THE FEDERAL TAX OMBUDSMAN SECRETARIAT

REGIONAL OFFICE, KARACHI

Complaint No.70/Khi/Customs(38)/402/2010
Dated: 18.03.2010*

Messrs Saita (Pakistan) (Pvt) Ltd
C-79, KDA Scheme No.1 ...Complainant
Opp. Bahria Auditorium
Off Karsaz Road, Karachi

Versus

The Secretary
Revenue Division ...Respondent
Islamabad

FINDINGS/RECOMMENDATIONS

Dealing Officer	:	Justice (R) Muhammad Nadir Khan, Advisor
Authorized Representative	:	Mr. S. M. Saghir, Manager (Admn)
Departmental Representative	:	Syed Imran Bokhari, Deputy Collector Customs

The Complainant has approached the FTO Office seeking refund of duty and other taxes collected by the Customs on re-import of machinery after its repair abroad. The case of the Complainant is that he imported drilling machinery vide Goods Declaration (GD) No. KAPR-HC-80952 dated 26.05.2009. The machinery was allowed release under Serial No.217 of SRO. 450(1)/2001 dated June, 2006 and Serial No.23 of SRO 575(1)/2006 dated 05.06.2006, on temporary import concession basis whereby 20% of the amount of leviable duty was paid in cash and 80% was guaranteed in the shape of pay order.

2. According to the Complainant, as the machinery became faulty and required immediate repair at the cost of the Company, it was 'exported' back temporarily vide GD-KEAP-SB-13497 dated 20.08.2009, and again re-imported vide GD No. KPR-HC-20703 dated 17.09.2009. However, the Customs again imposed duty and other taxes ignoring the fact that due duty and taxes were already paid on the re-imported machinery at the time of original import. The Complainant contended that as the machinery was urgently required, the Complainant paid the taxes under protest. He submitted that refund application

* Date of registration in FTO Secretariat

was then submitted to the Deputy Collector (Appraisement). but to no avail. The Complainant alleged that the Customs had arbitrarily taxed the machinery twice and had also delayed the refund due, and prayed that direction be issued to the Department to refund duty and other taxes obtained illegally.

3. The Department on being confronted with the averments of the Complainant submitted para-wise comments stating that the Complainant filed refund claim on 12.02.2009 on the ground that he had paid this amount inadvertently under protest as the duty and taxes were already paid. When the Complainant was asked to attend the hearing, he did not do so, and so his refund claim was rejected. The Department also pleaded that the Complainant had the option to approach the Collector (Appeals) by filing appeal against the Order-in-Original dated 06.01.2010. As he failed to exercise his option to impugn the O-in-O, the rejection of refund claim had attained finality, whereafter the FTO Office had no jurisdiction in the matter. The Department, therefore, prayed for dismissal of the complaint.

4. After receiving the para-wise comments, a copy of the same was provided to the Complainant who responded by filing a rejoinder wherein he listed the vain efforts he made for refund of duty and taxes collected by the Department on re-import of the machinery. The Complainant contended through his rejoinder that the repair charges/cost was not paid in Pakistan, and so the question of payment of duty and taxes on repair charges did not arise. According to the Complainant, the Department malafidely issued the O-in-O, rejecting his refund claim. He pointed out that the O-in-O indicated the date of issuance as 06.01.2010, which was not correct as the order was typed in the month of March but signed in back date by changing the month from March to January. Further the date of dispatch of the order as stamped on the envelope was 01.04.2010 which clearly belied the plea of the Department. The Complainant contended that the order was issued in back date only to show that it was issued before filing of the complaint before the Hon'ble FTO.

5. On receipt of the rejoinder, the parties were afforded opportunity of hearing. Mr. S. M. Saghir represented the Complainant while Syed Fawad Ali Shah, Deputy Collector Customs, appeared for the Department. The parties were heard at length and the record examined minutely.

6. The AR argued the case mainly on two grounds; firstly that the period of one year for which the machinery was temporarily imported originally on 05.06.2009 had not expired when the same was re-imported after repair and

that on re-import of the machinery the Department could not levy any duty or tax on account of repair charges as the same were borne by the foreign supplier. It was further argued that the Department acted with malafide; the request for refund was not disposed of promptly, the matter was kept pending for ulterior motives and on filing of complaint before the Hon'ble FTO, the application was rejected in backdate. However, the adjudicating officer got trapped while cheating as the tampering of date of O-in-O could not match the date on the envelope.

7. The DR argued that the GD was submitted electronically by the Complainant. On 're-import' of the machinery, the Complainant withheld information that it was a case of 're-import' of machinery. He further contended that the Complainant with his application for refund did not submit the agreement to show that the repair charges were borne by the supplier. However, the DR felt difficulty to support the proceedings as drawn by the Department. On being confronted with the backdating of O-in-O, the DR admitted that the order was originally dated 06.03.2010 which was overwritten as 06.01.2010 but he did make an attempt to make out a case of mistyping. However, when confronted with the fact that the envelope of dispatch of the O-in-O was dated 01.04.2010, he could not advance any reasonable justification as to what made the Department to dispatch the O-in-O dated 06.01.2010 after almost 3 months, and that too after filing of complaint before the Hon'ble FTO on 18.03.2010.

8. After the hearing, the AR filed copy of the contract showing that the repair charges for the machinery were to be borne by the supplier.

9. Submissions made by the learned representatives of the parties have been considered in the light of the pleadings of the parties as well as the documents filed in support of the same. It is reflected from the record/documents that the machinery re-imported after repair was got released on payment of duty/taxes amounting to Rs.129,839/- with endorsement "under protest". The Complainant filed application for refund, but when the Complainant approached the Department vide application dated 22.02.2010 to know about the fate of the issue, no response was given, whereas on filing of complaint before the Hon'ble FTO, the O-in-O purportedly issued on 06.01.2010 came to surface. On examination of the O-in-O, it becomes obvious that at the first page at two places the month of issuance of order was typed as '3' (March), but at the time of signature it was over written as "1" (January). Furthermore, it is admitted fact that the envelop in which this Order was sent to

the Complainant was dated 01.04.2010. The DR could not reasonably explain the overwriting/change of the month of issuance of O-in-O as well as delay of 3 months in dispatch of the same. These facts when considered in the light of the fact that the Complaint was filed in FTO Office on 18.03.2010 leave little room to doubt that the O-in-O was issued in back date by the adjudicating officer, Mr. Abdul Haye Sheikh, to cover delay in disposal of the application for refund and so defeat the purpose of the complaint before the Hon'ble FTO.

10. The adjudicating officer clearly appears to have manipulated issuance of O-in-O in the back date with the purpose to arbitrarily reject the application for refund. It also amounts to impeding and imperiling the determination of a matter already pending before the Hon'ble FTO. This act of the adjudicating officer not only constitutes maladministration as defined under Section 2(3) of FTO Ordinance, 2000, but also attracts the provisions of Section 16 of the FTO Ordinance, 2000. It is further concluded that the rejection of the application for refund in the stated circumstances would not deprive the Complainant to recover the amount of duty and taxes which were not payable by the Complainant on 're-import' of the machinery after repair except to the extent of repair charges even though carried out at the cost of the supplier of the machinery.

11. The DR did not dispute that the value of the machinery was not chargeable to Customs duty and taxes on re-import in September 2009 as it had already been charged at the time of import in May, 2009. He, however, stated that as only cost of repairs was chargeable as explicitly provided under Tariff Heading 9918, the duty and taxes were charged only on the cost of repairs. This contention was belied by the fact that duties and taxes were charged on the same value of the machinery as was declared in the GD at the time of export. The AR also confirmed that the duty had been charged on the entire value of the machinery and not merely on the cost of repairs.

12. It is noted that the clearing agent failed to provide efficient service to his client by declaring the dutiable value equal to the total value of machinery declared at the time of export instead of only to the extent of the cost of repairs. It also raises a serious question about the professional competence of Customs who not only failed to get the correct information from the clearing agent about the actual cost of repairs, but also had no clue about the rule position that only cost of repairs was dutiable at the time of re-import under PCT heading 9918. Their incompetence got further exposed when the Complainant filed refund claim on the ground that the duty and taxes had already been paid on the

machinery when originally imported in May, 2009, and that the machinery had been temporarily exported for repair only, but the concerned officials failed to determine the correct duty and instead indulged in even more serious acts of maladministration. Instead of doing justice to the taxpayer, the adjudicating officer resorted to cheating to justify an injustice already done, and that too by manipulating the dates of issuance of Order-in-Original. This kind of a conduct on the part of a Customs official charged with adjudication powers throws him in real bad light.

Findings:

13. The upshot of the foregoing discussion is that the Customs failed to levy duty and taxes correctly on re-import of repaired machinery despite protest by the Complainant. The adjudicating officer also indulged in manipulation of the date of the Order-in-Original to cover up delay on his part. He mishandled the refund claim which was clearly admissible to the extent of the differential between the amount payable on the cost of repairs and the amount actually charged on the entire value of the re-imported machinery. The clearing agent, a licensee of the Customs, also failed to render efficient service to the Complainant. The failure, inefficiency, neglect and manipulation on part of the Customs tantamount to maladministration as defined under Section 2(3) of the FTO Ordinance, 2000.

Recommendations:

14. FBR to direct the Chief Collector Customs (South) to-

(i) revisit the impugned Order-in-Original No.51/Misc/R-Imp/5364/2009-VI dated 06.01.2010, and proceed as per law;

(ii) ask Mr. Abdul Haye Shaikh, Deputy Collector Customs, to show cause within 15 days as to why he may not be proceeded against under Section 16 of the FTO Ordinance, 2000 as well as the relevant disciplinary rules;

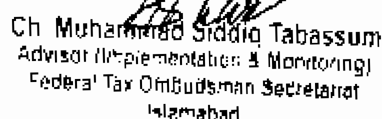
(iii) refund the amount of Customs duty and taxes in excess of what was chargeable on the cost actually incurred on repairs instead of the declared value of the re-imported machinery, after getting evidence of the actual cost of repairs from the Complainant; and

(iv) report compliance within 30 days.

(DR. MUHAMMAD SHOAIB SUDDLE)
Federal Tax Ombudsman

Dated: -2010

ATTESTED



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