for refund claim on 18.02.2015 and 06.03.2015 which were found time barred by one year three months and twenty three days and three years and five days respectively, which fact has been ignored by the FTO. Therefore, question of maladministration due to delay is unfounded. As such crucial date for reckoning of the limitation period is the date of decision/judgment. As the date of decision is 13.11.2013 hence refund claims filed on 18.02.2015 and 06.03.2015 are found barred by time in terms of Section 33 of the Customs Act, 1969.

16. The Agency has pointed out that the refund applications were filed after lapse of one year being mandatory period as envisaged under Section 33 of the Customs Act, 1969 initially by M/s Ameer Muhammad and Shahjehan who were neither owners nor party at any stage of proceedings, whereas as per endorsement on the reverse of copy of judgment dated 13.11.2013 (CTCs) of High Court of Balochistan were applied by one Abdul Raziq on 29.04.2014 who was not connected with the matter. Such fact has also been ignored by the FTO. Thus, the findings of maladministration are not correct.

17. The Agency has mentioned that as far as the question of discriminatory treatment is concerned, it is submitted that as per record, that claim of refund filed on 19.03.2014 by Habibullah S/O Mohammad Islam complaint number 44-46/QTA/Cust/(42-44)/1416-1418/2014 which was found within time limit and refund claim

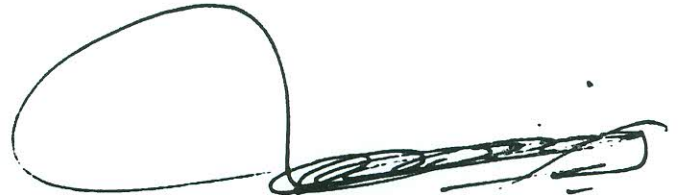
was found within time limit and refund claim was accordingly sanctioned for kind perusal. In view of this position of discrimination by the customs does not hold ground. As provided under Section 9(2)(b) of the FTO Ordinance, 2000 the Complainant should have approached the Balochistan High Court for implementation of the judgment dated 13.11.2013 by filing a review of contempt application for remedy instead of filing complaint before the FTO. Therefore, the subject matter falls outside the jurisdiction of FTO.

18. The Agency has requested that facts, evidences on record and express provisions of law. this Forum may graciously be pleased to set aside the findings/ recommendations of the FTO in the best interest of justice and the national exchequer.

19. On the other hand, the complainant has filed his written comments against the instant representation of FBR on 02.8.2017 through Qahir Khan Kakar, Advocate and supported the impugned recommendations/findings of learned FTO with the request that the representation of Agency may be rejected.

20. After perusal of record and examination of all documents, it has been observed that it is as clear as the crystal that FTO has made recommendations which are only to the extent to Collector, MCC, Custom House, Quetta to get refund applications processed in accordance with law in terms of order passed by the Tribunal and upheld by Hon'ble High Court of Balochistan 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/findings of FTO are sustainable and maintainable being unexceptional in nature.

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



(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

✓ The Chairman,
Federal Board of Revenue,
Islamabad.

No.120/FTO/2017 dated 05.10.2017

Copy for information to:

1. Mr. A. Shaker Khan, Office No. 34, 2nd Floor, Regal Plaza, Adalat Road, Quetta.
2. Mr. Qahir Khan Kakar, Advocate, C/o Zarghoon Legal Associates, Office No. 34, 2nd floor, Regal Plaza, Quetta.
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)