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

Mr. Sana Ullah Ghumman

Versus

Ministry of National Health Services, Regulation and Coordination

REPRESENTATION PREFERRED BY FEDERAL BOARD OF REVENUE AGAINST FINDINGS / RECOMMENDATIONS PASSED BY THE WAFAQI MOHTASIB IN COMPLAINT NO. WMS-HOR/6322/2017

I am directed to refer to your Representation dated 01.11.2017 on the above subject and to say that the President has been pleased to pass the following orders:

2. This Representation dated 01.11.2017 has been filed by the Federal Board of Revenue (FBR)/ Agency against the findings of the Wafaqi Mohtasib dated 20.09.2017, whereby it has been held that:

"From the perusal of the record, deliberations by respondents and input of experts departure from established practice is proved which is maladministration in terms of Article 2(1)(a) of P.O. No.1 of 1983. The Agency is advised to implement the obligatory Articles 6 & 15 of WHO Framework Convention on Tobacco Control, strictly in accordance with regulations.

Compliance should be reported within 30 days of the receipt of these findings or reasons for not doing so intimated in terms of Article 11(2) of President Order No.1 of 1983."

3. The Brief facts of the case are that the complainant has complained against the inattention and indecision of the Agency to act according to rules and regulations for safety of human health through reduction of tobacco consumption. The health hazards to the youth of the nation are likely to increase. The Ministry of Finance and Agency has been implementing regulations enunciated in Framework Convention on Tobacco Control for last many years but have committed departure during 2017-18. The complainants have approached all concerned to act according to rules but in vain. They have invoked the jurisdiction of this office to rectify injustice being done to the public at large through maladministration of the Agency under P.O.No.1 of 1983.

4. The Tobacco Cell, Ministry of National Health Services, Regulations & Coordination in its report have stated that tobacco use is the single previously been made. Technical Working Group in M/o NHSR&C monitors implementation by all stakeholders to minimize Health Hazards because of consumption of tobacco. M/o Finance endorsed Tobacco Control Cell to the extent that implementation of Article 6 & 15 is the obligation of Government of Pakistan. Thus Wafaqi Mohtasib has issued aforementioned findings.

5. Hearing of the case was held on 5.12.2017, Mr. M. Zaheer, Secretary Sales Tax & Excise has represented the FBR. Mr. Sana Ul Islam, Dy. Secretary M/o NHSR&C have represented the Ministry of National Health Services, Regulation & Coordination (NHSR&C). On the other hand, the Mr. Sana Ullah Ghumman General Secretary PANAH Complainant himself has appeared for the hearing on the particular issue.

6. The instant Representation has been filed by FBR. The Agency has taken ground that the Honourable Wafaqi Mohtasib (Ombudsman) is not justified in holding that "from the perusal of the record, deliberations by respondents and input of experts departure from established practices is proved which is maladministration in term of Article 2(1)(a) of PO NO.1 of 1983." This observation is based on the introduction of their tier of FED for cigarette industry through the Finance Bill, 2017, passed by the National Assembly and assented by the President of Pakistan.
7. The Agency has stated that under Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983 (President’s Order No.1 of 1983), Wafaqi Mohtasib (Ombudsman) has the jurisdiction, function and powers to undertake investigation into any allegation of maladministration on the part of any agency or any of its officers or employees as provided in section 9 of the Wafaqi Mohtasib (Ombudsman) Order, 1983. Agency has been defined in section 2 of the Order as a Ministry, Division, Department, Commission or Office of the Federal Government etc. The third tier of FED for cigarettes has been introduced by Finance Act, 2017 enacted by the National Assembly of Pakistan and assented to by the Honourable President of Pakistan on 19th June, 2017. These constitutional forums are neither included in the definition of Agency nor can an act of maladministration can be ascribed to these. In view of this, it is submitted that the Wafaqi Mohtasib (Ombudsman) had no jurisdiction to investigate into an Act of National Assembly in so far as introduction of the third tier of FED for cigarettes industry is concerned.

8. The Agency has mentioned that without prejudice to above, it is pertinent to mention that after the introduction of Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000, all acts of maladministration under the tax laws came under the purview of Federal Tax Ombudsman. Thus even if this is construed that introduction of third tier of FED was an act of maladministration on the part of Federal Board of Revenue or any of its functionaries, only the Federal Tax Ombudsman had the jurisdiction to investigate into the so-called maladministration.

9. The Agency has elaborated that without prejudice to grounds regarding the lack of jurisdiction by the Honourable Wafaqi Mohtasib in the matter, it is submitted that nowhere in the Federal Excise Act, 2005 and in Schedules to the Act, it has been laid down that there cannot be more than two tiers of FED. It is further submitted there were three tiers of FED for tobacco industry upto Finance Year 2012-13. Thus there had been no so-called departure from established practices constituting maladministration even if this is admitted that the Honourable Wafaqi Mohtasib (Ombudsman) had the jurisdiction to investigate into the issue.

10. The Agency has narrated that regarding implementation of the stipulations of Articles 6 of the WHO Framework Convention on the Tobacco Control ordained by the Honourable Wafaqi Mohtasib (Ombudsman), it is submitted that Article 6 of WHO Framework Convention on Tobacco Control (FCTC) does not place any bar on countries signatory to FCTC with respect to taxation of tobacco products. Its only recognizes that price and tax measures are an effective and important means of reducing consumption by various segments of the population, in particular young persons. At the same time, the Article acknowledges the sovereign right of the parties i.e. signatories to FCTC to determine and establish their taxation policies.

11. The Agency has apprised that without respect to Article 15 of WHO Framework Convention on Tobacco Control, it is submitted that this Article recognizes the need of elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting. It is submitted that the third tier has in fact been introduced to tackle the menace of illicit, non-duty paid cigarettes which were priced at lower levels of Rs.25 to Rs.30 per packet against legitimate, duty paid cigarettes priced around in the range of Rs.67 to Rs.72 per packet. This significant price differential led to capture of substantial market share of lower brand of cigarettes by illegitimate, non-duty paid cigarettes which was also reflected in decline in collection of duties and taxes from legitimate cigarettes industry evident from the following table:

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<tr>
<th>Financial Year</th>
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12. The Agency has pointed out that to tackle the menace of illicit, non-duty paid cigarettes and to help legitimate cigarette industry recapture its lost volumes, a third tier of federal excise duty has been introduced which has enabled legitimate tobacco industry to price its lowest brands at Rs.47 to Rs.52 per packet, still significantly higher than comparable illicit, non-duty paid brands being sold in the price range of Rs.25 to Rs.30 per packet. In this way, introduction of the third tier is in fact in line with the stipulation of Article 15 of FCTC which calls “elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting”. Besides significant growth in revenues is also expected.


14. On the other hand, the representative of the PANAH has stated that PANAH (Pakistan National Heart Association) is registered Health Advocacy NGO working since 1984 under the patronage of office of the President. In the Finance Bill 2017-18 GOP reintroduced the third tier (lower tier) of taxation for Tobacco (Cigarettes) sale in Pakistan. This was approved by the Parliament in the Budget 2017-18. This taxation measure resulted in reducing the prices of over 90% of all cigarettes by almost 50% thereby making availability of cigarettes easier to the public especially the youth. This has resulted in grave danger to the public health.

15. The representative has pointed out that the above taxation change was challenged by PANAH with Federal Ombudsman, where after at length deliberations and evaluation of evidence based on national and international data and in light of Pakistan’s Commitment to International Community by signing and ratifying FCTC of WHO since 2004, the Federal Ombudsman made the subject decision and recommendations.

16. The representative of the PANAH has mentioned that Article 6 of FCTC recognizes that prices and tax measures are effective means of reducing tobacco consumption in general and in particular young people. Para 2 of Article 6 while recognizing the sovereign right of countries (as is the usual/norm in all UN recommendations), recommends that each party (country) should take account of its National Health objectives concerning tobacco control and adopt or maintain, as appropriate measures which may include:

a. Implementing tax policies and where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption; and

b. Prohibiting or restricting as appropriate sales to and or importations by international travelers of tax and duty free tobacco products.

17. The representative of the PANAH has underscored that the matter of sovereign right has been used in a negative manner by FBR rather than the actual intended use in Article 6 Para 2 which allows countries to levy tax to the maximum possible limits under the given circumstances of a particular country’s economic health.

18. The representative of the PANAH has contended that Article 15 of FCTC has been quoted and interpreted wrongly to satisfy the needs and purpose of this representation. The Article 15 has been totally ignored while preparing the budget proposal 2017-18 and all measures related to Governance elucidated in Para 4 of Article 15 which point towards gross negligence, failure of Governance and maladministration have neither been implemented nor referred to. FCTC fully recognizes that reduction of taxes to curb the illicit tobacco trade has been proven to be an ineffective measure. The tobacco/cigarette industry has continued to earn profits in billions despite claims of dropping sales due to counterfeit illicit/trade.
19. The representative of the PANAH has emphasized that it is imperative for the health of Pakistani Nation in general and the Pakistani Youth in particular, that the decision of Federal Ombudsman be upheld by esteemed office of President of Pakistan. PANAH being a health care advocacy organization along with its National and International partners including tobacco control cell of Ministry of Health, prays to Head of the State act as protective father and save the nation from grave consequences of Tobacco /smoking epidemic.

20. Additionally, the representative of the Ministry of National Health Services has argued that tobacco use is single largest preventable cause of death in the world. In Pakistan tobacco is a cause of around 108, 800 persons every year. To address this major health issue, the Ministry of NHSRC is taking demand and supply reduction measures in coordination with other Federal Ministries, provincial and district governments. The Government of Pakistan signed the Framework Convention of Tobacco Control (FCTC) in May, 2004 and ratified it in the same year. FCTC obligates each party to undertake appropriate legislative, executive, administrative and /or other measures in accordance with its constitution or constitutional principles.

21. The representative has narrated that the FCTC provides framework for reducing demand and supply of tobacco products. Since FCTC is a multi-sectoral treaty and is an obligation to Government of Pakistan so many Divisions/Departments like Finance, Revenue, Commerce, Provincial Governments are responsible for its implementation. In accordance with its mandate, the Ministry of NHSRC has taken legislative, administrative and coordination measures to implement FCTC provisions. In this regard, the Ministry notified new enhanced pictorial health warning on cigarette packs and outsiders, banned import of tobacco and non-tobacco sheesha and related substances, banned tobacco advertisement in print, electronic and outdoor media, banned cigarette packs having less than 20 cigarettes, illegalized designated smoking areas/smoking rooms, declared public places 100% smoke-free, raised awareness among masses, and built capacity of authorized persons to support enforcement. Regarding tobacco taxation, under Article 6 of FCTC, Pakistan is mandated to implement tax and price policies on tobacco products as a way to reduce tobacco consumption.

22. The representative has pleaded that according to WHO study a 10% increase in tobacco prices will reduce consumption up to 8% in low and middle income countries. A study conducted in India found that a 10% increase in tobacco prices is estimated to reduce consumption by 9.1% and cigarette consumption 2.6%. WHO FCTC recommends that tobacco taxes should account for 75% of retail price of tobacco products. In compliance with the obligations under Article 6 of FCTC, this Ministry formed a technical working group on tobacco taxation. Experts from FBR, The Union, World Health Organization, World Bank and Tobacco Control Cell are members of the working group. The working group is mandated to develop an implementation mechanism to increase taxes on tobacco products and earmarking of tobacco tax revenues for tobacco control measures. The recommendations of the Working Group are sent to Ministry of Finance /FBR as taxation of tobacco products is under purview of Ministry of Finance /FBR.

23. The representative has elaborated that in order to increase tobacco taxes in Federal Budget 2015-16 and 2016-17 the recommendations of the working group were sent to FBR. Resultantly, FED was increased on cigarette packs. To increase tobacco taxes of Federal Budget 2017-18 the working group made the following recommendations to Ministry of Finance /FBR:-

- Lower slab of all brands of cigarettes should have minimum specific tax of Rs.44 per pack of 20 cigarettes with annual adjustment to tobacco tax rates introduced to minimize the impact of inflation and per capita income growth.

- All exemptions of tobacco taxes provided at S.No.4 of the Schedule 3 of Federal Excise Act (i.e. Navy, President of Pakistan, the President of AJ&K and the Governors of the
o Earmark 2% of tobacco tax revenues for Prime Minister’s National Health Program for treatment of NCDs /Tobacco control.

o Electronic Monitoring system to monitor production of cigarettes (tacking & tracing system) should be implemented on priority basis.

24. The representative of Health Ministry has explained that with regards to Article 15 of FCTC, the Ministry realized that illicit supply of tobacco products is a massive problem that leads to tobacco related death and disease. Moreover, Government also losses tax revenue from illicit trade in tobacco. So this Ministry requested the Ministry of Finance/FBR to take enforcement measures to curb illicit trade in tobacco products. These recommendations were sent to Finance Minister and Special Assistant to Prime Minister on Revenue on 16th May 2017. These recommendations were based on a research study on tobacco taxation in Pakistan jointly conducted by FBR, World Bank, University of Toronto, Johns Hopkins University, University of Illinois at Chicago and Beacon house National University. According to the study, a uniform specific excise tax that accounts for Rs.44 per pack of 20 cigarettes could reduce number of smokers by 13.2% increase tax revenues by Rs.39.5 billion leading to reduction of 0.65 million premature deaths caused by smoking among current smokers, while also preventing 2.55 million youth from taking up smoking.

25. The representative has underscored that in Finance Bill 2017 FED on upper and lower slabs was increased from Rs.74.10 to Rs.74.80 and Rs.32.98 to Rs.33.40 respectively. Parallel to this a new slab with reduction in FED (i.e. Rs.16) has been created. This resulted in decrease in consumer prices of the most sold brands from Rs.72 to Rs.48. According to FBR the third tier has been introduced to tackle the menace of illicit, non duty paid cigarettes, besides significant growth in revenues is also expected. Since no data is available in the representation on status of revenue growth in first quarter of FY 2017-18 so it is difficult to verify the assumption. The issue of illicit trade in tobacco products/cigarettes is of enforcement than of policy. In order to tackle illicit trade issue, enforcement mechanism should be strengthened rather than decreasing the taxes on cigarettes, as primary purpose of levying FED is to reduce consumption of cigarettes.

26. The representative has stated that keeping in view the aforementioned evidences it is expected that the reduction in prices of cigarette packs may increase consumption of cigarettes, hence may increase prevalence of smoking and deaths caused by cigarette smoking/tobacco use. Since FCTC is an international obligation to Government of Pakistan so effective measures should be taken to implement FCTC provisions in letter and spirit, to reduce the tobacco consumption and save lives of people of Pakistan.

Analysis/Conclusion

27. After perusal of record, examination of all documents and detailed hearing, it has been noted that Article 9(b) of the Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order 1983, provides that the Mohtasib shall not have any jurisdiction to investigate or inquire into any matters which:

a) Are sub judice before a Court of competent jurisdiction or judicial Tribunal or board in Pakistan on the date of receipt of a complaint, reference or motion by him; or

b) Relate to the external affairs of Pakistan or the relations or dealings of Pakistan with any, foreign state or government; or

c) Relate to, or are connected with the defence of Pakistan or any part thereof, the military, naval and air forces of Pakistan, or the matters covered by the laws relating to those forces.
28. It has been observed that the complainant had primarily raised concern against a tax proposal pertaining to tobacco products proposed to be introduced in the finance bill 2017-18. Notwithstanding the sincerity of the concern shown by the complainant the fact remains that setting up of taxation priorities/strategies is the sole prerogative of the government as part of the mandate conferred under the constitution. The outcomes of its tax initiatives may be debatable, but those cannot by any stretch of imagination, be subjected to scrutiny/review of Wafiq Mohtasib under the garb of “Maladministration”. The term has a definite meaning which remains restricted to acts of omission/commission as defined under Article 2(2) of P.O.No.1 of 1983. Similarly, the jurisdiction of that forum is also confined to allegation of “maladministration” against any ‘Agency’ as defined under Article 2(2) of the Ordinance ibid. A taxation proposal, as in the instant case cannot be assailed in name of “Maladministration” merely on apprehension of adverse impact. Moreover, a finance bill with all its taxation proposals, irrespective of those being good or bad, is passed as an Act of Parliament, which is a sovereign institution of the state and, as such, cannot be taken to mean an “Agency” as aforesaid.

29. The FBR’s argument has weightage, which elaborating that an Agency has been defined in section 2 of Establishment of the office of Wafiq Mohtasib (Ombudsman) Order 1983 as a Ministry, Division, Department, Commission or Office of the Federal Government etc. The third tier of FED for cigarettes has been introduced by Finance Act, 2017 enacted by the National Assembly of Pakistan and assented to by the Honourable President of Pakistan on 19th June, 2017. These constitutional forums are neither included in the definition of an Agency nor can an act of maladministration be ascribed to the Parliament. In this scenario, the Wafiq Mohtasib (Ombudsman) had no jurisdiction to investigate into an Act of National Assembly in so far as introduction of the third tier of FED for cigarettes industry is concerned.

30. It is significant to observe that 98% of FED in tobacco industries is being attained from Pakistan Tobacco Company as well as Philips and Morris Tobacco Company Pakistan Limited by FBR. Article 15 of WHO Framework Convention on Tobacco Control, recognizes the need of elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting. Owing to the third tier has in fact been introduced to tackle the menace of illicit, non-duty paid cigarettes which were priced at lower levels of Rs.25 to Rs.30 per packet against legitimate, duty paid cigarettes priced around in the range of Rs.67 to Rs.72 per packet. This significant price differential led to capture of substantial market share of lower brand of cigarettes by illegitimate, non-duty paid cigarettes which was also reflected in decline in collection of duties and taxes from legitimate cigarettes industry resulting into colossal loss to the national exchequer. The sorry state of affairs regarding decreasing FED collection can be seen from the following table:

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31. It is pointed out that after introduction of the third tier of FED for cigarettes by Finance Act, 2017 enacted by the National Assembly of Pakistan and assented to by the Honourable President of Pakistan on 19th June, 2017, a significant increase in FED from the particular tobacco industry has been noted as FED collection till November 2017 was Rs. 22.1 billion as compared to Rs.13.1 billion in November 2016 from Phillips and Morris Pakistan Limited. Similarly, in case of Pakistan Tobacco Company FED collection has been increased in the National exchequer to Rs.5.16 billion till November 2017 from Rs.4.30 billion in November 2016. Thus, the findings of Wafiq Mohtasib are based on mere surmises and conjunctures. There was no unimpeachable evidence to prove the particular case with bona-fide intention of the complainant M/s PANAH, devoid of any particular study/research to refute the claim of the Agency that in spite of increase in cigarette prices in the country in previous years the prevalence of smoking rate remained the same as branded cigarette had been replaced by the unbranded cigarette produced by the unknown cigarette brand/name being manufactured in FATA/PATA without any tax or custom duty as their manufacturing units were established comprising of just a large single room factory without any hindrance and they have been selling most hazardous cigarette at the lower price by replacing the branded cigarette in urban as well as rural centers of the country whereof the petitioner had been deprived of the legitimate duties/taxes. In the light of oral assertion, it was a fit case...
examination. Thus, it was not a fit case for decision in slipshod manner, as is decided by learned Wafaqi Mohtasib. Hence, no maladministration at the part of FBR has been observed warranting the interference from the appellant forum.

32. Similarly, compliance of international treaty/convention is a policy issue of the government and cannot be interfered with by a judicial or quasi judicial forum such as the Wafaqi Mohtasib. Reference in this regard is made to Article 9(1)(b) of the P.O.No.1 of 1983 as mentioned supra, which categorically ousts the jurisdiction of the Mohtasib in such matters. Moreover, it is now settled law that the correctness of the reasons which promoted the government in decision making, taking one action instead of another, is not a matter of concern in judicial review and even the courts are not the appropriate forum for such investigation. Reliance in this regard is placed on the Supreme Court of Pakistan judgment cited as PLD 1970 SC98 wherein it was held that:

"...in the matter of policy decisions the government is the best judge and it is not possible for the court to sit on judgment over the action of the government if from materials disclosed it does not appear that action taken was merely a colorable exercise of or in abuse of power."

33. Even otherwise, the legislature has promulgated a special law viz, Establishment of the Office of Federal Tax (Ombudsman) Ordinance 2000, for investigating any allegation of maladministration on the part of the Revenue Division or any tax employee. Section 9 read with Section 37 of the Ordinance ibid, categorically ousts the jurisdiction of the Wafaqi Mohtasib from that ambit.

34. In such circumstances, the Wafaqi Mohtasib has gone beyond the scope and powers under the relevant law, thus, the impugned findings/recommendations of Wafaqi Mohtasib are neither sustainable nor maintainable. Consequently, the Agency’s representation is required to be accepted and the impugned recommendations of Wafaqi Mohtasib are required to be set aside by the appellant forum being exceptional in nature in the eyes of law. However, the complainant can seek remedy available to him from the relevant forums under the law, if so desired.

35. The Honorable President has been pleased to accept the instant representation of the FBR-Agency and to set aside the impugned findings/recommendations of the learned Wafaqi Mohtasib as having been passed sans jurisdiction.

(Arshad Farid Khan)
Director (Legal)

The Chairman
Federal Board of Revenue (FBR)
Islamabad

No.498/WM/2017 dated 18th December 2017

Copy for information to:
1. The Secretary, Wafaqi Mohtasib’s Secretariat, Islamabad.
2. The Secretary, Ministry of National Health Services Regulation & Coordination, LG&RD Complex, G-5/2, Islamabad.
3. Mr. Sana Ullah Ghumman, General Secretary, PANAH Secretariat, Armed Forces Institute of Cardiology/ National Institute of Heart Disease, the Mall, Rawalpindi.
4. The Director General, Tobacco Control Cell, Ministry of National Health Services Regulation & Coordination, LG&RD Complex, G-5/2, Islamabad.
5. The Director General Health, Ministry of National Health Services Regulation & Coordination, LG&RD Complex, G-5/2, Islamabad.
6. Director to Secretary to the President.

(Arshad Farid Khan)
Director (Legal)