

**THE FEDERAL TAX OMBUDSMAN SECRETARIAT**  
**REGIONAL OFFICE, KARACHI**

Complaint No.110/Khi/Cus(54)/521/2010  
Dated: 26.04.2010

Messrs Monday Baba  
Office No.105, Insaf Chambers  
Light House, M.A Jinnah Road  
Karachi

... Complainant

***Versus***

The Secretary  
Revenue Division  
Islamabad

... Respondent

**FINDINGS/RECOMMENDATIONS**

Dealing Officer : Justice (R) Muhammad Nadir Khan, Advisor  
Authorized Representative : Mr. Zia-UI-Hassan Advocate  
Departmental Representative : Syed Imran Bukhari, Deputy Collector  
Mr. Noor Elahi, Appraiser

The jurisdiction of this office has been invoked by the Complainant being aggrieved by the refusal of the Customs Department to refund the amount of Rs. 2,759,715 despite the fact that the Order-in-Original on the basis of which the amount was recovered from the Complainant was set-aside by Appellate forums including the Hon'ble Supreme Court.

2. The facts of the case as reflected from the record are that the Complainant imported a consignment of hair accessories from China vide IGM No.1678/2001 dated 18.10.2001. According to the Complainant despite the fact that the consignment was released under Section 81 of the Customs Act, 1969 (hereinafter referred as Act), the same was intercepted by the staff of the Directorate of Intelligence & Investigation on the plea that the value of goods was misdeclared. On re-examination, the description and weight of the goods was found grossly misdeclared. On the basis of Valuation Advice No.MISC/1/2001/XIII/4214 dated 06.11.2001 it was observed that an amount of

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Date of registration in FTO Secretariat



Rs.2,121,719.8 had been short-paid by the Complainant. The case was accordingly adjudicated and Order-in-Original dated 20.03.2002 was passed, whereby additional amount of duty and taxes with 100% fine and penalty of Rs.200,000 were imposed on the Complainant. The Order-in-Original was challenged by the Complainant before Customs Excise & Sales Tax Appellate Tribunal Bench-III Karachi (Appellate Tribunal) by filing of Customs Appeal No. K0639/1466 which was allowed by order dated 22.10.2002. On the basis of Tribunal's decision, the Complainant filed a refund claim on 05.03.2003. The Customs did not process the claim on the ground that they had challenged the order of Appellate Tribunal by filing a Special Customs Appeal No.108/2003 before the High Court of Sindh. On the dismissal of this Appeal by the High Court vide Order dated 16.03.2005, the Customs approached the Hon'ble Supreme Court, but could not get the order of Appellate Tribunal reversed and both appeal and review petition were rejected by the Hon'ble Supreme Court vide its orders dated 17.10.2005 and 9.1.2006 respectively.

3. After the Hon'ble Supreme Court laid the matter to rest, the Complainant once again approached the Customs for refund of the amount. However, this time the Customs took cognizance of the matter under Section 19-A of the Act. The record shows that in addition to exchange of correspondence between the parties the Complainant was asked by the Customs to prove that the burden of import duty, tax and fine and penalty had not been passed on to the consumer as part of the price of the goods. The Complainant refused to supply this information and insisted on payment of the refund. The Complainant was offered opportunity of hearing. During pendency of the proceedings under Section 19-A of the Act the Complainant approached the FTO Office on 10.4.2010 by filing of this complaint. In the meanwhile, the Customs finalized the proceedings under Section 19-A of the Act and passed Order-in-Original dated 15.04.2010.

4. The complaint was forwarded for comments to Secretary Revenue Division. After receiving parawise comments of the Customs, the parties were summoned for personal hearing on 2.7.2010 which was attended by the AR, Mr. Zia-UI-Hassan, Advocate on behalf of the Complainant and the Department



was represented by Syed Imran Bukhari, Deputy Collector Customs and Mr. Noor Elahi, Appraiser Customs.

5. The AR argued that after the decision of the Appellate Tribunal, setting aside the Order-in-Original the Complainant was entitled for refund of the additional amounts of import duties and taxes received by the Department. He also contended that the proceedings initiated against the Complainant under Section 19-A of the Act were illegal as Section 19-A of the Act was inserted vide Finance Act 2005 dated 01.07.2005 which could not be applied retrospectively as the case of the Complainant pertained to year 2001.

6. According to the learned AR, the officers of the Department misusing their authority made departure from the procedure and passed illegal order which amounted to maladministration and contempt of the courts. He also argued that the Order-in-Original was issued on 19.04.2010 malafidely i.e. after filing of this Complaint, only to create the ground of bar of jurisdiction of this office.

7. The DR rebutted the arguments of the AR contending that the Appellate Tribunal although set aside the Order-in-Original dated 20.03.2001 but no order was passed for refund of the amount. This aspect of the matter was left to the discretion of the Department. However, during pendency of the case, Section 19-A of the Act was enacted whereby the duty and taxes paid under the Act, unless contrary was proved, were deemed to have been passed to the buyer as a part of the price of such goods. The case of the Complainant about levy of additional duty and taxes was finalized, after the rejection of appeal of the Department by the Hon'ble Supreme Court on 02.01.2006 while Section 19-A of the Customs Act was already part of the law. Hence, while deciding the application for refund Section 19-A of the Act could not be ignored.

8. The DR further argued that applicability of Section 19-A of the Act or otherwise needed interpretation of law which exercise in view of bar of Section 9 (2) (b) of the Establishment of the Office of FTO Ordinance, 2000 (FTO Ordinance) could not be undertaken by the FTO Office. The DR argued that the complaint filed before the Hon'ble FTO during pendency of case of refund before



the adjudicating officer was not maintainable. Moreover, an appealable order was passed and the Complainant had the legal remedy of appeal available to him.

9. Submissions made by the parties have been considered in the light of the material available on record and the relevant law. The dispute between the parties is about entitlement of the Complainant to refund of the amount after setting aside of Order-in-Original on the basis of which the amount was recovered. In said regard, the plea of the Complainant is that Section 19-A of the Act was inserted in year 2005 and so it could not be applied to the case pertaining to the year 2001. The admitted feature of the case is that the subject consignment was imported in the year 2001. The consignment after being released under Section 81 of the Customs Act, 1969 was intercepted by the staff of Directorate of Intelligence and Investigation on the charge of mis-declaration. This led to litigation. The adjudicating officer held the Complainant guilty of the charges of misdeclaration of description, weight and value of goods and an amount of Rs.2,759,715/- was recovered from the Complainant on account of additional duty, taxes, fine and penalty. The Appellate Tribunal vide order dated 22.10.2002 set aside the Order-in-Original. However, the Appellate Tribunal passed no order about refund of the amount recovered on the basis of the order of adjudicating officer.

10. Admittedly, the appeals filed by the Department before Hon'ble High Court of Sindh, Karachi, and Hon'ble Supreme Court were dismissed, but no specific order was passed for refund of the amount recovered from the Complainant by the Department, although after setting aside of the Order-in-Original on the basis of which recovery was made from the Complainant, the refund of amount would have been the natural consequence provided there was evidence to prove that the amount claimed had not been passed on to any third parties. For such view reliance can be placed on the judgment of the Hon'ble Supreme Court of Pakistan titled as Fecto Belarus Tractor Vs Government of Pakistan reported in PLD 2005 SC 605 wherein their Lordships have laid the principle that the relief of refund of amount cannot be claimed on basis of a judgment which has not decided the question of refund. The relevant observations of the Hon'ble Supreme Court read as under:-



"It may further be noted that without prejudice to the earlier arguments, there is yet another important thing which is to be borne in mind i.e. the judgment, dated 19<sup>th</sup> February, 2001 has decided the question of exemption of Customs Duty and Sales Tax but it has nothing to do with the question of refund, therefore, for this additional reason as well, on the basis of the judgment, the petitioner could not claim relief of refund of the amount and for that matter it ought to have chosen another equitable remedy as discussed hereinabove".

11. In view of above principle laid down by the Hon'ble Supreme Court the plea of the Complainant that after setting aside the Order-in-Original dated 20.03.2002, the Complainant automatically had become entitled for refund loses its weight.

12. There is no dispute about the fact that the controversy about correctness of the Order-in-Original remained subjudice before the Superior Courts until it was finally laid to rest by the Hon'ble Supreme Court vide order dated 09.01.2006, whereby the Review Petition filed by the Department was dismissed. The Complainant after passing of order dated 09.01.2006 by the Hon'ble Supreme Court again approached the Department for refund of the amount. However, the Department issued letter dated 20.03.2010 to the Complainant to provide supportive documents showing that the incidence of duty and taxes had not been passed on to the end consumer. The Complainant instead of replying to the letter filed this complaint on 10.04.2010 with prayer for order for refund of the amount.

13. When the Order-in-Original was set aside by the Appellate Tribunal in 2002, in pursuance of which the Complainant filed the refund claim on 05.03.2003, neither Section 19-A was part of the Customs Act, 1969, nor had the Hon'ble High Court of Sindh issued any stay order. Therefore, keeping the refund application undecided for the period from 2003 to 2006 without any stay order clearly constituted maladministration. Had the Customs then asked for proof of passing of incidence of duty for which refund was claimed, the Complainant would have been in a better position to supply the requisite information. Calling upon him now after seven to eight years of the import and sale of the goods, to supply the passing of incidence-related information is a difficult proposition. The responsibility for delay and ensuing difficulty entirely devolves on the Customs.

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The Customs cannot take the plea that they could not ask the information about passing of incidence in 2003 because Section 19-A was not then incorporated in the Act, as this Section is declaratory in nature as clarified in the aforesaid judgment of the Hon'ble Supreme Court. The verification of passing of incidence of import duties and taxes was always inherent in the law relating to the refund of indirect taxes.

14. As pointed out, this complaint before the Hon'ble FTO was filed on 10.04.2010 when the Complainant was already issued letter dated 20.03.2010 for providing documentary evidence that the incidence of duty/taxes had not been passed on to the end consumers. The record reflects that the Complainant did not cooperate to produce any evidence in this regard. The Complainant even did not wait for the out come of his application and filed this complaint. In such view of the matter, on the date of filing of this complaint the matter was subjudice before adjudicating authority, and particularly when the Department rejected the application for refund by means of Order-in-Original No.03/2010 dated 19.04.2010 against which the Complainant has remedy of appeal under the Customs Act, 1969, the matter of refund is left for final determination by the courts of law. The onus is on the Complainant to prove that the impugned incidence of duty, tax and penalty had not been passed on to the consumers to become eligible to claim refund in this case.

**Findings:**

15. In view of what has been discussed above, the inattention, inaptitude and delay in handling this case tantamount to maladministration as defined under FTO Ordinance, 2000.

**Recommendations:**

16. FBR to –

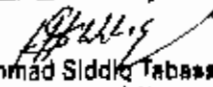
- (i) initiate disciplinary proceedings against the Departmental officials who sat idly for years and failed to ask the Complainant to produce the relevant evidence concerning whether or not the incidence of duties and taxes had been passed on to the consumers; and
- (ii) report compliance within 30 days.



(DR. MUHAMMAD SHOAIB SUDDLE)  
Federal Tax Ombudsman

Dated: 10.04.2010  
Waqas/A.H./M./R/A.H.

**ATTESTED**

  
Ch. Muhammad Siddiq Tabassum  
Advisor (Implementation & Monitoring)  
Federal Tax Ombudsman Secretariat  
Islamabad