

FEDERAL TAX OMBUDSMAN SECRETARIAT
REGIONAL OFFICE, KARACHI

Complaint No.160/Khi/Customs (79)690/2010

Dated: 12.05.2010

M/s. Sitara Peroxide Limited
5th Floor, Sitara Town, New Civil Lines
Faisalabad

Complainant

VERSUS

The Secretary
Revenue Division
Islamabad

Respondent

FINDINGS/RECOMMENDATIONS

Dealing Officer : Mr. Justice @ M. Nadir Khan, Advisor
Authorized Representative : Mr. Malik Ehsan Mehmood, Advocate
Departmental Representative : Mr. Syed Fawad Ali Shah, Deputy
Collector Customs

The Complainant has invoked the jurisdiction of this office for redressal of their grievance and action against the respondents/officers of the department involved in mal-administration.

2. It is alleged that the Complainant imported machinery, raw materials, components and sub-components for installation of plant for manufacturing of Hydrogen Peroxide. He claimed benefit of SRO 565(1)/2006 dated 06.05.2006, which was refused by the Customs on the ground that same was available only to those importers who were in the business of manufacturing and supplying chemical plants for the export sector and not to those engaged in setting up of such plants for local market. The Customs issued Demand Notice dated 26.11.2008 to the Complainant for payment of customs duty and taxes amounting to Rs.1,88,09059/-.

* Date of receipt in FTO Secretariat

The Complainant challenged the Demand Notice by filing of Constitutional Petition (CP) No. D-2424/2008 before the Hon'ble High Court of Sindh which was disposed of by order dated 30.01.2009 directing the Complainant to deposit the amount which was invested in Special Saving Certificates (SSCs). The certificates were not to be released to the Customs till disposal of first appeal or 15th June, 2009, which ever was earlier. The Complainant was also directed to file his objections before Customs who were required to pass a speaking order within one month but not later than 21.03.2009 and the Complainant, without waiting for the period of limitation, was directed to file appeal as soon as possible and try to get it disposed of latest by 15.05.2009.

3. As per direction of the Hon'ble High Court, the Complainant filed objections before the Collector of Sales Tax, Faisalabad, which he dismissed vide order dated 21.03.2009. The Complainant then filed Customs Appeal No.453/LB/09 before the Customs Appellate Tribunal Lahore (Appellate Tribunal). During pendency of the appeal, on the application of the Customs, the Hon'ble High Court of Sindh released the SSCs to Assistant Collector namely Shahid Jan with direction to retain the amount in the shape of Special Saving Certificates till final disposal of the Customs Appeal. The Appellate Tribunal allowed the appeal by a majority view vide order dated 06.08.2009.

4. According to the Complainant, the judgment of the Appellate Tribunal was not challenged by the Department within the period specified by Law, and so the order of Appellate Tribunal attained finality. The Complainant after the decision of Appellate Tribunal repeatedly approached the Customs for refund of the amount, but to no avail. He alleges that withholding release of scrutiny, after the judgment of the Appellate Tribunal was beyond jurisdiction,

perverse, unreasonable, unjust, oppressive, biased, discriminator and amounting to maladministration. He has prayed for issuance of direction to the Customs for releasing the held up SSCs and also for suitable action against them for maladministration.

5. The Customs in response to the notice of the complaint, filed reply/parawise comments wherein it was pleaded that against the order of Appellate Tribunal, Reference Application No.48/2010 was filed in the Hon'ble High Court, Lahore. It was also contended that the FTO Office in view of Section 9 (2) (a) of the FTO Ordinance has no jurisdiction to investigate the matter.

6. The Complainant on being confronted with the parawise comments, filed rejoinder contending that mere filing of Reference Application against the judgment of Appellate Tribunal could not operate as bar of jurisdiction to conduct investigation of a complaint involving issue of maladministration. The Complainant raising objections on the Reference Application stated that no stay had been granted against the order of the Appellate Tribunal, and so withholding of the SSCs was illegal. In support of his contentions the Complainant placed reliance on several Finding/Recommendation of the FTO office, judgments of Hon'ble High Courts and orders passed by the President on Representation filed against the FTO's Findings/Recommendation.

7. After filing of the rejoinder, the parties were afforded opportunity of hearing which was attended by Mr. Malik Ehsan Mehmood, Advocate [AR]. The Department was represented by Syed Fawad Ali Shah, Deputy Collector Customs [DR]. The parties during arguments repeated their earlier averments.

8. On due consideration of the pleadings and documents filed by the parties it is observed that the record is silent about any

response made by the Department on the request made by the Complainant for refund of the amount. However on filing of the complaint before the Hon'ble FTO, the Department came up with plea that the SSCs were not released as Reference Application was filed in the Hon'ble High Court Lahore.

9. It is observed that the copy of the Reference Application filed by the Department had no date, it only stated the month and year as ("___ May 2010"). Similarly, the certificate issued by the learned Counsel for the Department in the month of June 2010 did not state the date of filing of the Reference Application. On his request, the DR was provided opportunity to provide documentary evidence about date of filing of the Reference Application which they failed to provide. Of late the Customs submitted a letter by their Advocate to the effect that he filed Customs Reference No.48/2010 in the Lahore High Court against the decision of Appellate Tribunal, on 12th May, 2010 i.e. the date on which the complaint was filed in the FTO Office. Meanwhile the worthy Registrar High Court was requested to provide the requisite information. The Registrar supplied copy of set of memo of Reference Application with copy of order dated 08.07.2010 and verbally informed that the Reference Application was filed on 11.05.2010, however the same was under office objection. The matter was placed before the Hon'ble Division Bench on 8.07.2010. The Hon'ble Bench was pleased to issue pre admission notice of the Reference Application to the other side (Complainant) for 14.07.2010 and notice of the application for condonation of delay was also issued.

10. The above narrated facts though reflect that the Reference Application was filed a day before this complaint was filed. However the Reference Application was taken up by the Division Bench on 08.07.2010 and pre admission notice was issued to the

Complainant. It would be not irrelevant to observe that no order has been passed by the Hon'ble High Court about suspension or stay of order of Appellate Tribunal so much so that the Department did not file application for stay/suspension of order of Appellate Tribunal dated 06.08.2009. Besides the Reference has been filed against the order of the Appellate Tribunal, wherein the issue of applicability of SRO 565(1)/2006 and validity of order dated 06.08.2009 passed by Appellate Tribunal are in question.

11. In this complaint the grievance of Complainant is about maladministration of Department by withholding of the amount after the decision of Appellate Tribunal which has neither been stayed nor suspended by any competent court of law. Therefore, pendency of Reference Application would have no bearing on the investigation by FTO on the complaint filed on the issue restricted to maladministration only.

12. There can be no cavil to the legal position that order/judgment of competent court/tribunal or board or authority is to be implemented unless the same is stayed or suspended. In said regard reference can be made to series of judgments of Superior Courts as well as Findings/Decision of this Office. For ready reference reliance can be placed on judgment of the Hon'ble High Court Lahore reported in 2005 PTD 1825, 2007 CLC 304 and Findings/Decision of this office reported in 2008 PTD 1921, wherein it was held that withholding of the amount in absence of any order to withhold refund or return of SSCs, would constitute maladministration. It would not be irrelevant to observe that the Appellate Tribunal passed the impugned order on 06.08.2009 and reference was filed by the Department after more than 9 months without seeking any order for suspension/stay of the order of Appellate Tribunal and the order of Appellate Tribunal is also not

being complied. Such attitude on the part of Department being in defiance of the law set by the Superior Courts as well as FTO cannot be termed as just and proper.

FINDINGS:

13. In view of the foregoing discussion, refusal by the Customs to implement the judgment of the Appellate Tribunal on sole ground of filing of Customs Reference before Hon'ble High Court Lahore is found to be unreasonable and invalid. The Departmental officials mis-exercising their powers and authority and in administrative excess have withheld the SSCs which acts tantamount to maladministration as defined in Section 2 (3) of the FTO Ordinance, 2000.

RECOMMENDATION:

14. FBR to –

- (i) return the Special Saving Certificates to the Complainant within 15 days subject to any order by Hon'ble High Court, Lahore;
- (ii) fix responsibility of maladministration in illegal withholding of Special Saving Certificates and proceed against those found responsible under the relevant disciplinary rules; and
- (iii) report compliance within 30 days.

(DR. MUHAMMAD SHOAIB SUDDLE)
Federal Tax Ombudsman

Dated: _____ 2010
Waqar/ny

ATTESTED

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