

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

Federal Board of Revenue

Versus

M/s Khawaja Enterprises, Karachi

**REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE AGAINST FINDINGS
/ RECOMMENDATIONS DATED 13.06.2018 PASSED BY THE FTO IN COMPLAINT NO.
628/KHI/ST/2018**

I am directed to refer to your representation No. 1(628)S(TO-II)/2018, dated 12.07.2018 on the above subject and to say that **the President has been pleased to pass the following order:**

2. This Representation dated 12.07.2018 has been filed by the FBR—the Agency against the findings of the FTO dated 13.06.2018 whereby it has been held:

“FBR to direct the CC-IR RTO-II Karachi to:

- (i) Re-examine the legal justification of ‘Red Alert’ dated 21.03.2014 for blocking payment against already issued RPOs in favour of the complainant for refund claims of tax periods of May & June 2007, January, July, September to December 2012 and January to March 2013 & October 2013 and blocking of fresh refund claims of tax periods from April 2014 to February 2018; and
- (ii) Report compliance within 45 days”.

3. Brief facts of the case are that the complaint has been filed against the Chief Commissioner-IR, RTO-II, Karachi and the Chief (CSTRO) FBR, Islamabad respectively for failing to:

- (i) Process thirty one fresh claims of Rs. 101.065 million filed by the Complainant for various tax periods from April 2014 to February 2018; and
- (ii) Issue cheques in respect of twelve RPOs dated 26.09.2011, 26.02.2014, 28.02.2014 and 04.03.2014 of Rs.32.880 million (correct amount is Rs. 30.571 million as refund amount of Rs.2.308 million for February, 2013 has been mentioned twice in the complaint) relating to tax periods of May & June 2007, January, July, September to December 2012 and January to March 2013 & October 2013.

4. It has also been alleged in the complaint that the Director, Intelligence and Investigation (I&I) Karachi has failed to remove ‘Red Alert’ from e-profile of the complainant in spite of repeated requests.

5. The complaint was referred to the Secretary, Revenue Division for comments in terms of Section 10(4) of the FTO Ordinance read with Section 9(1) of the Federal Ombudsmen Institutional Reforms Act, 2013. In response thereto, the Chief (CSTRO), FBR Islamabad submitted parawise comments dated 04.05.2018 contending that the refund payment against RPOs could not be made due to ‘Red Alert’ placed by the Director of Intelligence and Investigation IR (I&I) Karachi vide letter dated 21.03.2014. It was averred that payment would be made after removal of ‘Red Alert’.

6. The Director IR (I&I) Karachi submitted parawise comments vide letters dated 08.05.2018 and 31.05.2018. at the outset preliminary objection of bar of jurisdiction has been raised in terms of Section 9(2)(b) of FTO Ordinance on the ground that matter of over adjustment of input by the Complainant for tax periods of April 2011 to June 2012 (decided vide O-in-O No. 08/2015 dated 02.02.2015) was sub judice before the Appellate Tribunal Inland Revenue (ATIR) Karachi on the appeal of the department against the decision of CIR Appeal vide Order No. 19/2016 dated 30.03.2016 which accepted the appeal of the complainant against the O-in-O No. 07/2015 dated 02.02.2015. On merits, it was contended that the ‘Red Alert’ dated 21.03.2014 was issued as a precautionary measure to safeguard government revenue and could be re-examined by the RTO for withdrawal.

7. The Commissioner-IR, Zone-I, RTO-II Karachi vide letter dated 04.05.2018 contended that fresh claims could not be processed due to ‘Red Alert’ issued by I&I Karachi. It was further averred that order of CIR (Appeals) Karachi was also sub judice before the ATIR. Arguments heard and record perused by the FTO. Thus, FTO has issued aforementioned findings.

8. The Agency has pleaded that the Directorate of Intelligence & Investigation, Inland Revenue, Karachi received a credible information/ complaint against M/s Khawaja Enterprises, Karachi that the said unit/ firm managed to get refund on the manufacturing of Shoe Adhesive unlawfully accordingly action under Section 38 of the Sales Tax Act, 1990 was initiated and the records were resumed. It is submitted that on scrutiny and examination of statistics reveals that a huge quantity of composite solvent thinner was declared to be used in the preparation of

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'Shoes Adhesive' with a combination of other chemicals like Chloroform, white oil, methylene chloride, natural raw rubber, hexane etc. surprising it is noted that the chemicals of their combination is not same in every month but varies in each month meaning thereby that there is no specific formula or formulae adopted by the taxpayer for the preparation of 'Shoe Adhesive'. It is also noticed with surprise that in few months composite solvent thinner was used to manufacture 'Shoe Adhesive' which is practically impossible. It is beyond any doubt that the declared manufacturing and sales of 'Shoe Adhesive' is fake and the complainant has used rather abused the cover of such fake business activity of manufacturing and fake sales of 'Shoes Adhesive' only to claim/ obtain illegitimate refunds of sales tax during the period under review and later on in the coming months.

9. The Agency has contended that during the period from April 2011 to June 2011 the taxpayer has not only adjusted input tax against supplies made at 6% sales tax but also claimed refund against such supplies at reduced rate which is not admissible in terms of SRO 283(I)/2011 dated 01.04.2011 and SRO 1058(I)/2011 dated 23.11.2011 wherein it is clearly envisaged in sub clause (ii) of clause (c) that no input tax adjustment or refund shall be admissible to any registered person against his liability of sales tax against supplies on reduced rate. Only SRO 1012(I)/011 dated 04.11.2011 allowed such adjustment/ refund but was effective from 04.11.2011 to 22.11.2011 and the total input tax of the Registered Person covered during the period under review for adjustment or refund if otherwise in order. Thus by this manner the Registered Person has not only adjusted inadmissible sales tax during the period under review and thereafter.

10. The Agency has asserted that the complainant violated the provisions of Section 3, 6, 7, 8, 10, 22, 23, 26 and 73 of the Sales Tax Act, 1990 read with provisions of SRO 283(I)/2011 dated 01.04.2011, SRO 1012(I)/2011 dated 04.11.2011, SRO 1058(I)/2011 dated 23.11.2011 and SRO 1125(I)/2011 dated 30.12.2011 and committed tax fraud in terms of Section 2(37) ibid. Therefore, inadmissible refund and input tax adjusted is recoverable alongwith the default surcharge and penalty. The tax period mentioned in the Red Alert pertains to July 2012 to March 2013 whereas the period covered in the contravention report/ show cause notice pertains to April 2011 to June 2012. The case was sent to the assessing officer for assessment and accordingly the case was decided vide impugned Order in Original No. 07 of 2015 dated 02.02.2015 ordering the complainant to make payment of the adjudged amount. It is also pointed here that there is no manufacturing facility available on the given/ registered address, therefore, it is confirmed that the complainant manage technically to get the illegal refund and caused heavy loss to the public exchequer.

11. The Agency has underscored that the Commissioner (Appeals) has condoned the delay in filing of appeal under Section 45B of the Sales Tax Act, 1990 of more than 10 months and after granting condonation accepted the appeal on technical grounds. The impugned order of appeal is also speaking that it is engineered. However, the matter is sub judice before the Appellate Tribunal therefore on this single ground the FTO has no jurisdiction to entertain the complaint as provided under Section 9(2)(b) of the FTO Ordinance, 2000 which is reproduced below:

(2) The Federal Tax Ombudsman shall not have jurisdiction to investigate or inquire into matters which—

(a) Sub judice before a court of competent jurisdiction or tribunal or Board of authority on the date of the receipt of complaint, reference or motion by him; or

12. The Agency has expressed that in this backdrop a 'Red Alert' was issued by Intelligence & Investigation IR in accordance with the policy documents No. VII as it was beyond imagination that goods specified in SRO 1125(I)/2011 can be manufactured from single input of petroleum product. The issue, therefore, required further scrutiny before issuance of refund. Over the last two decades the FBR has continuously remained the target of organized Duty/ Tax frauds. On account of immediate financial gains, issuance of illegal/ bogus refunds (income tax/ sales tax) was invariably the hub of all such fraudulent activities. It is noteworthy that in all cases of tax frauds after the initial hullaballo and some media hype, neither any recovery was made nor could the real culprits be identified. The loss caused to the national exchequer remained irretrievable. This was the state of affairs which created an urge for an internal preemptive and innovative anti-fraud mechanism aiming at protecting state exchequer against all such onslaughts. Introduction of 'Red Alert' was the FBR's answer to the said operational need.

13. The Agency has illustrated that in pursuance of Para3(b) of Policy Document of FBR dated 25.10.2011, Directorate of Intelligence & Investigation, Inland Revenue (Anti-fraud arm of Inland Revenue Wing of FBR and Respondent No. 1 in the present petition is the officer posted in the said Directorate at Karachi) generates 'Red Alerts' to preempt the fraudulent but organized crime of issuance of bogus/ dubious refunds. This policy decision was made by the FBR in this backdrop of facts that the fake refunds once issued were seldom retrieved since mostly these were issued to pseudonymous identities which were not traceable and departmental record is destroyed or misplaced by the internal connivers. So the basic rationale is to preempt the fraudulent organized crime of issuance of bogus/ dubious refunds. Since the Directorate General I&I has limited resources and the quantum of sanctioned/ issued refunds by the RTOs (Field Formations) was huge, therefore, the following risk parameters are relied upon to undertake swift probe/ checking of dubious refunds and to highlight the discrepancies immediately to all the concerned authorities.

a) Qualitative comparison of input claimed by the refund claimant with its output;

- b) Forensic but discreet analysis of buyers & suppliers;
- c) Physical verification of the business premises of refund claimants through dedicated teams;
- d) To gather details to ascertain that as to whether the refund claimant falls within the category of non-zero rated regime;
- e) The incorrect application of SRO 283 and 1125 by certain units of textile sector;
- f) Intelligence gathering by the Directorates I&I-IR through formal and informal channels;
- g) New registrants claiming heavy refunds.

14. The Agency has underlined that to achieve the aforesaid goals/ objectives following operational mechanism/ procedure is adopted:

- Preliminary examination/ desk audit of buyers & suppliers;
- Physical verification (if required);
- Ascertaining genuineness of manufacturing activity;
- Consumption of utilities (electricity/ gas) vis a vis turnover declared;
- Ascertaining sectoral benchmarks;
- Credentials of officers/ officials processing the claims;
- Issue of red alert to the concerned Chief Commissioner;
- Intimation to CSTRO/ Treasury Office, for information and necessary action;
- Verification and required action to be taken by the RTO concerned including:
 - Roll back of refund if required;
 - Blacklisting of units/ suppliers, if needed;
 - Rejection of refund/ recovery of prior issued refund if warranted;
 - Institution of criminal proceedings including FIR/Arrest by the RTO/Directorate of (I&I-IR).

15. The Respondent No. 2 approached the FTO vide complaint No. 628/KHI/ST/2018 for redressal of their grievances. The FTO considering the facts and law placed before him and passed the impugned order dated 13.06.2018 in complaint No. 628/KHI/ST/2018.

16. The Agency has taken ground that the FTO erred in law and has given findings against the applicant inspite of the fact that the entire case is based on the bogus refund and Red Alert was issued in this regard as already mentioned in the preceding paras and a contravention case covering the period from April 2011 to June 2012 and a case was adjudicated vide O-in-O 7/2015 wherein the content of Red Alert were also incorporated after providing hearing opportunity to the complainant. The aforesaid order is sub judice before the Appellate Tribunal.

17. The Agency has stated that the FTO erred in law and passed the impugned order in spite of the fact that the FTO under Section 9(2)(b) of FTO Ordinance, 2000 shall not have jurisdiction to investigate or inquire into matters which relates to assessment of income or wealth, determination to 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.

18. The Agency has pointed out that FTO erred in law and passed the impugned order on FTO complaint despite the fact that this is not the case of maladministration. The fact is that an order has been passed and the matter is sub judice before the Appellate Tribunal.

19. The Agency has pleaded that the FTO erred in law and facts and negated its own findings order passed in Complaint No. 01/ABD/ST(01)/1130/2015 wherein the FTO has given his findings recommendations as under:

“The charges of maladministration thus could not be established. It is also evident that at the time of filing the instant complaint on 17/09/2015, the adjudication case was pending before the ATIR while case of FIR was pending before the Special Judge Customs and Taxation, Peshawar. Thus, bar on FTO jurisdiction in terms of Section 9(2)(b) of the Ordinance, is also applicable. The complaint and application of the complainant for suspension of FIR are accordingly dismissed and case file consigned to record”.

20. The Agency has contended that the similar nature of cases where legal remedies are available the President has set aside the FTO findings and accepted the representation of FBR in Complaint No. 975/L/2002(Mr. Mumtaz Ali Vs CBR). The relevant extract of the decision of the President is given hereunder:

“Section 9(2)(b) of the Establishment of the office of Federal Tax Ombudsman Ordinance, 2000, provides that the Federal Tax Ombudsman shall not have jurisdiction to investigate or inquire into; matters which relates 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. The matter raised in the complaint properly pertains to assessment proceedings involving determination of facts. Also, there are no findings that legal remedies are not

available to the complainant against the impugned order. The recommendation of the Law Division that the recommendations of the FTO are hit by the provision of Section 9(2)(b) *ibid* is well founded.

Accordingly, the President has been pleased to accept the representation of the Collector Customs, Sales Tax & Central Excise (Adjudication) and set aside the FTO's recommendations dated 23.12.2002 in complaint No. 975-L/2002".

21. Besides above there are various representation of FBR of similar nature which had been accepted by the President (in complaint No. 173/2002(Prime Chorium (Pvt) Vs CBR/ Sales Tax Haripur) Complaint No. 429/2001 (Adnan Fabrics (Pvt) Ltd Vs Revenue Division).

22. The Agency has asserted that the impugned orders passed by the Respondent No. 1 is capricious exercise of powers not warranted under the law, hence the impugned orders passed by the Respondent No. 1 is illegal, void, unlawful, and is liable to be set aside.

23. The Agency has prayed that the President may be pleased to accept the representation of FBR and set aside the findings of FTO dated 13.06.2018. It is further prayed that the President may be pleased to set aside the recommendation/ finding/ decision made by the FTO in the instant complaint as there was no maladministration on the part of the department.

24. On the other hand, the Complainant has filed his written comments on 10.08.2018 against the instant representation of FBR and supported the impugned recommendations/findings of learned FTO with the request that the instant representation of the Agency may be rejected by the appellant forum.

Analysis/Conclusion

25. After perusal of record and examination of all documents, it has been noted that the learned FTO in his Order vide Para No.6. *inter alia*, indicates that "Directorate of Intelligence & Investigation had issued 'Red Alert' dated 21.03.2014 as a "precautionary measure" though contravention case made by the Directorate covered tax periods of April 2011 to June 2012 which was decided vide O-in-O No.07/2015 dated 02.02.2015 and has been set aside vide CIR (Appeal)'s Order No.19/2016 dated 30.03.2016 against which appeal filed by the Deptt is presently pending in ATIR." On the contrary, Section 9(2)(a) of the FTO Ordinance 2000 provides that **FTO shall not have jurisdiction to investigate or inquire into matters which are sub judice 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.**

26. 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.

27. 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 (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.

28. 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.

29. 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.

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




(Zulfiqar Hussain Awan)
Director General (Legal Affairs)

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The Chairman,
Federal Board of Revenue.
Islamabad.

No. 36/FTO/2018 dated 09.09.2018

Copy for information to:

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2. Tariq Mehmood Siddiqui, Advocate, Office No 506, 5th Floor, Asia Pacific Trade Centre, Rashid Minhas Road, Block-19, Gulistan-e-Johar, 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)