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Tax Bulletin

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Tax

Foreword

This publication contains brief commentary on Circulars, SROs and decisions of the adjudicating authorities issued during July 2024.

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2024 PTD 1017
LAHORE HIGH COURT

MESSRS RADIANT MEDICAL (PVT.) LIMITED
VS
THE FEDERAL BOARD OF REVENUE AND OTHERS

APPLCIABLE SECTIONS: 127,140,140(1) OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE) AND ARTICLE 199 OF THE CONSTITUTION OF PAKISTAN

Brief Facts:

In the instant case, Messrs. Radiant Medical (Pvt.) Limited, filed petition before the Lahore High Court being aggrieved by the recovery made from its bank accounts by an Officer of Inland Revenue (OIR) under section 140 of the Ordinance. The learned counsel of the Petitioner contended that the recovery made by the OIR was unlawful considering the fact that appeal filed before the Commissioner Appeals under section 127 of the Ordinance was still pending. On the other hand, the department's legal counsel contended that the stay granted by the Commissioner Appeals had expired when the recovery was made and the legal counsel of the Petitioner requested adjournment on the hearing date. Further, after the amendments made through Finance Act, 2024, the case was transferred to the Appellate Tribunal Inland Revenue (ATIR). The department's legal counsel further added that the deposit of 10% of the tax demand made before the Commissioner Appeals was only meant for extension of stay order, hence, in the absence of a stay order, the OIR was justified to invoke section 140 of the Ordinance.

Decision:

The LHC decided the matter in favour of the Petitioner on the following basis:

- By placing reliance on various case laws, it was held that tax allegedly due from a taxpayer cannot be recovered before adjudication of liability in an appeal preferred by a taxpayer before at least one extra departmental forum i.e. ATIR in the given case.

- The proviso of sub-section (1) of section 140 of the Ordinance prohibits Commissioner from issuing notice for recovery of tax demand if the taxpayer had filed an appeal before the Commissioner Appeals subject to the condition that 10% of the amount of tax demand has been deposited by the taxpayer in the Government Treasury.

Based on the above, the Court ordered to reimburse the amount recovered from the petitioner within a period of twenty days, after deducting 10% of the tax liability therefrom.

2. THE LANGUAGE OF SECTION 177(6A) DOES NOT SUGGEST RETROSPECTIVE APPLICATION

2024 PTD 1029
LAHORE HIGH COURT

COMMISSIONER INLAND REVENUE
VS
ZIA-UR-REHMAN

APPLICABLE SECTIONS: 120,122,122(4), 177, 177(6) AND 177(6A) OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The case of the taxpayer was selected for audit under Section 214C of the Ordinance and intimation of the said selection was sent to him on May 9, 2019. However, despite various reminders the taxpayer failed to produce documents required from him, therefore, show cause notice dated February 25, 2021, was issued to the taxpayer and vide order dated September 30, 2021, passed under Section 122(4) of the Ordinance.

The taxpayer file appeal against the above order before CIRA, which was remanded back vide order dated February 9, 2022, with the direction to provide proper opportunity of hearing as per FBR's Circular Letter No.7(2) dated February 1, 1994, and examine the documents and explanation of the taxpayer with respect to the Bank credit entries.

Taxpayer being aggrieved filed appeal before ATIR. ATIR decided the matter in favour of the taxpayer and held that the order passed under section 122(4) of the Ordinance, without issuance of audit report under section 177(6) of the Ordinance, is not maintainable in the eye of law by relying on the judgement reported as 2018 PTD 1444(S.C Pak).

Being aggrieved from the above decision, the department filed reference application under Section 133 of the Ordinance, before the LHC and raised following questions of law:

1. Whether the ATIR has erred in law to cancel the orders of authorities below by holding that issuance of audit report and its confrontation to the appellant is mandatory without appreciating that audit proceedings in this case were initiated before the substitution of subsection (6) and insertion of subsection (6A) in section 177 of the Ordinance through Finance Act, 2019?
2. Whether on the facts and circumstances of the case the ATIR was justified to ignore that for tax year 2017 the issuance of audit report was not required by law as the provisions of subsection (6) and subsection (6A), requiring the issuance of audit report, were substituted and inserted respectively under section 177 through Finance Act, 2019?
3. Whether the provisions of subsection (6) and subsection (6A), requiring the issuance of audit report, substituted and inserted respectively in section 177 through Finance Act, 2019, are applicable for the audit proceedings initiated prior to the said amendments in section 177 of the Ordinance?

Decision:

Questions raised by the department were answered against the department and in favour of the taxpayer.

Scope of Sub-section (6A) of section 177 of the Ordinance, empowers the Commissioner to amend the assessment under section 122(4) of the Ordinance, after issuing the audit report and providing an opportunity of being heard to the taxpayer under section 122(9) of the Ordinance.

Issuance of the audit report is a precondition or sine quanon for the exercise of authority to amend the assessment under said subsection (6A) and the requirement to grant opportunity of hearing is meant to ensure satisfaction of the due process requirement guaranteed under Article 10A of the Constitution.

There is nothing in the language of the said provision which suggests retrospective application of subsection of (6A) of Section 177 (6A) of the Ordinance; which means that cases where audit exercise was already completed and proceedings to amend the assessment were completed or initiated with the issuance of Show Cause Notice prior to the said legislative enactment, subsection (6A) of the Ordinance, cannot arguably be pressed into service. The Court held as under:

- There is, however, nothing in the language of said subsection (6A) which restricts application of the said provision to cases where audit was pending completion or still underway on July 1, 2019, which is the case here as manifest from the facts of the present case.

- There is nothing in the text of the said provision that restricts its application to the cases selected for audit after any particular tax year. Indeed, the date of selection for audit hardly provides any basis for regulating applicability of the amended subsection (6A) of section 177 of the Ordinance, which clearly would apply to all cases where audit was to be completed after the said enactment and proceedings for the amendment of assessment were yet to commence.

- Impugned order of the ATIR was based on the determination that no audit report was issued in the present case, and that the amended assessment order passed under section 122(4) of the Ordinance, without issuance of audit report under section 177(6) of the Ordinance was not sustainable in the eye of law, which finding was unexceptionable.

Sales Tax Act, 1990

A. Notifications:

1. SRO 1130(I)/2024 dated August 1, 2024

Through S.R.O. 350(I)/2024 dated March 7, 2024, certain amendments were made in the Sales Tax Rules, 2006 (ST Rules) which include insertion of second proviso to sub-rule (3) of rule 18 of ST Rules which provides that the sales tax return filed by the buyer for a tax period shall be taken as provisional return in IRIS until the respective seller files its return for the same tax period upto the last day of the month in which due date of filing of sales tax return falls. In case of non-filing of sales tax return by the seller till the last day of the month, invoices pertaining to non-filer seller will be deleted from buyer's sales tax return and related input tax claimed will become payable for filing of sales tax return by the buyer.

Through the S.R.O. 1130(I)/2024 dated August 1, 2024, FBR has made further amendments in the Sales Tax Rules, 2006 by inserting a new rule 18A which provides exception from application of aforesaid second proviso to rule 18(3) of the ST Rules to the invoices issued to the registered persons by the specified sectors effective from March 7, 2024. Such specified sectors include following;

- Gas transmission and distribution companies.
- Electricity distribution companies.
- The independent power producers or WAPDA, if the sales tax liability has been paid by them.
- Invoices for specific items pertaining to the Third Schedule to the Sales Tax Act, 1990 issued by manufacturers or traders to distributors, wholesalers, or retailers subject to following conditions:
    - i The sales tax liability has been paid by the manufacturer to the extent of items as per return; and
    - ii None of the distributors, or wholesalers, or retailers, other than the manufacturers, have been the ultimate supplier of the items.
- The petroleum exploration and production companies, if the sales tax liability has been paid by them.
- Registered persons if their suppliers have paid the re-computed sales tax liability within six days from the end of the month.

B. Reported Decisions

1. CLAIM OF INPUT TAX AGAINST PURCHASES OF PACKING MATERIAL OF YARN FOR EXPORT IS ALLOWED.

2024 PTD 1021
PESHAWAR HIGH COURT

M/S. GADOON TEXTILE MILLS LTD
VS
THE DEPUTY COMMISSIONER INLAND REVENUE,

Applicable provisions: Section 3, 3(1A), 7, 7(1), 8, 8(1)(b), 8(b), 47 and 73 of the ST Act.

Brief facts:

In the instant case, M/s Gadoon Textile Mills Ltd claimed refund against invoices of supplier in respect of purchases of packing materials which were used for packing of yarn for export, contending that it has direct nexus with taxable activity of the registered person. The contention of the petitioner was rejected by the department vide an order on the plea that it was not admissible under section 8(1)(b) of the ST Act read with SRO 491(I)/2016 June 30, 2016 and passed the order.

Being aggrieved, the petitioner filed appeal before the Commissioner Appeals whereby the Commissioner Appeals maintained the decision and held that the provisions of SRO 1125(I)/2011 were amended through SRO 491(I)/2016, dated June 30, 2016, introducing a new condition that specifically excludes input tax credit or refund on packing materials of all types.

This amendment was found to be contrary to the petitioner's claim. The petitioner, being aggrieved by the decision preferred second appeal; however, the Appellate Tribunal also upheld the decision of lower authorities.

The Petitioner filed two sales tax references with common questions of law against the findings of Appellate Tribunal.

Decision:

The Hon'ble Court decided both references in favour of the petitioner and held that the restriction in claiming input tax provided in SRO 1125(I)/2011 issued by the Federal Government under Section 8(1)(b) of the Sales Tax Act, 1990 was inconsistent with the substantive provision of Section 7 and therefore, SRO has to yield before the substantive provision of the Act allowing input adjustment to a registered person against the goods used for taxable activity.

The Court mentioned that the provisions of Section 3 of the ST Act is a charging section, while Section 7 allows input adjustment to registered persons for taxable supplies. The Court explained that the concept of "input tax" and "output tax" was introduced to facilitate value addition and ease the burden of tax on suppliers. Moreover, Section 8 of the Act, restricts input adjustment in certain cases where goods are used or to be used for purposes other than taxable supplies.
The Court emphasized that Section 8 does not create a separate class of goods disentitling registered persons from claiming or deducting input tax.

The Court decided that once a registered person establishes that goods are used or to be used for taxable supplies, they are entitled to deduct input tax paid from output tax due.

2. PETITIONER IS ENTITLED TO CLAIM PROVINCIAL INPUT TAX FOR THE PERIODS PRIOR TO JULY 1, 2016 UNDER THE ACT OF 2015

130 TAX 18
ISLAMABAD HIGH COURT

M/S. MOL PAKISTAN OIL & GAS COMPANY
VS
THE FEDERAL BOARD OF REVENUE AND OTHERS

Applicable provisions: Section 2(14)(d), 2(22A), 26 and 74 to the Sales Tax Act, 1990 (the Act), SRO 814(I)/2016 and SRO 212(I)/2014

Brief facts:

In the instant case, M/s MOL Pakistan Oil and Gas Company (the Company), a non-resident company, engaged in the exploration and production of petroleum products mostly in the Province of Khyber Pakhtunkhwa (KPK),being the recipient of services, the Company paid input tax on services in KPK.

Since July 2013, claim of said input tax on web portal of FBR was not permissible, therefore the Company used to file manual returns for claiming provincial input tax.

As no adjudication had been taken place regarding petitioner's entitlement for claim of provincial sales tax, the Company filed writ petition before Lahore High Court (LHC) which was disposed off in September 2019 in the manner that provincial input tax be allowed by FBR in light of the decision passed in case of Treet Corporation Limited Vs Federation of Pakistan. FBR filed intra-court appeal against the decision of LHC.

Pursuant to above judgement, the Company filed an application for condonation with FBR to file revise returns in order to claim adjustment of provincial sales tax, which was accepted for claim of input tax relating to the tax periods after July 1, 2016, whereas the condonation application for claim of input tax pertaining to the period prior to July 1, 2016 was rejected on the basis of SRO 814(I) of 2016. The Department contended that input tax in respect of KPK can only be adjusted with effect from July 1, 2016 being the effective date of the said SRO.

Decision:

Islamabad High Court directed FBR to reconsider the Company's condonation application for filing revised sales tax returns so as to allow claim of provincial input tax paid in KPK prior to July 1, 2016 in the light of the judgement in WP No. 1228/2016 passed in the case of Hub

Power Company limited wherein it was held that the petitioner could claim input tax even under the Act of 2015 before the notification 814(I) of 2016 dated September 2, 2016.

The Court further held that the decision of the FBR shall be subject to the final outcome of the intra court appeal filed by the Department against the judgment of Lahore High Court in the case of Treet Corporation Limited.

3. "GOODS SUPPLIED AS EXEMPT SUPPLIES" ARE ALSO "EXEMPT GOODS"

130 TAX 15
APPELLATE TRIBUNAL INLAND REVENUE KARACHI

M/S. PIONEER CABLES LIMITED
VS
THE COMMISSIONER-IR

Applicable provisions: Sections 2(41), 3(1), 7, 8, 11 and 13 and serial 52A of Sixth Schedule to the Sales Tax Act, 1990 (the Act)

Brief facts:

In the instant case, M/s Pioneer Cables Limited (the Company), is engaged in the manufacturing and supply of cables, conductors and allied products. For the tax periods July 2014 to June 2015 and July 2015 to June 2016, DCIR issued show cause notices and consequently orders creating demand and penalty on multiple issues. The Company filed appeal before CIRA whereby majority of the matters were either decided in favour of the Company or were remanded back for reverification except for the matter of claim of input tax related to exempt supplies.

The Company argued that it is engaged in the supply of taxable goods only, however, the supplies of such goods made to the hospitals become exempt in terms of serial number 52A of the Sixth Schedule. Thus it was supply of taxable goods which became exempt when supplied to hospitals whereas these were not exempt goods as such. The Company further argued that the DCIR had issued similar order in the past which was dismissed by CIRA and no second appeal was filed by the department.

Decision:

The appeal was dismissed by the Appellate Tribunal on the basis that the Act does not distinguish goods that are listed as exempt or goods that are supplied as exempt supplies. Furthermore, the Company is entitled to the benefit of supplying its product as exempt without charging sales tax as provided under the Act. The Company would have to face all consequences of advantages and disadvantages associated with supply of goods declared as exempt. Supplies made to the hospitals by the Company as exempt are for all purposes of the Act including the claim of input tax for adjustment.

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