

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

Mr. Amjad Ali, Peshawar
Versus
Federal Board of Revenue

**REPRESENTATION PREFERRED BY MR. AMJAD ALI, PESHAWAR AGAINST FINDINGS /
RECOMMENDATIONS DATED 27.04.2018 PASSED BY THE FTO IN COMPLAINT NO. 405,
408, 409, 410, 411, 412/PWR/ST/2018**

I am directed to refer to your representation No. Nil, dated 25.05.2018 the above subject and to say that the President has been pleased to pass the following order:

2. This Representation dated 25.05.2018 has been filed by the complainant-Amjad Ali Khan and brothers against the findings of the FTO dated 27.04.2018 whereby it has been held:

"It is evident that the instant complaints have been filed by an un-registered person without either filing any refund claim with the department or making any written request to the department. Thus no case of maladministration is made out against the department. The complaints are accordingly rejected having no merit. Case files be consigned to record".

3. Brief facts of the case are that complaints have been filed by the same complainant under Section 10(1) of the FTO Ordinance, 2000 against RTO, Peshawar (the department) asserting that he is an agency holder of Kerosene Oil of PSO at Parachinar. He has prayed for directing the department to refund various sales tax amounts deducted by M/s PSO from the Kerosene Oil sales made to the complainant during various period from July 2011 to June 2017 as sales tax exceeding 50% of the applicable rate had been exempted vide SRO 165(1)/2010 dated 10.03.2010 read with SRO 180(1)/2011 dated 05.03.2011. Since all these complaints have been common question of law and facts hence the same shall be disposed of by this single consolidated finding.

4. The complaints were forwarded to the Secretary, Revenue Division, Islamabad and the Chief Commissioner Inland Revenue (CCIR), RTO, Peshawar for comments. In terms of Section 10(4) of the FTO Ordinance read with Section 9(1) of the Federal Institutional Reforms Act, 2013. The department in its comments, inter alia, submitted that the complainant's requests for refund of sales tax deducted by M/s PSO on purchase of Kerosene Oil cannot stand for the following reasons:

- i. Under Section 3(3)(a) of the Sales Tax Act, 1990 (the Act) liability to pay the sales tax is that of the supplier of the taxable goods, therefore, PSO has fulfilled its responsibility to charge sales tax on taxable supplies from the complainant and has paid the same to national exchequers. In view of clarification FBR letter No. 3(1)STP/99 Pt dated 12.01.1999 taxable supplies to any area including Gilgit or Northern Areas or FATA) shall be liable to sales tax. According to another clarification issued vide FBR letter No. 2(38)STP/97 Pt dated 15.04.1999, the registered person in Pakistan, making taxable supplies (other than the zero rated exports) has to charge sales tax even on its supplies to FATA/PATA and issue invoices accordingly.
- ii. FBR vide its letter C.No 1(23) CEB/91 (Pt-1)/23044-R dated 15.02.2012 had also informed the FTO Secretariat in Complaint No. 147/ISD/ST(37)/1316/2011 that taxable goods produced in Pakistan and supplied to FATA, are liable to sales tax and the question of refund of sales tax on such goods does not arise at all.
- iii. Consumer prices of petrol, diesel, kerosene oil (inclusive of all charges, taxes and levy) are determined/ regulated by the OGRA from time to time which are applicable to all buyers. PSO gives commission on selling of its products. Complainant has sold the kerosene oil on company rate and acquired commission thereon. In this way, he has passed on the incidence of sales tax to the end consumers. Therefore, refund of sales tax is not admissible in terms of Section 3B of the Act. Furthermore, burden of proof that the incidence of tax had or had not been passed to consumer shall be on the complainant as per Section 3B(3) of the Act.
- iv. Federal Government has also introduced changes into the Sales Tax Act, 1990 by inserting words in Section 3(1)(b) of the Act that irrespective of the final destination of goods imported into Pakistan, sales tax on such goods shall be charged at standard rates.
- v. taxability of sales tax/ income tax in FATA/PATA is subjudice before the Supreme Court of Pakistan, therefore, the complaint may be disposed of".

5. During hearing, the complainant averred that the department has already issued refund to him on the recommendations of FTO Forum in Complaint No. 147/ISD/ST(37)/1316/2011 dated 22.03.2012 for the period August 2009 to June 2011. He also averred that this Forum had also decided in his favour (Complaint No. 47/KP/ST(06)1460/2012 dated 10.09.2013) for the period July 2011 to June 2012 and the representation of the

department before the President of Pakistan was also rejected but the department has not paid any refund of that period up till now. The complainant further stated that he receives supplies from Peshawar depot of PSO and takes Kerosene Oil to Parachinar through his own means for its sales over there. However, sells out the lubricants supplied by PSO at Peshawar at less rates thus sustains loss on this product.

6. The DR informed that after post refund audit of the refund claim of Rs. 0.821 million was allowed to the complainant for period of July 2011 to June 2012 (C.No.47/KP/ST(06)/1460/2012). This amount has been adjudged to be recoverable vide Assessment Order No. 28/2015 dated 07.07.2015. It was also informed that refund in C.No. 47/KP/ST(06)/1460/2012 has also been disallowed by the department. He also averred that the complainant is neither a registered person nor has filed any refund claim or application for refund. Further he has not proved that the incidence of sales tax was actually not passed on to the customers who were in fact end consumers. He also provided copy of judgment of Peshawar High Court on Writ Petition No. 3036/2011 wherein the Court has declared SRO 180(1)2011 dated 05.03.2011 to be illegal. Concluded that the complainant cannot claim refund of 50% paid tax under the said SRO. Argument heard and record perused by the FTO. Thus FTO has issued aforementioned findings.

7. Hearing of the case was held on 18.7.2018. Mr. Shamsul Qamar, Inland Revenue Audit Officer has represented the FBR. On the other hand, Mr. Amjad Ali complainant has appeared for the hearing on the particular issue.

8. The instant representation has been filed by the complainant. The complainant has stated that the appellant is an agency holder of kerosene oil of PSO at Peshawar, Parachinar, Kurram Agency/ FATA. The appellant purchased kerosene oil from PSO depot at Peshawar and sold it in the Tribal Area where Sales Tax Act is not extended, therefore, the appellant/ is not lawfully required to be registered for the sales tax purpose as there is no registration in FATA for sales tax. The PSO deducted sales tax on supply of kerosene oil to FATA but the Revenue Department refused to refund the sales tax deducted being unregistered person. The apex Court has recently held vide its judgment dated 14.12.2017 that sales tax is not leviable in Tribal Area.

9. The complainant has pointed out that certificates issued by Political Agent, Kurram Agency that the kerosene oil in question has been imported from down districts and distributor in Parachinar by the distributed it in Parachinar by the petitioner during the period from 01.07.2009 to 30.06.2010, 01.07.2010 to 30.06.2011, 01.07.2013 to 30.06.2014, 01.07.2014 to 30.06.2015, 01.07.2015 to 30.06.2016 and 01.07.2016 to 30.06.2017. Sales tax can be refunded unregistered persons under Rules. 26(e) of Chapter V of Sales Tax Rules, 2006. Unregistered persons. The appellant receives supplies from Peshawar depot of PSO and takes kerosene oil to Parachinar through his own means for its sales over there.

10. The complainant has underscored that the appellant filed complaint before FTO, Peshawar vide his findings dated 30.04.2013 has rejected complaint of the appellant by holding that:

"It is evident that the instant complaints have been filed by an un-registered person without either filing any refund claim with the department or making any written request to the department. Thus no case of maladministration is made out against the department."

11. The complainant has taken ground that FTO was not justified to hold that the appellant has not filed refund claim or making any written request to the department whereas the appellant has already filed refund claim to the department but the same has been rejected. FTO was not justified to dismiss the complaint in similar nature cases the said office has time and again issued directions for issuance of refund. The department has already issued refund to the petitioner on the recommendations of the FTO in complaint No. 147/ISD/ST(37)/1316/2011 dated 22.03.2012 for the period August 2009 to June 2011. Findings of FTO were not assailed before the President hence attained finality. The FTO is not justified to reject complaint of the appellant in the presence of above mentioned order which has attained finality.

12. The complainant has contended that FTO has also decided the issue in the favour of the appellant in another complaint No. 47/KP/ST(06)/1460/2012 dated 10.09.2013 for period July 2011 to June 2012 whereby the FTO directed the Commissioner concerned to exercise revisionary jurisdiction under Section 45A(4) of the Act and review the unlawful assessment, issue refund/ compensation due, as per law. The Revenue Department filed representation before the President but the same was rejected vide No. 606/FTO/2013 dated 24.02.2015 but the department has not paid any refund of that period till date. The President vide order dated 24.02.2015 regarding representation preferred by FBR against findings dated 10.09.2013 passed by FTO in C.No. 47/KP/ST(06)/1406/2012 in the case of appellant has categorically explained that: "However, there can be no cavil with FTO's findings that earlier recommendations, rendered in identical circumstances between same parties having not been questioned in accordance with law rather complied with different view would not be taken by him. Impugned findings and recommendations are not, therefore, liable to be interfered with".

13. The complainant has pleaded that the appellant purchased kerosene oil from PSO depot at Peshawar and sold it in the Tribunal Area where Sales Tax Act is not extended, therefore, the appellant is not lawfully required to be registered for the sales tax purpose as there is no registration in FATA for sales tax. The PSO deducted sales tax on supply of kerosene oil to FATA but the revenue department refused to refund the sales tax deducted being unregistered person. The apex Court has recently held vide its judgment dated 14.12.2017 that sales tax is not levied

in Tribunal Area, whereas sales tax can be refunded to unregistered persons under Rules (26(e) of Chapter-V of Sales Tax Refund Rule, 2006.

14. The complainant has prayed that the findings of FTO dated 27.04.2018 are factually and lawfully not justified for the reasons that the issue in question has already been settled up to the President and that the appellant is not lawfully required to be registered for the sales tax purpose.

15. On the other hand, the representative of the Agency has argued that under Section 3(3)(a) of the Sales Tax Act, 1990 the liability to pay Sales Tax is on the supplier of goods. In this case P.S.O has rightly fulfilled its responsibility. Supply to the complainant was made in taxable area and not in FATA. Therefore tax was required to be deducted. Further in view of FBR letter No.3(1)STP/99 pt dated 12.1.1999 taxable supplies to any area (including GB Or FATA are liable to sales tax. FBR in its letter No.2(38)STP/97 pt dated 15.04.1999 has specified supplies to FATA/PATA as taxable. The ambiguity has been fully laid to rest by the Federal Government by introducing changes into the Section 3(1)(b) of the Sales Tax Act, 1990 wherein words "irrespective of the final destination in territories of Pakistan", were inserted to make clear the taxability of such supplies. As mentioned before taxable supplies to the appellant were made by P.S.O. in taxable territory and tax thereon was deducted rightly. The appellant then made these supplies in FATA/PATA. No tax on supplies made to FATA/PATA was deducted.

16. The representative of the FBR has mentioned that the Hon'ble FTO was fully justified to have rejected the contentions of appellant as no case against the Department, as per law or facts, could be made out. He is an unregistered person, no return or refund application has been filed by him, therefore no case of maladministration could be made. The Hon'able FTO was fully justified to reject the appellant's claim as no refund application has been filed by the appellant for the period July 2012 to June 2013, July 2013 to June 2014, July 2014 to June 2015, July 2015 to June 2016 & July 2016 to June 2017. He failed to prove the same before the Hon'ble FTO as well. Therefore, his application was rejected. The Hon'ble FTO after considering all the facts and record of the case rejected the claim of the complainant.

17. The representative of the Agency has pleaded that since there was ambiguity in the law, therefore, the Hon'ble FTO decided the case in favour of complainant earlier. Now this ambiguity has been clarified by inserting words in Section 3(1)(b) of the Sales Tax Act, 1990, "irrespective of the final destination in territories of Pakistan." this controversy has been laid to rest finally. The complainant had requested refund on the basis of concessionary SRO 180(1)/2011 which was allowed by the Hon'ble FTO & Honorable President Islamic Republic of Pakistan. Now the complainant wants refund on the basis of FATA/PATA, which has been rightly rejected by the Hon'ble FTO. As discussed above the period in question is the same where relief under SRO 180(1)/2011 was requested and granted by the Hon'ble FTO. Present request basis are different.

18. The representative of the Agency has explained that the recent change in Section 3(1)(b) has clarified the taxability of goods destined for FATA/PATA once for all. The FTO rightly dismissed the complaint of these grounds. The complainant has also failed to prove that the incidence of tax has not been passed on to consumers. The FTO has rightly decided the case in departments favour as the facts and circumstances of the case are altogether different from the previous complaint on the issue.

19. The representative of the Agency has submitted that the applicant has also filed review petition before the Hon'ble FTO which has not been decided yet and this representation before the Honorable President Islamic Republic of Pakistan being pre-mature is not entertainable at all, therefore, it is graciously prayed that the same may be rejected.

Analysis/Conclusion

20. After perusal of record and examination of all documents and detailed hearing, it has been noted 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.

21. 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."

22. 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 (IT), 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.

23. Needless to be mentioned that this representation has been filed by Complainant **repeating** the contents of the pleadings already made before the learned FTO. Nothing turns on the same as it fails to answer the reasoning of learned FTO and not even contain denial of the factual observations for his impugned decision. No grounds stand made out for interference with the decision of the FTO. Undoubtedly FTO's decision is based on sound reasoning and supported by the law. Thus, the representation is devoid of any merits and is liable to be rejected. FTO impugned findings/recommendations do not warrant any interference. Consequently FTO findings are sustainable and unexceptional having no illegality or improbability.

24. Accordingly, the President has been pleased to reject the instant representation of complainant namely Amjad Ali Khan and the recommendations/findings of learned FTO are upheld.

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

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Peshawar.

No. 29/FTO/2018 dated 27.08.2018

Copy for information to:

1. The Chairman, Federal Board of Revenue, Islamabad.
2. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
- ✓ 3. The Chief (Legal-I), Federal Board of Revenue, Islamabad.
4. Director to Secretary to the President.
5. Master file.

(Zulfiqar Hussain Awan)
Director General (Legal Affairs)