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Tax Bulletin

OCTOBER 2023

Tax

Foreword

This publication contains brief commentary on Circulars, SROs and decisions of the adjudicating authorities issued during September 2023.

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Karachi
October 18, 2023

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Income Tax Ordinance, 2001

A. Circulars

1. Circular No. 4 of 2023-24

Extension in date of return filing

Through this Circular, FBR has granted general extension in time for filing of return of income for Tax Year 2023 till October 31, 2023.

B. Reported Decisions

1. MINIMUM TAX SHALL NOT APPLY IF THERE IS GROSS LOSS

(2023) 128 TAX 1
SUPREME COURT OF PAKISTAN

PAK PANTHER SPINNING MILLS LIMITED, LAHORE
VS
COMMISSIONER INLAND REVENUE, LAHORE

APPLICABLE SECTIONS: 113 OF THE INCOME TAX ORDINANCES, 2001

Brief Facts:

The Lahore High Court (LHC) passed the Order against the petitioner vide order No.303/2013. Being aggrieved by the decision of the LHC and Appellate Tribunal, the petitioner filed petition in the Supreme Court.

The petitioner contended that they had suffered gross loss during the tax year, therefore, the minimum tax under section 113 of the Income Tax Ordinance, 2001 (the Ordinance) is not applicable in his case. The petitioner admits that they had inadvertently mentioned depreciation and other inadmissible expenses in the return, however, if the said expenses were removed from the return, then they would have incurred a gross loss and would not have fallen under the ambit of minimum tax regime.

The Petitioner further argued that the ATIR has adopted two different approaches with regard to the said section. In ITA 1486/LB/2013 order dated May 18, 2021, the ATIR did not penalize Bank of Punjab and in the said case the ATIR subtracted the depreciation and other inadmissible expenses and then considered whether there was a gross loss. As there was gross loss, the Appellate Tribunal did not apply section 113 of the Ordinance. The same treatment was not followed in Petitioner's case.

Decision:

The Supreme Court of Pakistan allowed the petition and set aside the orders of the High Court and Appellate Tribunal and decided as under:

1. It would be appropriate if the Appellate Tribunal applied the same yard stick to the petitioner as it with the Bank of Punjab and subtract depreciation and other inadmissible expenses and then ascertain if the petitioner had suffered gross loss.

2. The judgements of the Appellate Tribunal and LHC were set aside and consequently the appeal preferred by the petitioner before the Appellate Tribunal, that is ITA No.759/LB/2011, will be deemed pending which shall be decided as stated above preferably within a period of three months from the receipt of this order.

2. SALE OF AIRTIME IS CONSIDERED TO BE PART OF THE "BUSINESS PROFITS" OF THE ENTITY AND NOT ROYALTY

(2023) 128 TAX 38
APPELLATE TRBUNAL INLAND REVENUE, KARACHI

ARY COMMUNICATION LIMITED, KARACHI
VS
COMMISSIONER INLAND REVENUE, ZONE IV, CRTO, KARACHI

APPLICABLE SECTIONS: 2(24)(b), 2(24)(c), 2(54)(c), 21 (C), 108, 122(1), 122B, 122(9) AND 122(5A)OF THE INCOME TAX ORDINANCES, 2001 and Article 12(3) of DOUBLE TAX TREATY BETWEEN PAKISTAN AND UAE.

Brief Facts:

ARY Communication Limited (the Appellant), a local company having principal business of establishing and broadcasting satellite tv channels, obtained licenses and right from PEMRA for the launch and distribution of channels (7 in numbers) in Pakistan and the Airtime is purchased from a non-resident company namely ARY FZ LLC, UAE.

The Assistant / Deputy Commissioner Inland Revenue (ADCIR) made addition on account of transfer pricing in terms of section 108 and made additions under section 21(c) of the Ordinance for failure to deduct tax on the amount treated by ADCIR as royalty, having been paid without deduction of tax.

Being aggrieved by the above treatment, the Appellant filed appeal before Commissioner Inland revenue Appeal (CIRA). CIRA set aside the impugned order of the ADCIR for denovo proceedings.

The AR of the Appellant filed appeal in ATIR and contended that the CIRA is not empowered to decide appeals by way of setting side or remand back the impugned order after amendment in section 129 of the Ordinance through Finance Act, 2005. Reliance was placed on ATIR decision reported as 2012 PTD 1032.

The AR of the Appellant further contended that the Appellant did not report any amount as "royalty" in its audited accounts or the return, so there was no reason to disallow Rs. 2,219,000 on account of "royalty". Accordingly, the addition made by the ADCIR is based on surmise, conjecture and assumption which is not permitted under the law.

The AR of the Appellant further contended that earlier, the concerned Zonal Commissioner cancelled the exemption certificates issued to non-resident company namely ARY Digital FZ LLC, on the ground that the payment made by the Appellant company to the non-resident company were not "Business Profit" falling under article 7 of the Avoidance of Double Taxation Treat between UAE and Pakistan, and treated the same as " fee for technical services" and "royalty" hence chargeable to tax in Pakistan. Being aggrieved by the cancellation of exemption certificate a revision application was filed before the Chief Commissioner who allowed the application and passed the order under section 122B of the Ordinance by treating the payment made by the Appellant as business profits and exempt under Article 7 of the treaty. Thus, the exemption certificate issued for the tax year under appeal was binding on the Appellant Company in terms of section 159(2) of the Ordinance and the ADCIR was not justified in passing the impugned order.

Decision:

ATIR Held that after the amendment in section 129 by the Finance Act, 2005, the CIRA is not competent to set aside/remand back an assessment order/amended assessment order, for denovo proceedings.

The ATIR further held that transfer of right to use copyright content is the litmus test while assessing whether transaction was to be considered as Royalty or not. From the plane reading of the agreements, it is evident that payments made by the Appellant to non-resident company were against purchase of airtime and that no right to regarding ay copyrighted content was transferred to the Appellant.

The ATIR in light of the decision of another ATIR in the case of International Media FZ LLC reported as 191 Tax 330 and also considering the earlier order passed by the Chief Commissioner under section 122B of the Ordinance, decided the matter in favour of the Appellant by considering the sale of airtime as part of the "Business Profits" of an Appellant, thus exempt as per provisions of the double taxation treaty between Pakistan and UAE.

3. ORDER/NOTICE SERVED ONLY ELECTRONICALLY CANNOT ALONE CONSTITUTE A PROPER SERVICE IN TERMS OF SECTION 218 OF THE ORDINANCE

(2023) 128 TAX 84
APPELLATE TRBUNAL INLAND REVENUE, LAHORE

COMMISSIONER INLAND REVENUE, CTO, LAHORE
VS
KOHINOOR ENERGY LIMITED, LAHORE

APPLICABLE SECTIONS: 131 AND 218 OF THE INCOME TAX ORDINANCE, 2001

Brief Facts:

Appeal was filed by appellant on July 4, 2022 before the ATIR under section 131 of the Ordinance against the CIRA order dated April 7, 2022 (served on IRIS portal) which was physically served to the appellant on May 17 2022. However, the Registrar Office of the ATIR treated the appeal as barred by time.

Based on the above decision of the Registrar office, the Appellant filed application for condonation of delay in filing the appeal before Appellate Tribunal.

The Appellant contended that the subject appeal was filed within the prescribed limitation of 60 days from the date of service of the CIRA's order, so there was no delay in filing the appeal. However, the delay if any may be condoned, keeping in view the date of service of the order which is of a paramount consideration for the computation of limitation period.

Decision:

The ATIR held that electronic delivery of notice on IRIS alone cannot be considered as a valid service in terms of section 218 of the Ordinance. Moreover, section 218 along with Article 129 of the Qanoon-e-Shahadat Act, 1984 and section 27 of the General Clause Act clearly state that for the presumption of service of notice/order to be valid, the service method must follow clause (a), (b) & (c) of sub sections 1 & 2 of section 218 of the Ordinance. Otherwise, orders/notices served only electronically cannot alone constitute a proper service in terms of section 218 of the Ordinance read with Rule 74 of the Income tax Rules, 2002.

Thus ATIR allowed the miscellaneous application seeking condonation of delay and the objection against the appeal being time barred was overruled.

4. SUPER TAX CAN BE LEVIED RETROSPECTIVELY, HOWEVER, THE LEVY OF 10% OF SUPER TAX ON SPECIFIC SECTORS UNDER SECOND PROVISIO OF DIVISION IIB, PART I OF THE FIRST SCHEDULE TO THE ORDINANCE IS DISCRIMINATORY IN NATURE IN THE ABSENCE OF RATIONAL JUSTIFICATION

(2023) 128 TAX 90
LAHORE HIGH COURT

SERVICE GLOBAL FOOTWEAR LIMITED AND OTHERS
VS
FEDERATION OF PAKISTAN AND OTHERS

APPLICABLE SECTIONS: 2(42), 2(48), 4A, 4B, 4C, 74, 80, 114, 118 AND 120 OF THE INCOME TAX ORDINANCE, 2001

Brief facts:

Through this petition, the petitioners challenged before the Lahore High Court (LHC) the retrospective application of section 4C of the Ordinance introduced through Finance Act, 2022 on one hand, while on the other hand called in question the vires of First Proviso to Division IIB of Part I of the First Schedule to the Income Tax Ordinance, 2001, being

discriminatory in terms of Article 25 of the Constitution of Pakistan and unlawfully impairing the vested rights accrued in past and closed transactions.

Decision:

With respect to retrospective application of section 4C of the Ordinance, the LHC held that it has been settled in plethora of judgments by the superior courts that legislature is competent to give retrospective effect to an Act and can also take away the vested rights of the parties. But, in order to give this effect, the Legislature must use words which are clear, unambiguous and not capable of any other interpretation of law. Plain reading of section 4C of the Ordinance clearly indicates the year from which it is applicable, the rates which would be applied and the time and manner of payment.

It was further held that the grounds of the petitioners mainly emphasize that the amendment cannot not apply retrospectively as their tax year 2022 ended on June 30, 2022 and December 31, 2021 which have become absolute past and closed transactions. This is analyzed under the provisions of Pakistan tax law, where computation of any taxable income and tax assessed is subject to scrutiny in terms of sections 111 and 122 of the Ordinance for a period of five years, therefore, the return of income can only be considered as past and closed after the lapse of statutory five years limitation period.

The LHC also held that the super tax imposed under section 4B of the Ordinance on persons other than banking companies having income equal to or exceeding Rs. 500 million was gradually reduced from 3% to 0% from Tax Year 2018 to 2022 as per Division IIA of the Ordinance, while at the same time a new super tax was introduced through section 4C of the Ordinance with a sudden increase in super tax at the rate of 10% which is unreasonable and unjustified as compared to super tax earlier imposed under section 4B of the Ordinance.

Moreover, it was held that it is a settled law that Article 25 of the Constitution allows for differential treatment of persons who are not similarly placed under a reasonable classification but it is also equally settled that in order to justify this difference the reasonable classification must be based on intelligible differentia that has a rational nexus with the object being sought to achieve.

However, the said provision imposing 10% super tax on specific sectors is found discriminatory, hence, ultra vires to the Constitution, thus the rate of super tax is reduced to 4% from 10%.

Rest of the prayers made in the petition were declined being super tax as valid.

5. MINIMUM TAX NOT APPLICABLE ON INDIVIDUALS AND AOPS PRIOR TO TAX YEAR 2011

(2023) 128 Tax 93 (Trib.)
APPELLATE TRIBUNAL INLAND REVENUE, KARACHI

THE COMMISISONER INLAND REVENUE, KARACHI
VS
M/S. PIONEER FLOUR MILLS, KARACHI

APPLICABLE SECTIONS: 113, 122(9) AND 122(5A) OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

In the instant case, the taxpayer, an association of persons, filed its return of income for Tax Year 2010 declaring a turnover of Rs. 454,750,560 with a taxable income of Rs. 2,362,388. The taxpayer paid tax of Rs. 590,597 on its taxable income. The Additional Commissioner Inland Revenue (ADCIR) after examining the facts of the case found that the deemed order under section 120 of the Ordinance was erroneous and prejudicial to the interest of the revenue. He, therefore, issued notice under section 122(1)/(5A) of the Ordinance showing his intention of levying minimum tax at the rate of 1% of turnover under section 113 of the Ordinance. Disregarding the submissions of the taxpayer, the ADCIR passed order creating tax demand as aforesaid of Rs. 4,547,505. The taxpayer filed appeal against ADCIR's order before Commissioner Appeals, who decided in favour of the taxpayer. Against the order of

Commissioner Appeals, the Department filed appeal before the ATIR.

On behalf of the taxpayer, the authorized representative submitted that vide Finance Act 2010, individual and AOP were included in section 113 of the Ordinance; however, the levy of minimum tax was applicable on individuals and AOPs from tax year 2011 and onwards and therefore, since the case pertains to tax year 2010, therefore, the said provision of the law is not applicable on the taxpayer.

Decision:

It was decided by the ATIR that prior to tax year 2011, individuals and AOPs were not liable to pay tax under section 113 of the Ordinance, thus taxpayer is automatically absolved from paying turnover tax for the period covering 01-07-2009 to 30-06-2010.

6. VACATION OF ORDER OF TAX OFFICER IN THE ABSENCE OF PROVIDING REASONABLE OPPURTUNITY OF BEING HEARD TO THE TAXPAYER

(2023) 128 TAX 99
APPELLATE TRIBUNAL INLAND REVENUE

THE COMMISSIONER INLAND REVENUE, ZONE-I, RTO, KARACHI
VS
MR. MUHAMMAD ABID ALIAS ABID ALI HABIB, KARACHI

Brief Facts:

The Taxpayer, member of Stock Exchange, deriving income from dividend and sale/purchase of shares filed his return of income, declaring dividend income of Rs. 128,792 on which tax at the rate of 10% was deducted under final tax regime. The Deputy Commissioner Inland Revenue (DCIR) obtained definite information in the form of bank statement, showing credit transactions of Rs. 149,202,250. The DCIR then issued show cause notice under section 122(5) read with 122(9) of the Ordinance seeking an explanation regarding the credit transactions. On receiving no response from the taxpayer, an Order was passed by the DCIR under section 122(5), under which the aforesaid amount of Rs. 149,202,250 along with an additional amount of Rs. 14, 632,721 was added to the taxpayers income. The taxpayer being dissatisfied with the Order of the DCIR, filed an appeal before Commissioner Appeals who deleted the additions made under section 111 of the Ordinance.

The Department being aggrieved, filed an appeal before the ATIR.

Decision:

The Appellate Tribunal held that the matter was decided in undue haste and requires further investigation. The DCIR was, therefore, directed to issue fresh notices under section 122(5)/(9) and section 111 of the Ordinance and decide the case within three months after providing an opportunity of being heard to the taxpayer.

7. BEST JUDGEMENT ASSESSMENT ORDER CANNOT BE PASSED IF THE TAXPAYER HAS DULY COMPLIED WITH THE NOTICE ISSUED.

(2023) 128 TAX 104
APPELLATE TRIBUNAL INLAND REVENUE

M/S. MULTINET PAKISTAN (PVT.) LIMITED, KARACHI
VS
COMMISSIONER INLAND REVENUE, LTU, KARACHI

APPLICABLE SECTIONS: 21, 34, 120, 121, 122, 174, 177, 214 AND 231A OF THE INCOME TAX ORDINANCE, 2001

Brief Facts:

The Appellant taxpayer is a Private Limited Company whose return of income for Tax Year 2014 was selected for audit through computer balloting under section 214C of the Ordinance. As per tax officer, the taxpayer neither responded to the notices issued nor submitted any information required. Subsequent to audit notice, the tax officer issued audit observations under section 177(6) of the Ordinance. The tax officer alleged that the taxpayer did not respond to the audit observations, hence, the officer passed best judgement assessment order under section 121 of the Ordinance.

Being aggrieved by the order, the Taxpayer filed appeal before the Commissioner Appeals who also decided the case against the taxpayer. Hence, the taxpayer filed appeal before the ATIRon the following grounds:

- The Taxpayer Company has a huge business volume that is reflected by the Company's turnover of Rs. 6 billion. Due to this, collection of information and preparing response to the notice received requires considerable time, which the officer should have considered.
- Company's assessment proceeding under section 122(1)/(5) of the Ordinance for the same tax year was just completed which in itself is an evidence of compliance made by the Taxpayer.
- Audit observations were duly responded by the Taxpayer vide letter dated November 16, 2016, hence there is no non-compliance on part of the Taxpayer.
- The addition made by the officer on account of Regulatory fee pertains to PTA mandatory fee against license for Long Distance International Calls and has nothing to do with Payables of Universal Service Fund in respect of Access Promotion Contributions. The AR further argued that addition of unpaid liability of Universal Service Funds in tax year 2014 under section 34(5) of the Ordinance is illegal as the liability relates to Tax Year 2011 (financial year 2010).
- For the addition on account of cash expenses, the officer simply worked back the amount of tax collected by banks without identifying specific heads, transactions and vendors.

Decision:

The case was decided by the ATIR as follows:

- Before passing the order, the tax officer could have confirmed from PTA, if the payments relate to Access Promotion Contributions or Long Distance Calls which the tax officer did not confirm. Access Promotion Contributions were levied under Access Promotion Regulations 2005 promulgated vide SRO 1006 (I)/2005, whereas, the amount in dispute relates to Long Distance International Calls.
- The issue of adding back unpaid liability claimed as exempt under section 34(5) of the Ordinance was decided in favour of the taxpayer. The ATIR stated that as per law, tax officer can add outstanding liability for more than three years after the end of the third tax year and not in the third tax year. The payment relates to financial year 2010 that falls in Tax Year 2011 hence, any addition to income could have been made in Tax Year 2015 and not in 2014.
- The issue of adding cash expenses under section 21(l) of the Ordinance was decided in favour of the taxpayer on the basis that the tax officer was bound to identify expenses head-wise and voucher wise and the entire cash withdrawal cannot be disallowed in one go.
- The officer in his order stated that the audit observations were duly replied by the taxpayer. The statement is self-contradictory as order under 121 was passed on the basis of non-responsiveness of the taxpayer. Since the tax payer complied with the notices issued, hence, legally there is no justification in passing best judgement assessment order under section 121 of the Ordinance.
- It is a settled principle of law that where the law requires a particular action in a particular manner and such particular procedure is not followed than the whole structure is liable to be abolished. As per ATIR, the officer was predetermined to pass the order and had not given due consideration to the submissions of the taxpayer, which validates that the due procedure was not followed. Hence, the ATIR annulled the orders of the below authorities.

8. LEVY OF SUPER TAX UNDER SECTION 4C OF THE ORDINANCE IS UNCONSTITUTIONAL AND SUPER TAX CANOT BE APPLIED RETROSPECTIVELY

(2023) 128 Tax 141
ISLAMABAD HIGH COURT

M/S. FAUJI FERTILIZER COMPANY LIMITED AND OTHERS
VS
FEDERATION OF PAKISTAN AND OTHERS

APPLICABLE SECTIONS: 4B AND 4C OF THE INCOME TAX ORDINANCE, 2001

Brief Facts:

The petitioners filed petition before the High Court of Islamabad (IHC) challenging the levy of super tax under section 4C of the Ordinance on the basis that super tax is being charged in Tax Year 2022 on the events that had already occurred or on closed transactions.

It was also argued that the method of computation of new category of income for the purpose of 4C is tantamount to presumptive taxation, which is permissible under entry 52 of the Federal Legislative list, but it cannot be taxed under Entry 47, or in any event it cannot be taxed with disregard of the other provisions of the Ordinance.

Decision:

The IHC in its decision stated the following:

- Section 4C of the Ordinance is ultra vires the fundamental rights under Article 18, 23 and 24, read with Article 4 of the Constitution. All classes of income mentioned in Section 4C which are already final shall be excluded when calculating income under Section 4C.
- In computing the income for the purposes of section 4C, taxpayers will be allowed to deduct brought forward depreciation, bought forward business losses, and bought forward amortization allowances.
- Further, section 4C will have prospective application only and will not apply to any transactions or events past and closed on or before June 30, 2022;
- Section 4C will not apply to the benevolent funds holding exemptions from tax under other provisions of the Ordinance;
- Section 4C will not apply to petroleum and exploration companies to the extent its application results in taxation of such companies exceeding the thresholds stipulated in Rule 4 of the Fifth Schedule to the Ordinance. The practical effect of the applicability of Rule 4 of the Fifth Schedule of the Ordinance is that a Petroleum Company cannot be taxed beyond the cap/limit stipulated in its Petroleum Concession Agreement. If the imposition of super tax under Section 4C of the Ordinance results in the said cap/limit being crossed, then the same cannot be demanded as tax from the Petroleum Company; and
- Any notices of demand or recovery issued to taxpayers under Section 4C of the Ordinance are set aside, without prejudice to FBR's right to issue fresh notices in accordance with the findings of the Judgment.

9. LHC HELD THAT FBR'S NOTIFICATION EXTENDING TIME LIMIT FOR AMENDMENT OF ASSESSMENT ONLY APPLIES FOR PROCEEDINGS ALREADY INITIATED BEFORE ISSUANCE OF SUCH NOTIFCATION.

2023 PTD 953
LAHORE HIGH COURT

COMMISSIONER INLAND REVENUE
VS
MUHAMMAD AFZAL CHEEMA

APPLICABLE SECTIONS: 122, 133 AND 214A OF THE INCOME TAX ORDINANCE (THE ORDINANCE)

Brief Facts:

The taxpayer deriving income from running a Rice Mills filed its return of income for tax year 2014, deemed to be an assessment order under section 120 of the Ordinance. The Officer Inland Revenue (OIR) on the basis of information available with the department issued notices under section 122(9) and 111(1)(b) of the Ordinance and confronted taxpayer regarding purchase of immovable property. The taxpayer furnished reply along with some documents. The OIR vide assessment order dated December 31, 2020 finalized the proceedings and made additions while determining taxable income of the taxpayer.

The taxpayer, being aggrieved by the decision, first filed an appeal before the Commissioner Inland Revenue-Appeals (the CIRA) raising various legal and factual grounds including plea that the instant proceedings were finalized after the expiry of statutory limit as provided under section 122 of the Ordinance i.e. for the case under discussion, it was expired on 30th June 2020, whereas assessment order was passed on 31st December 2020. It was also contended that the alleged extension in limitation granted by the FBR was neither valid nor applicable. The CIRA dismissed the appeal of the taxpayer and upheld the assessment order passed by OIR.

Consequently, the taxpayer filed an appeal before the ATIR. The ATIR allowed the appeal and held that extension of time limitation with respect to amendment of assessment under section 122 of the Ordinance cannot be extended by FBR, as this is exclusively the domain of legislature and exercise of powers under section 214A cannot be regarded as delegation of power to FBR to legislate.

The department (the applicant) filed reference application before the Lahore High Court (the LHC) on the ground that the assessment order was passed within statutory time limit as general condonation of limitation under section 214A of the Ordinance was granted by FBR vide notification dated 30th June 2020 amid lockdowns and rise in COVID-19 cases, thus, ATIR was not justified to annul the order of the authorities below.

Decision:

The LHC dismissed the reference application filed by the applicant in the following manner:

- FBR notification dated 30th June 2020 specifically condones the time limitation with respect to finalization of issues pertaining to the tax year 2014 up to 31st December 2020. Whereas the word 'finalization' is to be construed in terms of ordinary grammatical meaning wherein it is clear this refers to "closing, completion, culmination of something which is already in progress or has already been commenced".

- For the case in hand, notification referred by the applicant does not seem applicable as notice issued under section 122 was issued after the date of FBR's notification extending the timeline for finalizing the proceedings, which does not cover under the terminology of 'finalization of issues already in progress or has already been commenced'.

10. SUPER TAX IS TO BE DISCHARGED UPTO TAX RATES PROVDIED UNDER THE DOUBLE TAX TREATIES, APPLICABLE ON RESEPCTIVE INCOME

2023 PTD 964
SUPREME COURT OF PAKISTAN

COMMISSIONER INLAND REVENUE, CTO, KARACHI
VS
MESSRS MSC SWITZERLAND GENEVA AND OTHERS

APPLICABLE SECTIONS: 4B, 44(1), 107 AND 109 OF THE INCOME TAX ORDINANCE (THE ORDINANCE)

Brief Facts:

The relevant facts of the case are that the tax returns filed by the taxpayers were considered erroneous and prejudicial to the interests of the revenue and, accordingly, the Deputy Commissioner Inland Revenue (DCIR) initiated proceedings under section 4B of the Ordinance and assessments were amended vide orders under section 4B(4) of the Ordinance.

The taxpayers/respondents filed appeals against the said Orders before the Commissioner Inland Revenue (Appeals) ("CIRA") who upheld the orders of the DCIR. Being aggrieved, the taxpayers filed appeal before the ATIR.

The ATIR directed the DCIR to reduce the imposition of instant super tax by 50% in accordance with the provisions contained in the relevant Double Tax Treaties (DTTs) and also annulled the CIRA orders. The department (the applicant) filed reference applications before the Sindh High Court (the SHC) and raised following questions of law, inter alia:

- Super Tax under section 4B of the Ordinance is for rehabilitation of temporarily displaced persons, the levy of which is a separate feature without any exception to non-residents.

- DTTs also mention Super Tax separately and independently from Income Tax.

The SHC dismissed this reference application and allowed the connected Constitution Petitions filed by the taxpayers vide the consolidated judgment which was challenged before the Supreme Court of Pakistan (the SCP) through review petitions.

Decision:

The SCP dismissed the review petitions by taking cognizance of the following aspects associated with the matter under consideration:

- When any definite and unambiguous condition is mentioned under Double Tax Treaty the said provision will obviously supersede the general provisions of the Tax Laws of the contracting states. The word 'Super Tax' is clearly specified under the treaty and thus available for relief under the treaty, if any.

- Super Tax was identical to the levies that existed at the time the treaties in question came into force, hence the petitioners within the realm of double taxation treaties are either exempt or, wherever applicable, liable to pay the Super Tax at reduced rates in terms of their respective treaties.

- Super tax, under consideration, is not variant to the nature of existing taxes mentioned in the Treaty. Therefore, upon independent assessment of the character of super tax, as levied presently, is clearly worded as per Article 2(3) of the Treaty that does not require any interpretation or review by the Courts.

11. RECOVERY OF QUARTERLY ADVANCE TAX IN CONTRADICTION OF TAX ESTIMATES FILED BY THE TAXPAYER IS VOID EVEN IF SUCH ESTIMATES FOUND TO BE INCORRECT

2023 PTD 1095
ISLAMABAD HIGH COURT

MESSRS FIRST MICRO FINANCE BANK LIMITED
VS
FEDERATION OF PAKISTAN

APPLICABLE SECTIONS: 147 AND 205 OF THE INCOME TAX ORDINANCE (THE ORDINANCE)

Brief Facts:

The petitioner was aggrieved with the notice issued under section 147 of the Ordinance for the payment of advance tax and subsequent recovery notice thereof under section 138 (1) of the Ordinance ordering attachment of property in respect of failure to pay installment of advance tax due for a quarter for a relevant tax year. Thus, the petitioner approached the Islamabad High Court (the IHC) to determine the legality of the instant notices issued to the petitioner.

Petitioner argued that he furnished an estimate of advance tax payable under section 147(6) of the Ordinance which could not be rejected by the department and the only remedy for the department was imposition of default surcharge under section 205 of the Ordinance, in the event that there was under payment on his part in relation to the amount due under section 147 of the Ordinance.

Decision:

The IHC allowed the petition in view of the following aspects and declared the impugned notices to be void ab initio and of no legal effect being suffered from jurisdictional defect:

- The Ordinance does not authorize the authorities to affect recovery of the amount that they deem to be due under section 147 of the Ordinance in contradiction of any tax estimate filed by the taxpayer under section 147(6) of the Ordinance.

- In the event that the estimate filed by the taxpayer under section 147(6) is incorrect a remedy is provided under section 205 of the Ordinance to impose a surcharge to the extent of short payment to penalize the taxpayer. This was the settled law at the time when the impugned notices were issued. Reliance in this regard was place on Sindh High Court judgment reported as 2011 PTD 1996 (Karachi Port Trust, Karachi vs Commissioner Inland Revenue, Karachi.

- Reliance also placed on the IHC judgment reported as W.P. No. 2462/2016 (M/s Pak Telecom Employees Trust v. Federation of Pakistan, etc.) wherein it was held that veracity of the tax estimate filed by the taxpayer can only be questioned by the department once the tax return for relevant tax year is filed and if same is found to be incorrect then department is entitled only to levy default surcharge under section 205 of the Ordinance.

12. CAPITAL VALUE TAX IS RIGHTLY IMPOSED AS PER ARTICLE 142(c) OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN

2023 PTD 1103
APPELLATE TRIBUNAL INLAND REVENUE

MUHAMMAD ALI TABBA
VS
COMMISSIONER INLAND REVENUE, AEOI, LTO, KARACHI

APPLICABLE SECTIONS: 8 OF THE FINANCE ACT 2022 (THE ACT)

Brief Facts:

According to Section 8(4)(g) of the Act read with Rule 3 of Capital Value Tax Rules, 2022, (the CVT Rules) the appellant was liable to file Capital Value Tax (CVT) declaration along with its due payment. However, the appellant failed to discharge such CVT liability and, thus, a default was established under section 8(6) of the Act which entailed proceedings under section 8(7) of the Act.

The appellant furnished the written reply which was examined by the Assessing Officer (the AO) who passed the impugned order and raised CVT demand. The appellant felt aggrieved with the order and preferred an appeal before the learned CIR(A) who confirmed the order of AO. The appellant dissatisfied with the treatment meted out by the learned CIR(A), filed second appeal before the ATIRon a number of grounds.

Decision:

The ATIR dismissed the petition, being devoid of any substance, and pronounced the following:

- Sections 8(6) to 8(11) of the Act read with Rule 6' (1) of CVT Rules, provide the relevant provisions for jurisdiction of different authorities in respect of collection, recovery and refund of CVT. Thus it is construed that AO has inherent jurisdiction for the purpose of collection of CVT over persons as specified under the Ordinance.

- What is being taxed is the capital value of foreign assets, which now stands declared and is part of the Wealth Tax Returns of the appellant person pursuant to the Foreign Assets (Declaration and Repatriation) Act, 2018, whereby the appellant availed amnesty scheme and paid requisite tax. Therefore, there is a nexus of these properties with the income and wealth of the resident taxpayers and there appears to be no impediment or restriction for the Parliament to levy the tax in question.

- It is obvious that a person, who is a resident in Pakistan, is liable to tax in respect of his foreign income, earned outside the territorial jurisdiction of Pakistan, and this chargeability is mandated under the Constitutional provisions whereby the Parliament is empowered to levy taxes on foreign income of a resident person.

- Without any endeavour to suggest a nomenclature for the levy under reference, it can appropriately be classified as tax on the capital value of foreign assets of resident individual. Apparent and obvious purpose /objective of the levy is to discourage concentration of wealth.

- No fault is found in exercise of legislative powers by the parliament under entry 50 of the Federal Legislative list, which matter is within the competence of Parliament in terms of Article 142(a) of the Constitution of Pakistan.

Sales Tax Act, 1990

A. Notifications

1. S.R.O. 1185(I)/2023 dated September 5, 2023

Through this SRO, Federal Board of Revenue has amended Rule 14(1) of the Sales Tax Rules, 2006 whereby a new annexure i.e. Annex-L has been inserted in the sales tax return for reporting particulars of domestic sale invoices of petroleum products which are subject to Petroleum Development Levy (PDL).

2. STGO No. 12 of 2023 dated September 7, 2023

Standard Operating Procedures (SOPs) to deal with cases involving Fake / Flying Invoices

FBR has formulated and implemented following SOPs with immediate effect in order to create uniformity in approach and consistency in reporting line and to deter the use of fake and flying invoices and eliminate such malpractice:

I. Identification of fake / flying invoices by Dedicated Staff

i. Each Chief Commissioner of Inland Revenue (CCIR) would assign at least two senior officers of impeccable integrity in their respective jurisdictions to identify such fraudulent invoices and bogus firms. This responsibility to be primarily handled by the Assessment & Processing Cell, if it already exists.

ii. The designated officers or the cell should have complete access to sales tax and Federal Excise Duty (FED) data through relevant automated systems to perform effective data analysis and scrutinize the supply chain through registered entities' sales tax returns and registrations. CCIRs are required to coordinate with the Member IT to facilitate such access.

iii. The said officers shall obtain complete data and make its thorough scrutiny to ascertain the truthfulness of declarations or otherwise for detection of fake/flying sales tax invoices. They shall particularly focus, inter alia, on the following:

a. High volume transactions with little or no net sales tax payment;

b. Purchases and input tax values equaling or exceeding the values of supplies and output tax;

c. Consistently huge carry forwards, with unrealistic levels of stocks;

d. A significant mismatch between the declared capital amount in wealth statements or company accounts and the stock's value;

e. Frequent and substantial use of credit notes to avoid sales tax payment;

f. Recent registrations, typically less than 2 years, involving high-value purchases or sales, or a sudden surge in transactions after a long dormant period;

g. Registered persons with addresses in low income, residential or remote areas;

h. Income tax returns are either not filed, or filed with very low income. No withholding tax deduction despite declaration of huge transactions;

i. Nature of supplies is different from purchases (purchases of textile

goods but supplies of iron scrap or vice versa etc. etc.); and

j. Focus on the cases of commercial importers, dealers/distributors of large companies and dealers of petroleum products which are generally engaged in issuing flying invoices. In such cases, a diligent comparison of goods imported/purchased with the nature of business of the buyers shall help establish the wrong-doing by the registered person(s).

iv. Scrutiny of the forward and backward transactions i.e. purchases and sales in Annex A and Annex C of their sales tax returns, shall help in uncovering other wrongdoers in the supply chain.

v. On obtaining the above information, the staff shall confirm that there is physical existence of these registered persons and shall prepare a report which shall be part of the record.

II. Suspension / blacklisting

i. On identification of aforesaid invoices by the registered persons, their registration must be immediately suspended by the concerned Commissioner IR in terms of section 21 of the ST Act 1990 read with Rule 12(a) of the ST Rules, 2006. Further, actions to blacklisting should be completed quickly and a SCN should be issued within 7 days as per the rule 12(a)(vi) of the ST Rules, 2006.

ii. The Commissioner should conduct a physical verification to determine the existence of the company and its manufacturing facilities. The verification report can help to expose tax fraud in cases of fake firms registered in the name of low-level workers or unconcerned persons with office addresses in lesser-known areas.

iii. These proceedings must be concluded within 90 days of issuance of the SCN. The order should be carefully crafted to avoid common mistakes that could easily lead to relief for the affected parties from the appellate authorities.

iv. A "speaking order" with clear reasons for the blacklisting should be passed. The reasons could include the fact of issuing fake/flying invoices without actual supply of physical goods, non-existence at the declared address, lack of capital to hold stocks, and the mala fide intent to avoid payment of due tax or claiming illegal refunds, among others.

III. Action Against Beneficiaries

i. To effectively combat fake/flying invoices, it is insufficient to merely suspend dubious firms, as fraudsters can easily create new registrations. Staff shall focus on identifying the actual beneficiaries of these fake invoices and take immediate action to recover evaded sales tax or fraudulent refunds.

ii. Show Cause Notices and orders should be carefully crafted to establish that beneficiaries knowingly engaged in fake invoice transactions to evade taxes, with this intent occurring before suspension or blacklisting.

IV. Registration of FIRs

Officers shall register FIRs against those involved in tax fraud related to fake/flying invoices, leveraging automated systems to gather evidence. It is essential to ensure that the fraudulent activities fit the legal definition of tax fraud under Section 2(37) of the Act.

V. Action against E-Intermediaries

Section 52A(5) of the ST Act holds e-intermediaries jointly and severally liable with registered persons for providing false information to evade taxes. When dealing with fake or flying invoices, officers should take action against these e-intermediaries under Section 37A of the ST Act and initiate the process for

suspending and eventually canceling their licenses as per sales tax regulations.

VI. Action against Insiders:

The Chief Commissioners and Commissioners of Inland Revenue should maintain constant vigilance over their RTO staff to identify any such activities. If there is evidence of complicity or collusion with those utilizing fake or flying invoices, swift action should be taken against departmental officials involved. In cases of widespread fraud within an RTO, responsibility should also be attributed to officials who failed to detect such activities and take timely legal action.

VII. Other Jurisdictions:

Where buyers/suppliers of a fake/bogus firm(s) fall in the domain of other jurisdictions, in such case, it shall be the responsibility of the Chief Commissioner concerned to immediately share details of such cases to the relevant jurisdictions and action must be taken against them in accordance with this SOP.

Commissioners IR who issue orders for suspension/blacklisting shall also endorse a copy of the order to the respective jurisdiction(s) where the beneficiaries are located.

VIII. Reporting to the Board:

In addition to detecting fraudulent activities involving invoice misuse, field formations should share reports with the Board for a high-level analysis. The aim is to enhance current automated systems and statutory procedures to prevent such occurrences and protect government revenues effectively.

To raise public awareness and act as a deterrent, field formations may also consider widely circulating information about the detection of fraudulent activities, while preserving the confidentiality of taxpayer details.

B. Reported Decisions

1. INPUT TAX CLAIM ON OBSOLETE STOCK

2023 PTD 1069
APPELLATE TRIBUNAL INLAND REVENUE

THE COMMISSIONER INLAND REVENUE
Vs
M/S ABU DAWOOD TRADING COMPANY (PVT) LTD

Applicable Provisions: Section 3, 7, 8 and 11 of the ST Act

Brief Facts:

The department issued Show Cause Notice (SCN) alleging the registered person of claiming inadmissible input tax on the obsolete stock disclosed in the annual accounts for the period July 2012 to June 2013.

The department disregarded the reply of the registered person and passed the order against the Company by stating that the Company has adjusted input tax paid in relation to goods which are unfit and not saleable.

The Company filed appeal before the Commissioner Inland Revenue Appeals (CIRA) wherein CIRA decided the appeal in favor of the Company which was challenged by the department before the Appellate Tribunal Inland Revenue (ATIR).

Decision:

The ATIR upheld the decision of CIRA and dismissed the appeal filed by department based on the decision of Lahore High Court in the case of M/s. Mayfair Spinning Mills Ltd with citation 2002 PTCL 115; wherein input tax paid on stock which was subsequently destroyed by fire was held admissible in terms of section 7 and 8 of the ST Act.

2. SUSPENSION OF SALES TAX REGISTRATION WITHOUT PRIOR NOTICE IS UNCONSTITUTIONAL

2023 PTD 1087
SINDH HIGH COURT
MR. MUHAMMAD TAHIR
Vs
FEDERAL BOARD OF REVENUE

Applicable Provisions: Section 21 of the ST Act

Brief Facts:

The petitioner is registered for Sales Tax and is engaged in import and export, as a general trader, under the name 'Tahir Impex'.

The petitioner filed constitutional petition, challenging suspension of its Sales Tax Registration (STR) without giving proper opportunity of being heard.

Decision:

The Sindh High Court (SHC) allowed the petition by taking the view that the suspension of STR without prior notice is ultra vires to the Constitution, violation of principles of natural justice and in excess of authority vested under Section 21(2) of the ST Act. The High Court directed the department to restore STR within 10 days of the receipt of its order.

3. ADMISSIBILITY OF INPUT TAX ON PACKING MATERIAL

128 TAX 74
SUPREME COURT OF PAKISTAN

M/S RAJBY INDUSTRIES KARACHI AND OTHERS
Vs
FEDERATION OF PAKISTAN AND OTHERS

Applicable Provisions: 2(14), 2(35), 3(1)(b), 3(2)(6), 4, Proviso to Section 4, 4(a), 4(6), 4(6), 7, 8, 8(1)(a), 8(1)(b), 8(b), 8(1)(g), 8(2), 8(3) & 71 of the ST Act, 1990.

SRO. 491(1)/2016, 1125(1)/2011, 777(1)/2018, 1058(1/2011 and 1125(1)/2011

Brief Facts:

The petitioners are registered persons and engaged in the business of processing, manufacturing, weaving, packing and marketing of various textiles, apparel and terry towel products. By virtue of the condition (x) of the SRO 491(1)/2016, the claim of input tax on packing material was disallowed with effect from July 01, 2016 on the supply and export of five sector zero rated goods as specified in SRO 1125. The same was challenged through several petitions. Subsequently, such disallowance was withdrawn through SRO 777(I)/2018 dated June 21, 2018 and thereafter, the petitioners took an additional ground that such withdrawal/amendment is of curative and beneficial in nature, which should have been given retrospective effect but the constitution petitions were rejected by the Sindh High Court.

Decision:

The Supreme Court dismissed the petitions and maintained the judgment passed by the SHC while holding that the restriction on claim of input tax on packing material is well within the law and the consideration that the withdrawal of the impugned proviso should be made applicable with retrospective effect is a misconstrued and ill-thought-out notion.

4. APPLICATION OF SUB-SECTION (6) OF SECTION 11

128 TAX 127

LAHORE HIGH COURT
M/S ABDULLAH SUGAR MILLS LTD
Vs
FEDERATION OF PAKISTAN, ETC.

Applicable Sections: 11, 11(1), 11(6), 14, 26, 33, 33(5), 34 & 34(1) of the ST Act, 1990

Brief Facts:

The petitioner filed writ petition against the SCN issued under section 11(1) of the ST Act alleging non-payment and also the non-filing of sales tax returns for the tax periods January 2023 and February, 2023 along with default surcharge and penalty.

The petitioner contended that the impugned SCN was issued without lawful authority and the same is of no legal effect as such case falls within the purview of section 11(6) and is outside the scope of section 11(1) of the ST Act.

The petitioner further contended that Section 11(1) is limited to those persons who are liable to be registered but not actually registered. Whereas, being a registered person, liability of the petitioner was only to be determined under section 11(6) of the ST Act in accordance with Chapter-17 of the Rules.

Decision:

The instant Petition was dismissed being devoid of merit on the following grounds:

- Section 11(1) can be invoked only against a person required to file a return under the ST Act i.e. registered person.
- Section 11(6) provides for determination of the minimum tax liability of the registered person who defaults in filing a tax return which the petitioner has to pay as per rule 157(5) of ST Rules, 2006.
- The Court did not find any apparent inconsistency or obvious conflict within the provisions of sub-section (1) and (6) of Section 11 of the ST Act.

Sindh Sales Tax on Services Act, 2011

Notification:

1. SRB-3-4/46/2023, dated September 27, 2023

New rules have been introduced to the Sindh Sales Tax Special Procedure (Tax on Specified Services) Rules, 2023 as discussed below which have been made effective from October 01, 2023.

These rules require collection agent (viz. scheduled bank or any other entity licensed by the SBP to transfer money abroad for specified services) to collect sales tax from recipient of the following specified services received from the person not resident in Pakistan.

S.No	Description of taxable service	Tariff heading	Rate of tax
1.	Advertisement services for which payment is made through a collection agent by using any means for transfer of payments to any service provider not resident in Pakistan	9802.1000 9802.2000 9802.3000 9802.4000 9802.6000 9802.7000 9802.9000	13%
2.	Services provided by software or IT based system development consultants as covered under clause (84B) of section 2 of the Act, including cloud-based content streaming services for which payment is made through a collection agent by using any means for transfer of payments to any service provider not resident in Pakistan	9815.6000	3%

Mode and manner of collection and reporting of sales tax:

The collecting agent shall charge and collect the sales tax at applicable rate on the gross value of specified services and shall report the same in Annexure C of its sales tax return as an output tax against which no input tax shall be adjustable.

Punjab Sales Tax on Services Act, 2012

Notification

1. No.PRA/Orders.06/2021/3 dated September 06, 2023

Through this notification, Punjab Revenue Authority has provided exemption from sales tax on services provided on Deutsche Gesellschaft fur Internationale Zusmmenarb eit (GIZ)

2. No.SO(TAX1-2/97 (Pt.XIV) dated September 12, 2023

Certain amendments/substitutions have been introduced in the Second Schedule to the Punjab Sales Tax on Services Act 2012 (XLII of 2012) as identified in the table below:

Section	Description	Tariff Headings	Old Tax Rate	New Tax Rate
13	Franchise service[including intellectual property rights services and licensing services.	9823.0000, 9839.0000 and respective headings	(a) Five percent without input tax adjustment for services relating to educational institutions; and (b) Sixteen percent for others.	(a) Zero percent without input tax adjustment for services relating to educational institutions for information technology; (b) Five percent without input tax adjustment for services relating to educational institutions other than educational institution for information technology; and (c) Sixteen percent for others.
22	Information technology-enabled or information technology based services **In the explanation below following bold-italic services have been added:** Explanation: This entry includes and shall be deemed to have always included real estate aggregators ***"and streaming/over-the-top (OTT) services"***	9815.6000 and respective heading	Five percent without input tax adjustment.	(a) Zero percent without input tax adjustment for services provided by software or information technology based system development persons; and (b) Five percent without input tax adjustment for others

Section	Description	Tariff Headings	Old Tax Rate	New Tax Rate
24	Services provided by other consultants (by whatever name called or treated, whether as consultant or otherwise) including human resource and personnel development services, exhibition or convention services [188][including provision of space, equipment, accessories and other allied services], event management services (whole range and variety of their services regardless of separate or individual classification thereof), valuation services, evaluation services (including competency and eligibility testing services), certification, verification and equivalence services, market research services, marketing or sales services (including marketing agencies and on line marketing or sales services), surveyors services, training or coaching services (other than general education services) and credit rating services.	9852.0000, 9859.0000 9825.0000, 9819.5000, 9849.0000, 9818.9000, 9853.0000, 9856.0000 and respective headings	Sixteen percent	(a) Zero percent without input tax adjustment for training services related to information technology; and (b) Sixteen percent for others.
37	Services provided in respect of manufacturing or processing on toll or job basis (against processing on conversion charges) including industrial and commercial packaging services and similar outsourcing of industrial or commercial processes.	9868.0000; 9841.0000; and 9819.1400	Five percent without input tax adjustment	Omitted
69	Ride-Hailing Services Explanation: This entry includes and shall be deemed to have always included cab aggregators	-	Four percent without input tax adjustment	Five percent without input tax adjustment

CONTACT US

For more information you may contact

Atif Mufassir
Partner - National Leader Tax & Legal
Karachi Office
Email: amufassir@yousufadil.com

Zubair Abdul Sattar
Partner Tax & Legal
Karachi Office
Email: zsattar@yousufadil.com

Rana Muhammad Usman Khan
Partner
Lahore Office
Email: rmukhan@yousufadil.com

Imran Ali Memon
Partner Tax & Legal
Karachi Office
Email: immemon@yousufadil.com

Arshad Mehmood
Senior Advisor Tax & Legal
Karachi Office
Email: amehmood@yousufadil.com

Sufian Habib
Director Tax & Legal
Islamabad Office
Email: sufianhabib@yousufadil.com

Muhammad Shahzad Hussain
Partner Business Process Solutions
Karachi Office
Email: muhahussain@yousufadil.com

Our Offices

Karachi
Cavish Court, A-35, Block 7 & 8
KCHSU, Shahrah-e-Faisal
Karachi - 75350, Pakistan

Phones: + 92 (021) 34546494-97
Fax : + 92 (021) 34541314
Email: sghazi@yousufadil.com

Islamabad
18-B/1
Chohan Mansion, G-8 Markaz
Islamabad, Pakistan

Phones: + 92 (051) 8350601
+ 92 (051) 8734400-3
Fax: + 92 (051) 8350602
Email: shahzad@yousufadil.com

Lahore
134-A, Abubakar Block
New Garden Town,
Lahore, Pakistan

Phones: + 92 (042) 35913595-7
+ 92 (042) 35440520
Fax: + 92 (042) 35440521
Email: rmukhan@yousufadil.com

Multan
4 th Floor Mehr Fatima Tower,
Opposite High Court, Multan Cantt,
Multan, Pakistan

Phones: + 92 (061) 4571131-2
Fax: + 92 (061) 4571134
Email: rmukhan@yousufadil.com

About Yousuf Adil

Yousuf Adil, Chartered Accountants provides Audit & Assurance, Consulting, Risk Advisory, Financial Advisory and Tax & Legal services, through nearly 550 professionals in four cities across Pakistan. For more information, please visit our website at www.yousufadil.com.