

Islamabad, the 30<sup>th</sup> Dec 2014

No.02,33&48/FTO/2014

**[M/S Utility Store Corporation of Pakistan, Islamabad Vs FBR]**

**SUBJECT: REPRESENTATIONS PREFERRED BY FBR AGAINST:**

- (i) **FINDINGS/RECOMMENDATIONS DATED 24.1.2014**
- (ii) **STAY ORDER DATED 29.10.2013**
- (iii) **WARNING LETTER DATED 3.12.2013**

**PASSED BY FTO IN COMPLAINT NO. 113/ISD/ST(23)/1641/2013**

I am directed to refer to your representation No.1(1641)S(TO-II)/2013 dated 1<sup>st</sup> Jan 2014, 4<sup>th</sup> Feb 2014 and 21<sup>st</sup> Feb 2014 on the above subject and to say that the President has been pleased to pass the following orders:

2. "The present Representation filed by the Revenue Division/Agency has impugned the decision dated 24.01.2014 of the learned F.T.O in the shape of Findings and Recommendations, relevant portion whereof is reproduced herein under:

"FBR to direct the Commissioner concerned to-

- (i) review/vacate order under Section 45A of the Act, being unlawful;
- (ii) refund the amount recovered forcibly and unlawfully by the officials(s), as per law, within two weeks;
- (iii) identify the official(s) responsible for forcible recovery of tax in violation of lawful procedure and initiate appropriate disciplinary action against them; and
- (iv) report compliance within 45 days".

3. Relevant background facts for the present case are that the Deputy Commissioner Inland Revenue of the Agency had issued a show cause notice dated 27.09.2012 to the complainant—Utility Stores Corporation of Pakistan (Pvt) Ltd., a wholly owned entity of Federal Government, engaged in running chain of provision stores all over the Country. The said show cause notice raised a demand of Rs.86,388,591/- and Rs.14,141,896/- towards the Sales Tax and Federal Excise Duty, respectively. The total demand in the show cause notice was of Rs.24,572,817,538/-. The complainant filed a detailed reply dated 13.11.2012 to the said show cause notice and explained the factual and legal position that the sales tax demand was wrongly levied by the Agency on the sugar sold by the complainant to the end consumer /public at large as the said sale of sugar was on the subsidized rates, that is, below the market price as directed by the Federal Government for the benefit of low income group/ public at large and prayed for dropping the proceedings.

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4. Eventually, the Agency passed Order in Original No. 02/50 dated 25.09.2013 for payment of Rs.8,068,107,108/- (*Rupees eight billion sixty-eight million one hundred seven thousand one hundred eight*) against the complainant. As per the complainant's un-disputed version the said Order in Original was received by them on 02.10.2013, but in the intervening period the Agency commenced the recovery proceedings by attachment of bank accounts of the complainant purportedly in terms of Rule

71 of Sales Tax Rules, 2006. The complainant challenged this action of attachment before the F.T.O, who granted a stay in favour of the complainant and subsequently though the Agency withdrew its attachment orders, but substantial amount of Rs. 410.00 million (approximately) was got recovered by the Agency through the above process. This stay order granted by the learned F.T.O has been subsequently challenged by the Agency by filing a Representation under Section 32 of the F.T.O Ordinance, 2000 and the said case is also tagged with the instant case and has been numbered as 33/F.T.O/2014.

5. On the other hand, the complainant also filed a contempt proceeding before the F.T.O against Mr. Naveed Mukhtar, DCIR (Audit-I) on the ground that despite the stay order operating in favour of the complainant, the Agency illegally recovered a huge amount of Rs.412,532,027.81 from the bank accounts of the complainant. Outcome of this proceeding was that the Registrar, F.T.O vide letter dated 03.12.2013 conveyed to the Agency as follows:

“The Hon’ble Federal Tax Ombudsman has considered your reply and by taking a lenient view, has warned you to remain careful in future”.

Subsequently, the above warning letter has also been challenged by the Agency before this Secretariat by filing a Representation under Section 32 of the F.T.O Ordinance, 2000 and this case has been numbered as 02/F.T.O/2014 and is clubbed with the subject main case.

6. The other relevant and admitted fact is that against the aforementioned Order in Original No.02/50 dated 25.09.2013 the complainant had already preferred an appeal which is *subjudice* before the Appellate authority.

7. The main contention of the Agency is that the F.T.O lacked jurisdiction to decide the matter and passed the impugned decision as reproduced herein above, *inter alia*, as the matter relates to assessment for which appeal is provided in the relevant Statute—Sales Tax Act, 1990 and in this regard admittedly an appeal filed by the complainant is also *subjudice*. The other ground of attack on the impugned decision is that the F.T.O has erroneously decided the issue that the proceedings initiated by above mentioned show cause notice should have been decided within stipulated period of seven months (120 days + 90 days extension) as envisaged in Section 11 sub section 5 of Sales Tax Act, 1990; and that condonation of delay under Section 74 of Sales Tax Act is not applicable to the proceeding conducted by Agency against the complainant.

8. If the entire proceeding starting from post show cause notice till the filing of three different Representations before this Secretariat, which are now tagged together, is examined carefully, the entire controversy can be divided into two:

(i) Order in Original No. 2 of 50, whereby demand of Sales Tax and Federal Excise Duty has been created by the Agency against the complainant regarding which admittedly an appeal is already pending adjudication before the appellate authority;

(ii) the overall conduct of the Agency and its officers while proceeding against the complainant”.

Admittedly, the show cause notice was issued on 27.09.2012 and the Order in Original has been passed on 25.09.2013, that is, after 364 days, which should have been passed in terms of Section 11(5) [of Sales Tax Act, 1990], within 210 days, which includes an extended period of 90 days, which can only be given through a speaking order of the Commissioner. Such an order is not available in the case record nor filed by the Agency with their Representation. An order dated 28.08.2013 is available as part of case record, which is a purported extension granted by the Federal Board of Revenue in terms of Section 74 of the Sales Tax Act. Interestingly, this purported condonation and extension of time

limit for finalizing the above mentioned proceedings initiated under the aforesaid show cause notice has been issued **after lapse of stipulated period of 210 days** and in effect this is an ex post facto approval granted by the Agency to its officers, which is not tenable in law.

9. The action of attachment and recovery of Rs.410.00 million (approximately) by invoking Rule 71 of the Sales Tax Rules, 2006 has also been challenged by the complainant. Rule 71, *inter alia*, gives the Agency and its officers the authority and power to recover the Government dues through different modes but after expiry of 30 days from the date **on which the Government dues are adjudged (emphasis added)**. Admittedly, the recovery proceeding initiated on 28.09.2013, whereas, the un-rebutted plea of the complainant is that they had received the impugned assessment order on 02.10.2013. The Agency **should not have shown haste** in making recovery of such a huge amount from the complainant, which itself is a Government owned entity and keeping in view the consequences that such huge amount of recovery can seriously jeopardize the operations/activity of the complainant– Utility Stores Corporation. In this regard, guidance can be taken from a famous judgment of Honorable Supreme Court of Pakistan reported in 1993 SCMR page 1553, wherein, the learned judges have held that **“excessive use of lawful power is itself unlawful”**. This concept was further explained by the Supreme Court that when expressed statutory power is conferred on public functionary, it should not be pushed too far, as such conferment implies restraint in operating that power in a just, fair and reasonable manner.

10. The F.T.O in its impugned decision has also relied upon Supreme Court judgment reported in 2006 PTD page 537. Facts of this case are that a show cause notice under the Sales Tax Act was issued after the lapse of the prescribed limitation (three years) as mentioned in the item sub section 2 of Section 36, which later was set at naught by the Sindh High Court. The Supreme Court upheld the decision of High Court and was of the view that since show cause notice was served beyond the period of limitation as prescribed in sub section 2 of Section 36 of the Sales Tax Act, the same was rightly set aside by the Sindh High Court. There is also a precedent of this Secretariat given in case No. 107/F.T.O/2005 and facts of this precedent are quite similar to the case in hand, as in that case also the Agency had passed an order after stipulated period, and it was held that where a public functionary is empowered to create liability against citizen only within prescribed time, such time limitation is mandatory and consequently F.T.O’s decision was sustained, which had found the Order in Original passed by the Agency as time barred.

11. The upshot of the above discussion is that the Agency could not make out plausible ground(s) for interference with the impugned decision dated 24.01.2014 of the learned F.T.O and the same is hereby affirmed.”

12. Accordingly, the President has therefore been pleased to reject the main Representation No.48/FTO/2014 of the Agency against the above decision of the F.T.O and consequently the other two cases - No. 33/FTO/2014 against the stay order of the F.T.O as well as case No. 02/FTO/2014 relating to the contempt proceedings - have been disposed of in the above terms. The President has further been pleased to advise that FBR should raise and process tax demand against Utility Stores Corporation strictly as per law. Compliance now to be reported to F.T.O’s Secretariat within two weeks of the receipt of copy of this order.

(Arshad Farid Khan)  
Director (Legal-II)

The Chief (Legal),  
Federal Board of Revenue,  
Islamabad

Copy for information to:

1. The Registrar, Federal Tax Ombudsman, Secretariat, Islamabad.
2. General Manager (Finance), Utility Stores Corporation of Pakistan (Pvt) Ltd,  
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