

599/2016
Subjudice

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

Federal Board of Revenue
Versus
M/s Nafecs Trading Company, Faisalabad

26 DEC 2017
M(L)

REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE AGAINST FINDINGS / RECOMMENDATIONS DATED 27.07.2017 PASSED BY THE FTO IN REVIEW PETITION IN COMPLAINT NO. FTO-FSD/599/2016

I am directed to refer to your representation No. 1(599)S(TO-II)/2016, dated 24.08.2017 on the above subject and to say that the President has been to pass the following order:

2. This Representation dated 24.08.2017 has been filed by the Agency-FBR against the findings of the FTO dated 27.07.2017 whereby it has been held:

"In view of supra, findings dated 15.03.2017 are recalled. The RP is accepted and it is recommended to FBR to direct the concerned Commissioner-IR to return the seized goods of the petitioner and report compliance within 60 days".

Original recommendations of FTO dated 15.03.2017 provides as under:

"It has been found that after filing of the complaint, the deptt in October, 2016 has submitted formal contravention report to the concerned Adjudicating Officer. The issues raised in the complaint have thus become *subjudice* barring FTO's jurisdiction in terms of Section 9(2)(c) of the Ordinance. The deptt is, however, advised to process the case strictly in accordance with law/rules after giving opportunity of hearing to the Complainant.

In view of supra, further investigation in this complaint is stopped and case file consigned to record".

3. Brief facts of the case are that this complaint has been filed under Section 10(1) of the FTO Ordinance, 2000 against unauthorized raid on the business premises, taking into custody the stock & cash of Rs.0.055 million and harassment of the ladies under threat of arrest.

4. The complaint was referred for comments to the Secretary Revenue Division in terms of Section 10(4) of the Ordinance. In response, the FBR vide letter No. C.No.1(599)TO-II/2016 dated 14.10.2016 forwarded comments of the Director, Intelligence and Investigation (IR) bearing No. DIR/I&I/IR/FSD/2016/803 dated 14.10.2016 contending that raiding staff was duly authorized under Section 62 of the Federal Excise Act, 2005/ the Act by the competent authority i.e. Director I&I vide letter C.No.DIR/I&I/IR/FSD/2016/DD-III/571 dated 26.09.2016. The authorized team visited the business premises in presence of the Complainant and his son Mr. Naeem by serving order upon him who allowed free excess to the business premises. The team seized the stock of cigarettes and record of sales as per provisions of Sections 26 & 27 of the Act and Rules 18, 62, 63 and 64 of the Federal Excise Rules, 2005 as the Complainant failed to provide proof of tax payment in respect of stock available at the business premises. No residential house, as alleged by the Complainant was visited and hence question of search warrant or the lady police did not arise.

5. Further stated that the business premises i.e. P-41, Faiq Hussain Town, Sumandari Road, Faisalabad was also visited by serving order upon the employees of the Complainant namely M/s Nisar Ahmad and Muhammad Illiyas because son of the Complainant escaped from the premises on seeing the raiding team. The authorized staff inspected the building and stocks as per provisions of Rule 62 of the Rules and Section 38 of the Act, but the Complainant deliberately falsified the facts regarding search of premises. Drawers and locks were not broke open by the authorized staff. The Complainant has unnecessarily attributed false allegation of taking away Rs. 0.055 million with the purpose to conceal his evasion of tax and duty. The Complainant was reportedly maintaining stock of non duty paid cigarettes in peripheral area of old Central Jail District Faisalabad and the exact address could not be properly marked due to sanctity of secrecy of information. The deptt prayed that the complaint being frivolous, misleading and devoid of any merit be rejected.

6. In rebuttal the AR contended that Rule 62 of the Rules is subservient to Section 25 of the Act whereby all search/ arrest shall be carried out in accordance with Section 103 of the Code of Criminal Procedure 1898 which makes mandatory the presence of two or more witnesses from the locality near the place of search but it was not followed by the raiding team. Search under Section 40(2) of the Act can be made with prior approval of the Magistrate which was not obtained in the instant case. Similarly, raiding party had no search warrant under Section 25 of the Act. No independent witnesses from the inhabitants of the locality near the place of the search were present. The raiding party violated the provisions of Section 52 of CrPC regarding mode of search of a woman as no lady police accompanied the team when they raided residence of the Complainant. Rule 62 of the Rules was not

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applicable in the case of the Complainant, as he was not engaged in business of manufacturing or processing of cigarettes but was a dealer of Subhan and Co., Mardan. The detention-cum-arrest of two salesmen was set by witnesses. Carrying of Rs. 0.055 million from safe was beyond jurisdiction. The team violated the provisions of Sections 38 and 40 of the Sales Tax Act, 1990 and CrPC. In view thereof, the record impounded from the site without following the prescribed legal procedure cannot be used against the taxpayer. Further, branded cigarettes consisting of eight cartons were not mentioned in the resumption memo. It was also contended that Federal Excise Duty was not leviable as the Complainant was neither a manufacturer nor processor of cigarettes but only a dealer. The whole exercise was thus illegal and void. Both the parties heard and record perused by the FTO. Thus, FTO has issued aforementioned findings.

7. The instant Representation has been filed by the Agency. The Agency has taken ground that the FTO can investigate any allegation of maladministration as per Section 9(1) of the FTO Ordinance, 2000. No issue of maladministration has been established as is evident from the perusal of the Order in Review dated 31.07.2017. The FTO has no jurisdiction to investigate or inquire into the matters which relate to assessment of income, determination of liability of tax or valuation of goods. The Section 9(2)(b) is reproduced for ready reference:

9. Jurisdiction, functions and powers of the Federal Tax Ombudsman.-

"(2) The Federal Tax Ombudsman shall not have jurisdiction to investigate or inquire into matters which (b) relate to assessment of income or wealth, determination of liability of tax or duty, classification or valuation of goods, interpretation of law, rules and regulations relating to such assessment, determination, classification or valuation in respect of which legal remedies of appeal, review or revision are available under the Relevant Legislation".

8. In the Order in Review dated 31.07.2017 the FTO has recommended to FBR to direct the concerned Commissioner IR to return the seized goods of the Petitioner. The FTO has exceeded its jurisdiction by directing the concerned Commissioner IR to release the seized goods which require interpretation of law, determination of liability and valuation of goods as per provision of Section 9(2)(b) of the FTO Ordinance, 2000.

9. The Agency has pointed out that the FTO decided the Order in Review dated 31.03.2017 without considering the facts of the case as listed below:

- (i) The visit of the premises near Sabzi Mandi Samundari Road, Faisalabad (P-41 Faiq Hussain Town, Sumandari Road, Faisalabad) was authorized by the competent authority vide No. 574 dated 26.09.2016. The FTO is not justified to declare the visit to the said premises as unauthorized because the same was made under Rule 62 of the Federal Excise Rules, 2005. This issue has already been thrashed out in the FTO order dated 15.03.2017;
- (ii) The House No.620-D Sir Syed Town Faisalabad was never visited by the staff of Directorate of Intelligence and Investigation IR Faisalabad, hence the question of search and seizure does not arise. This issue has already been thrashed out in the FTO order dated 15.03.2017".

10. The Agency has pleaded that the FTO was not justified to state that:

"Further, the deptt in its formal contravention report dated October, 2016 admitted that no wrong doing on the part of the petitioner was established and has made the case of evasion of Federal Excise Duty and Sales Tax against the manufacturer of cigarettes, therefore, the deptt has no justification to retain the seized goods of the petitioner".

11. The Agency has underscored that the contravention report clearly establishes that Petitioner/Stockist Mr. Nafees Ahmad was maintaining stock of non duty paid cigarettes and he failed to provide any invoices showing payment of duty and taxes on the stock present at his premises and resumed by the authorized staff under Rule 62 of the Federal Excise Rules 2005. The relevant extract of contravention is reproduced as under:

"On credible information of tax evasion, an authorized team under Rule 62 of the Federal Excise Rules 2005 of this Directorate visited two premises/ godowns of a cigarettes stockiest Mr. Nafees Ahmad/ Nafees Trading Company located at Shop No. 80, D-Block Sirsyed Town, Cotton Mill Road near Old Central Jail Faisalabad and near Sabzi Mandi, Sumandari Road, Faisalabad on 26.09.2016 and resumed record under Section 38 of the Sales Tax Act, 1990. At the time of visit, Mr. Nafees Ahmad, the stockist of M/s Souvenir Tobacco Company Limited was present in the building. Mr. Nafees Ahmad is running the godown of M/s Subhan and Company NTN No. 4021201-7, the distributor of M/s Souvenir Tobacco Company Limited, Mardan in the building. The team found the stock of cigarettes and stock/ supply register in the premises. The details of stock of cigarettes is as follows:

| Sr. No. | Description/ name of cigarette brand | No. of cartons (one carton contains 500 packets of 20 cigarettes each. |
|---------------|--------------------------------------|--|
| 1 | Melburn | 41 |
| 2 | Allwin | 4 |
| Total: | | 45 |

The details of the stock of cigarette as resumed from the premises located at near Sabzi Mandi, Faisalabad in the presence of Mr. Ilyas S/o Mr. Ismail & Mr. Nisar Ahmad S/o Mr. Jamal having CNIC No. 33102-1788268-5 (The salesmen of the stockist Mr. Nafees Ahmad) are as follows:

| Sr. No. | Description/ name of cigarette brand | No. of cartons (one carton contains 500 packets of 20 cigarettes each. |
|---------------|--------------------------------------|--|
| 1 | Melburn Plus | 5 |
| 2 | Allwin | 4 |
| 3 | Ronson | 1 |
| Total: | | 10 |

As no invoices were available with the stock and Mr. Nafees Ahmad also failed to provide invoices in respect of the stock, the same was seized alongwith record consisting of Diaries, Registers, Cash Memos, Loose Papers and Sale summaries of Souvenir Tobacco from the premises located at Shop No. 80, D Block, Sir Syed Town, Faisalabad. The stock and the record was resumed in the presence of Mr. Nafees Ahmad, the stockist and his son Mr. Naeem. Record consisting of register containing ledger of sales was resumed from premises/ godown situated at Sumandari Road, Faisalabad. After seizure of the stock, the stockist Mr. Nafees Ahmad, was issued notice under Section 23 of the Federal Excise Act, 2005 to give following documents evidence/ documents in respect of the stock:

- (i) Purchase Register
- (ii) Purchase Invoices
- (iii) Sales Register
- (iv) Sales Invoices
- (v) Mode of Payment with proof of payment to your buyers and suppliers;
- (vi) Mode of transportation with documents i.e. Bilities etc.

However, in response to the notice, Mr. Nafees Ahmad failed to provide invoices issued to him from M/s Subhan & Company or M/s Souvenir Tobacco Company in respect of the stock seized at his premises. Further he failed to provide any evidence of payment of taxes on the seized stock".

12. The Agency has explained that the Stockist-Mr. Nafees Ahmad was maintaining stocks of non duty paid cigarettes and he failed to provide any evidence of payment of taxes as requested by the Directorate of Intelligence & Investigation IR, Faisalabad. The FTO has directed in Order in Review dated 31.07.2017 to return the seized goods of the Petitioner. It is submitted that goods i.e. cigarettes belongs to M/s Souvenir Tobacco Company and the stockist Mr. Nafees was maintaining the stock of cigarettes of M/s Souvenir Tobacco Company without any invoices showing evidence of payment of duty and taxes as revealed during the visit of the authorized staff under Rule 62 of the Federal Excise Rules, 2005 at the premises of the Stockist Mr. Nafees Ahmad. The Rules 62 of the Federal Excise Rules, 2005 is reproduced for ready reference:

62. Authorized officer to have free access to premises, equipment, stocks and accounts relating to excisable goods and excisable services:-

Any officer authorized in writing by the Collector in this behalf, shall have free access at all times to any premises and to any place where excisable goods are processed, stored, sold or manufactured, or where excisable services are provided or rendered. and may 1[] inspect the building, the plant, the machinery, and the stocks, and the accounts, and may at any time check the records of the goods stocked in, or removed from the factory, or place, or their transfer within a factory, to that part of the premises, if any, in which they are to be used for the manufacture of any other commodity, or the record being maintained where excisable services are provided or rendered, whether for the purpose of testing the accuracy of any return or statement submitted under the Act or these rules, or of informing

himself as to any particulars regarding which information is required for the purposes of the Act or these rules.”

13. The Agency has narrated that the goods against which there is no evidence of payment of taxes is available are liable to seizure under Section 26 of the Federal Excise Act, 2005. Without evidence of payment of duty and taxes the cigarettes as seized under Section of the Federal Excise Act, 2005 from the premises of the Stockist-Mr. Nafees Ahmad under Rule 62 of the Federal Excise Act, 2005 cannot be released as it will cause serious breach of statutory provisions of the Act. Further, the legal incidence of payment of taxes on the seized stock was on manufacturer i.e. M/s Souvenir Tobacco Company, Mardan hence the contravention report was made against the M/s Souvenir Tobacco Company, Mardan for adjudication.

14. The Agency has contended that FTO in order in Review stated;

“A free access to any property of the citizen does not mean search and seizure for the purpose of collecting evidence against him”.

15. The Agency has emphasized that the visit under Rule 62 of the Federal Excise Act, 2005 allows free access to any premises where excisable goods are stored. The relevant Section is reproduced for ready reference:

62. Authorized officer to have free access to premises, equipment, stocks and accounts relating to excisable goods and excisable services:-

Any officer authorized in writing by the Collector in this behalf, shall have free access at all times to any premises and to any place where excisable goods are processed, stored, sold or manufactured, or where excisable services are provided or rendered, and may inspect the building, the plant, the machinery, and the stocks, and the accounts, and may at any time check the records of the goods stocked in, or removed from the factory, or place, or their transfer within a factory, to that part of the premises, if any, in which they are to be used for the manufacture of any other commodity, or the record being maintained where excisable services are provided or rendered, whether for the purpose of testing the accuracy of any return or statement submitted under the Act or these rules, or of informing himself as to any particulars regarding which information is required for the purposes of the Act or these rules.”

16. The Agency has quoted that Rules 62 of the Federal Excise Act, 2005 provides for free access to the authorized officers to premises, equipment, stocks and accounts relating to excisable goods and excisable services. Free access by no means comes within definition of search. Free access is defined and explained below:

Meaning of 'Free Access':

The true meaning of the expression 'free access' means approach admittance, admission. Similarly 'free access' as explained in the Corpus Juris Secundum is unobstructed, open clear, unhampered, un-restricted and unimpeded.

Meaning of 'Search':

The word 'search' means to look for. It implies invasion with some kind of force either actual or constructive. Search is forcible seeking out, a probing in hidden places.

17. The Agency has apprized that Chapter XIII of the Federal Excise Act, 2005 starts with three headings namely ENTRY SEARCH, SEIZURE. In this chapter Rule 62 of the Federal Excise Act, 2005 (the Act) give guidance for entry into the premises for inspection of the stock. There is no element of search in action taken under Rule 62 of the Act hence involvement of Chapter IV of the Act for search warrant is out of question. Bare reading of Rule 62 of the Act reveals that there is no interference of Chapter IV of the Act to the extent of the search warrant for implementation of the action under Rule 62 of the Act. As the words 'Free Access and 'Search' have been explained above, the action under Rule 62 of the Act involves entry into the premises and inspection of the stock and does not involve search as alleged by the Complainant and hence no search warrant for action under Rule 62 of the Act is required. Action under Rule 62 of the Act is not subservient to Section 25 of the Chapter IV of the Act 2005 for search warrant as the action under Rule 62 of the Act is inspection of the stock and this action does not constitute search. If during the visit under Rule 62 of the Act, the excisable goods are found on which duty has not been paid, they become liable to seizure under Section 26 of the Act. The FTO has not properly appreciated the link between Rule 62 of the Act and Section 26 of the Act. The action under Section 26 of the Act becomes a logical consequence when non duty paid goods are found during visit under Rule 62 of the Act and such visit is by no means a search as explained above.

18. The Agency has stated that the FTO directed in order dated 15.03.2017 that:

“Moreover, fate of seized goods in the instant complaint is to be decided by the concerned Adjudicating Officer/ Appellate authorities”.

Whereas the FTO in its Order in Review dated 31.07.2017 has directed:

“It is recommended to FBR to direct the concerned Commissioner-IR to return the seized goods of the petitioner and report compliance within 60 days”.

19. The Agency has underscored that the findings given in the order in review dated 31.07.2017 are not consistent with the findings given vide order dated 15.03.2017 as the FTO has given its findings in the order in review dated 31.07.2017 without verifying the facts as already directed by its order dated 15.03.2017. The Adjudicating Authority has already declared the seized stock non duty paid and has adjudged liability against M/s Souvenir Tobacco Company. It has been established by the Adjudicating Authority that seized stock was non duty paid and belonging to M/s Souvenir Tobacco Company. The FTO has not appreciated in its order in review the fact that Adjudicating Authority has already declared the seized stock as non duty paid vide its Assessment Order No. 14/2017 dated 16.03.2017. It would have been desirable and logical had the FTO directed in its Order in Review dated 31.07.2017 like its order dated 15.03.2017 to release the goods after satisfaction of the concerned Adjudicating Authority. But instead of directing to subject the fate of seized good to verification the FTO directed to release seized goods. The FTO exceeded its jurisdiction by directing the concerned Commissioner to return seized goods of the Petitioner because the release of goods involves determination of liability of duty, valuation of goods, and interpretation of law. The Section 9(2)(b) of the FTO Ordinance, 2000 is reproduced for ready reference:

9. Jurisdiction, functions and powers of the Federal Tax Ombudsman: (1) Subject to sub-section (2), the Federal Tax Ombudsman may on a complaint by any aggrieved person, or on a reference by the President, the Senate or the National Assembly, as the case may be, or on a motion of the Supreme Court or a High Court made during the course of any proceedings before it or of his own motion, investigate any allegation of maladministration on the part of the Revenue Division or any Tax Employee. (2) The Federal Tax Ombudsman shall not have jurisdiction to investigate or inquire into matters which: (b) relate to assessment of income or wealth, determination of liability of tax or duty, classification or valuation of goods, interpretation of law, rules and regulations relating to such assessment, determination, classification or valuation in respect of which legal remedies of appeal, review or revision are available under the Relevant Legislation."

20. The Agency has prayed that the Order in Review dated 31.07.2017 by the FTO may be vacated as it is beyond jurisdiction of the FTO and does not establish any maladministration on the part of the Directorate of Intelligence & Investigation IR Faisalabad and hence may very graciously be annulled.

21. On the other hand, the complainant has filed his written comments against the instant representation of FBR on 8.09.2017 and supported the impugned recommendations/findings of learned FTO with the request that the representation of Agency may be rejected.

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

23. 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/TT(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/TT (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."

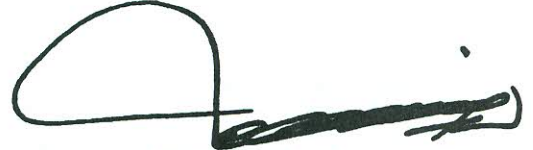
24. It is an admitted position that the matter involves the determination of tax liability and refundable amount on account of tax as well as seizure of goods of the petitioner. Such matters are appealable before the Commissioner (Appeal), Appellate Tribunal (IR), the High Court and the Supreme Court. 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.

25. 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.

26. In such circumstances, where remedy of appeal was available FTO could not interfere with the matter of assessment of tax and interpretation of law. Thus 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 desired.

27. Accordingly, the President has been pleased to accept the instant representation of FBR-Agency and to set aside the impugned recommendations/findings of learned FTO.



(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

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The Chairman,
Federal Board of Revenue,
Islamabad.

No. 151/FTO/2017 dated 18.12.2017

Copy for information to:

1. Mr. Nafees Ahmad Khan, M/s Nafees Trading Company, Shop No. 80-D, Sir Syed Town, Factory Area Road, Faisalabad.
2. Mr. Muhammad Anwar Bhatti, Advocate, Anwar Bhatti & Company, 299/A, People Colony No. 1, Faisalabad.
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)