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Tax Bulletin

February 2023

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Foreword

This publication contains brief commentary on Circulars and SROs issued during January 2022 and important reported decisions.

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Karachi
February 10, 2023

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Income Tax Ordinance, 2001

A. SROs

1. S.R.O. 80(I)/2023 DATED FEBRUARY 01, 2023

SHARING OF DECLARATION OF ASSETS OF CIVIL SERVANTS RULES, 2023

FBR has prescribed the rules for sharing of declaration of assets by Federal Government civil servants. It is worth mentioning that as per reports appearing in the media this initiative has been taken pursuant to the demand from the International Monetary Fund, whereby it was considered necessary to allow banks access to assets declarations of civil servants of BS17 to 22, as a prior condition for opening of bank accounts as part of good governance and anti-corruption measures. It is likely that such requirement will be extended to provincial government officials in the near future.

These rules apply for sharing of information by FBR with the banking companies limited to information related to civil servants in BS 17 to 22. FBR will share with the banks the simplified or abridged version of declaration, based on the fields agreed with the State Bank, made by a civil servant in his electronic declaration filed with FBR.

For details for procedures and responsibilities of FBR and banks, please refer the link below: https://download1.fbr.gov.pk/SROs/20232119282592SRO80.pdf

2. S.R.O. 72(I)/2023 DATED JANUARY 25, 2023

APPLICABILITY OF SECTION 148 ON THE GOODS IMPORTED FOR RELIEF OPERATION OF FLOOD AFFECTEES.

Clause (123) in Part IV of the Second Schedule to the Ordinance was introduced in August 2022 through SRO 1634(I)/2022 which restricts collection of advance tax on import stage of goods imported for relief of flood affectees in Pakistan for a period of 90 days from insertion. The said clause is further amended through SRO 72(I)/2023 and the time limit has been further extended for non-applicability of section 148 on such goods for a further period of three months starting from December 1, 2022.

B. Reported Decisions

1. APPEAL CANNOT BE FILED TWICE AGAINST THE SAME CAUSE OF ACTION
2022 PTD 1927
APPELLATE TRIBUNAL INLAND REVENUE KARACHI
MESSRS NEW DADU SUGAR MILLS (PVT) LIMITED, KARACHI
VS
THE COMMISSIONER INLAND REVENUE, ZONE-II, LTU, KARACHI
APPLICABLE SECTIONS: 131, 132 AND 138 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The appellant filed an appeal before the Commissioner Inland Revenue Appeals (the CIRA) along with stay application. The CIRA rejected the stay application and, accordingly, the appellant approached the Appellate Tribunal Inland Revenue (the ATIR) against the stay rejection order of the CIRA by filing stay application with supporting appeal. The ATIR rather granting the stay directed the department not to proceed for recovery of tax demand and not to attach bank accounts unless 15 days prior

notice under section 138 given to the appellant. The taxpayer again filed the misc. appeal before the ATIR against the same cause i.e. against the order of the CIRA whereby he rejected the stay application.

Decision:

The ATIR dismissed the miscellaneous appeal and supporting appeal and pronounced the case in the following manner:

- One who knocks the door of the court must come with clean hands, hence would not be entitled for any remedy / relief by filing frivolous, appeal especially where he had already availed remedy under the law.

- The appeal shall not stand admissible before the ATIR, where the interim stay together with appeal had been decided already.

2. POWERS OF CIRA TO REMAND BACK THE ORDER
2022 PTD (Trib.) 1935
APPELLATE TRIBUNAL INLAND REVENUE LAHORE
THE COMMISSIONER INLAND REVENUE, RTO, LAHORE
VS
MESSRS HABIB STEEL RE-ROLLING MILLA, LAHORE
APPLICABLE SECTIONS: 161, 205 AND 129 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The respondent / taxpayer is an AOP. The Assessing Officer (AO) examined return for tax year 2020 and monthly withholding statements filed under section 165 of the Ordinance. The AO noted that the taxpayer, being withholding agent, failed to deduct taxes while making payments against the various heads of expenses and thus, passed the order under section 161/205 of the Ordinance against the taxpayer.

Being aggrieved by order of the AO, the taxpayer filed an appeal before the CIRA, who after hearing the matter, remanded the case to AO for de-novo consideration. However, the tax department preferred appeal before the ATIR against the order of the CIRA by taking plea that CIRA is not vested with power under the Ordinance to remand back an order of monitoring of withholding of taxes.

Decision:

The ATIR dismissed the appeal filed by the tax department and upheld the decision of CIRA in the following manner:

- Section 129 of the Ordinance that deals with disposal of appeals by CIRA has two shades. Firstly, with respect to assessment order the CIRA may confirm, modify or annul such order. Secondly, for any other order the CIRA may make such order as it thinks fit meaning thereby CIRA has wide powers and broad discretion to pass an order including a remand of case to the AO, keeping in view the merits of the case.

- Nature of proceedings under the relevant provisions of the Ordinance i.e. assessment provisions, charging provisions or collection provisions determine the way forward for disposal of appeal. As provisions under section, 161 of the Ordinance are of collection of recovery in nature and are distinct from assessment provisions and are not charging provisions, thus, CIRA has power to remand back to the AO the proceedings under section 161 of the Ordinance.

- AO confronted the amounts appearing in the income tax return, without establishing that these were all payments. Neither specific default nor identified names and addresses of the parties form whom tax to be deducted were pointed out by the AO. Thus, CIRA rightly held that the order under

section 161/205 of the Ordinance was passed without following statutory provisions and without properly considering the contentions of the taxpayer, thus, remanded the matter to AO for de-novo consideration.

3. UNEXPLAINED INCOME OR ASSETS SHALL BE INQUIRED THROUGH SEPARATE NOTICE

2022 PTD 1942
LAHORE HIGH COURT
THE COMMISSIONER INLAND REVENUE, ZONE-II, RTO, LAHORE
VS
SHAZIA ZAFAR
APPLICABLE SECTIONS: 111, 122 and 133 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The tax department filed reference application against the order passed by the ATIR deleting the additions made under section 111. Following questions of law with respect to section 111 of the Ordinance i.e. 'Unexplained Income or assets' were presented before the Court:

(i) Whether the learned Appellate Tribunal has erred in law by deleting the additions made under Section 111 of the Ordinance while holding that a separate and specific notice is required for addition under Section 111 when there is no specific provision in the Ordinance requiring separate notice under Section 111 of the Ordinance?

(ii) Whether learned Appellate Tribunal IR has overlooked the scheme of law that Section 111 of the Ordinance cannot be read in isolation without making reference to Sections 122(1), 122(5)(ii) and 122(9) of the Ordinance?

(iii) Whether the learned Appellate Tribunal Inland Revenue fell in error by failing to appreciate that in view of insertion of the 'Explanation' in section 111 of the Income Tax Ordinance, 2001 vide Finance Act, 2021 the issuance of a separate notice under section 111 was not required for amendment of an assessment under section 120 of the Ordinance?

The Lahore High Court (LHC) through consolidated judgment decided the instant reference application along with connected reference applications as common questions of law and facts were involved in all the cases.

Decision:

The LHC answered the questions in negative i.e. against the department and in favor of taxpayers:

- Based on plain reading of section 111 of the Ordinance, where unexplained income or assets, emerge to the Commissioner, the taxpayer is required to offer explanation that refers to proper mechanism of correspondence between applicant and respondent. Thus, notice and explanation are prerequisites to make additions under section 111 of the Ordinance otherwise such additions would be legally unsustainable.

- Assessment could not have been amended until first the proceedings under section 111 of Ordinance had culminated in an appropriate order to allow the amendment of the deemed assessment order.

- In respect of Explanation inserted in section 111 through Finance Act, 2021, LHC held that it is well-settled principle that all fiscal statues shall apply prospectively unless specifically and expressly provided.

4. APPLICABILITY OF THE INCOME TAX LAW IN TRIBAL AREAS

(2022) 126 TAX 567
SUPREME COURT OF PAKISTAN

MUHAMMAD TAHIR
VS
COMMISSIONER INLAND REVENUE

APPLICABLE SECTIONS:
170 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)
SRO 118(I)/2001 DATED FEBRUARY 10, 2011
ARTICLE 246(b)(i), 247(I) and 247(3) OF THE CONSTITUTION OF PAKISTAN, 1973 (THE CONSTITUTION)

Brief Facts:

The Taxpayer claimed refunds for Tax Years 2011, 2012 and 2013 against deduction of tax on payments received for performing contract work in Northern Areas and Torghar District of Khyber Pakhtunkhwa, which in his view were part of Tribal areas in which provisions of the Ordinance are not applicable.

The Officer Inland Revenue, after verification, allowed the refund claims made by the taxpayer against the work done in Northern Areas. However, remaining refund of Rs 3,742,405 was disallowed on the ground that tax deduction/refund claim relates to the work done in the area of Torghar District of Khyber Pakhtunkhwa (formerly known as Kala Dhaka) which has ceased to be a part of Tribal area, therefore, provisions of the Ordinance would apply on such district.

Being aggrieved by the disallowance of refund, the Taxpayer filed an appeal before the Commissioner Appeals which was dismissed. Subsequently the ATIR held that the income tax withheld on contract work done in the District Torghar is to be refunded to the Taxpayer.

Being aggrieved by the decision, the tax department filed the reference before the Peshawar High Court, which decided the matter in tax department's favor by stating that the District Torghar's status as a Tribal area ended after issuance of the above-mentioned SRO. Since the subject District has now become a part of settled area in Pakistan, therefore, all laws including the Ordinance would now apply on District Torghar.

The Appellant, being aggrieved by the decision of High Court, filed petition before the Supreme Court of Pakistan.

Decision:

The Supreme Court of Pakistan dismissed the appeal filed by the Appellant on the basis that SRO 118(I)/2001 dated February 19, 2011 was issued by the President of Pakistan through the powers vested under Article 247(6) of the Constitution for determining the status of an area. After issuance of the said SRO, the relevant area ceased to be a part of Provincially Administered Tribal Area, therefore, any tax levied/deducted in accordance with the provisions of the Ordinance was leviable / payable because the Ordinance stood extended to the said area. As such, tax refund claimed by the appellant is not justified.

5. MATTER THAT WAS NOT TAKEN BEFORE LOWER JUDICIARY, NOT TO BE DECIDED BY THE SUPREME COURT / TAX IMPLICATION ON CONTRIBUTION TO UNAPPROVED GRATUITY FUND

(2022) 126 TAX 572
SUPREME COURT OF PAKISTAN
MESSRS KOHINOOR SPINNING MILLS LTD.
VS
COMMISSIONER INLAND REVENUE

APPLICABLE SECTIONS: 21(e), 131, 133 INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

Petitioner, M/s. Kohinoor Spinning Mills Limited filed tax reference before the Lahore High Court (LHC) wherein the question of law was raised that whether the ATIR was justified in disallowing the contributions made by the petitioner to an unapproved

gratuity fund while computing income from business under section 21(e) of the Ordinance. The decision of ATIR was further confirmed by LHC through the order dated April 21, 2022.

Being aggrieved, the petitioner filed civil petition before the Honorable Supreme Court of Pakistan wherein apart from challenging the order of the LHC, the petitioner claimed that it is exempt under clause (33) of Part-II of the Second Schedule to the Ordinance.

Decision:

The Supreme Court of Pakistan affirmed the decision of LHC on the basis that section 21(e) explicitly specifies that no deduction is allowed against a contribution to an unapproved gratuity fund while computing income from business.

The Supreme Court further emphasized that only a matter that is already brought before the Tribunal or High Court would be considered by the Supreme Court and any new question of law would not be decided. The petitioner had not contended exemption claim before the ATIR or LHC, therefore, the Supreme Court will also not consider the same.

6. AGRICULTURAL INCOME TAX ALONG WITH RELATED PENALTIES AND DEFAULT SURCHARGE IS SUBJECT MATTER OF PORVINCIAL LAW

2022 126 TAX 579
LAHORE HIGH COURT
THE COMMISSIONER INLAND REVENUE, LAHORE
VS
TASNEEM AKHTAR
APPLICABLE SECTIONS: 111, 111(1) and 122(5A) OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The taxpayer declared the agriculture income in tax return for tax year 2014.

Notices issued under section 122(5A) of the Ordinance seeking proof for payment of provincial agricultural tax and after series of proceedings, such declared amount was taxed under section 111 read with 122(5A) of the Ordinance.

Being aggrieved, the taxpayer preferred an appeal before the CIRA that remained unsuccessful. The taxpayer then approached the ATIR and during proceedings, challan for payment of agricultural income tax to the provincial authority was produced. the ATIR vacated such order with the pronouncement that delay of payment and its consequences are not subject matter of the Ordinance. The department filed reference to the Lahore High Court (the LHC) against the said order of ATIR.

Decision:

The LHC decided the instant reference application against the tax department and held as follows:

- Agricultural income cannot be taxed by any interpretation under the Ordinance being beyond legislative competence of the Federation under entry 50 of fourth schedule to the Constitution.

- The ATIR rightly held that penalties or default surcharge for late payment of agricultural tax could be imposed only under the relevant provincial law.

- It is a settled proposition that a matter during proceedings cannot be taken to the past and closed transactions, therefore, if agricultural income tax is paid during pendency of an appeal before ATIR, then the effect of charging provisions in section 111 of the Ordinance would be obliterated.

7. TAX RECOVERY SHALL BE IN THE MANNER PRESCRIBED UNDER THE LAW

2022 126 TAX 584
ISLAMABAD HIGH COURT
MESSRS PAKISTAN LNG LIMITED

VS
FEDERATION OF PAKISTAN
APPLICABLE SECTIONS: 138, 138(1) and 140 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The taxpayer filed an appeal before the the CIRA against the assessment order (AO) along with stay application, against the demand notice. The CIRA denied such stay application, the taxpayer then approached the ATIR seeking an injunction against recovery, which was duly granted. On the other hand, after some span of time, CIRA upheld the order of the AO and soon after such appellate order by CIRA, the taxpayer filed an appeal before ATIR and again obtained stay relief against the coercive recovery.

On the date of appellate order, the department issued a notice to the bank to remit amount held on behalf of taxpayer under the threat of penal actions in case notice is not complied with and, accordingly, accounts of the taxpayer were attached and amount in dispute was recovered instantly.

The taxpayer filed representation to the Chairman FBR seeking refund of the recovered amount in light of the directions of ATIR, wherein the tax department was barred from recovery till adjudication of appeal pending before the ATIR. Due to no response from the FBR, the taxpayer filed a writ petition before Islamabad High Court (the Court) seeking directions whether there is an obligation under the law to issue a recovery notice to taxpayer before effecting recovery from persons holding money on behalf of the taxpayer.

Decision:

The Court reprimanded the tax department, declared the recovery notice to the bank as devoid of legal authority and held as follows:

- There is an obligation on behalf of the State to give taxpayer reasonable time through notice in writing to discharge tax liability adjudicated against him whereas taxpayer files an appeal before the appellate forum then tax department is supposed to be restrained from effecting coercive recovery measures until adjudication of appeals.
- Under the law, there is a defined mechanism with specified timelines for recovery of disputed tax demands along with statutory right of appeals. That is to say firstly give reasonable time period for payment of due tax, secondly, issue notice direct to the taxpayer for tax recovery and the last resort to contact persons holding money on behalf of taxpayers. This mechanism has been shaded in detail under various judgments of the appellate authorities. However, in the instant case, this mechanism was not followed as recovery notice issued to the bank within thirty minutes of uploading of appellate order by the CIRA on IRIS portal.
- The impugned notice being void legally is set aside and thus, the amount recovered from the bank accounts of the taxpayer be reimbursed or credited to the same bank accounts within a period of fifteen days.
- The Court is of the view that the tax department is liable for abuse of authority and maladministration in the instant case and, therefore, refers the matter to the Federal Tax Ombudsman who shall revert with findings and recommendations to the Court within a period of three months.

Sales Tax Act, 1990

A. Sales Tax General Orders (STGOs)

i. STGO NO. 06 OF 2023, DATED JANUARY 10, 2023

TIER-L RETAILERS - INTEGRATION WITH FBR'S POS SYSTEM

FBR has adopted practice of notifying retailers (who have not yet integrated with FBR's system) as Tier-1 Retailer as defined in section 2(43A) of Sales Tax Act, 1990 (ST Act).

Vide the subject STGO, a list of further 81 persons identified as Tier-1 Retailers, has been placed on FBR's web portal requiring them to integrate with FBR's system by January 10, 2023. In case of failure to make the requisite integration by such notified persons, their adjustable input tax for the month of December 2022 would be disallowed up to 60% as per sub-section (6) of section 8B of the ST Act, without any further notice or proceedings, thus creating tax demand by the same amount.

Any of the notified retailers who claims itself to have been wrongly notified as Tier-1 Retailer and whose input tax adjustment has been reduced by 60%, may file Online application on IRIS portal for removal of this restriction following the procedure laid down in STGO No. 17 of 2022, dated May 13, 2022 and the Commissioner would decide the case in this regard.

B. SROs

SRO 01 (I)/2023 DATED JANUARY 3, 2023

EXEMPTION FOR UN PEACEKEEPING MISSION

Through this SRO, Federal Government, through exercising powers conferred under section 13(2)(a) of the ST Act, has exempted the repatriation of old Contingent Owned Equipment (COE) or used stores of Civil Armed Forces which have arrived at Karachi Port after completion of United Nations Peacekeeping mission in Darfur (Sudan).

SRO 70 (I)/2023 DATED JANUARY 25, 2023

EXEMPTION ON IMPORT AND SUPPLY OF FLOOD RELIEF ITEMS

Federal Government, exercising powers conferred under section 13(2)(a) of the ST Act, has exempted import and supply of donated consignments and relief items (as certified by NDMA and PDMA to be meant for flood relief operations) for a period of three months with effect from December 01, 2022.

C. Reported Decision

1. SELECTION FOR AUDIT WITHOUT REASON IS ILLEGAL

(2022) 126 TAX 502

SINDH HIGH COURT (SHC)
M/S.DALDA FOODS LTD.
VS FEDERATION OF PAKISTAN AND OTHERS

Applicable Provisions: Section 46 of the Federal Excise Act, 2005 (FED Act) and Section 25 of the Sales Tax Act 1990, (ST Act)

Brief Facts:

The plaintiff challenged before the Hon'ble SHC, the notice issued by the Commissioner Inland Revenue (CIR) for selecting its case for audit under section 46 of the FED Act read with section 25 of the ST Act on the premise that such selection is illegal being without assigning any reason in such notice. The question was raised before the court as to whether the CIR can select a registered person for the purpose of conducting audit without assigning any reason?

Decision:

The SHC decided the matter in favour of the petitioner by holding that the selection of the Plaintiffs' case for conducting audit is unlawful on the ground of failing to disclose the reasons. While giving its findings, the Court relied on another judgment of the Divisional Bench (DB) of SHC in case of C.P. No. D-4729/2021 Wazir Ali Industries Vs. Federation of Pakistan wherein the learned DB has concluded that for the purpose of Section 25(1), the Commissioner must frame legitimate mindful queries to the knowledge of the taxpayer and if such queries remain unsatisfied he then is obliged to give reason under subsection (2) of Section 25 for conducting audit.

Sindh Sales Tax on Services Act, 2011

Reported Decision

VALUE OF TAXABLE SERVICE IS A CONSIDERATION PAID FOR SERVICES

(2022) 126 TAX 556
SINDH HIGH COURT
IMS HEALTH PAKISTAN (PRIVATE) LIMITED
VS COMMISSIONER –II, SPECIAL SALES TAX REFERENCE

Applicable Provisions: Section 3,5 and 8 of the Sindh Sales Tax on Services Act, 2011 (SSTS Act)

Brief Facts:

The registered person is a wholly owned subsidiary of IMS-AG Switzerland which is engaged in collection of data, statistics and information of all kinds for preparing publications and selling market research reports. The Company received a Show Cause Notice from Sindh Revenue Board on April 25, 2016 for the tax period from July 2013 to December 2014, requiring the registered person to:

- change the Tariff Heading from 9824.0000 Data processing and provision of information, to 9805.9200 Business Support Services (BSS) as the primary object, in connection therewith of the applicant, was not only to collect data, rather preparing marketing research reports and its publication. Such exercise was undertaken under the agreement which relationship is more appropriately governed under the tariff heading of BSS.

- pay sales tax on gross invoice including reimbursable amount along with penalty.

The registered person being aggrieved of the order, filed appeal before the Hon'ble SHC after getting no relief from lower appellate forums. The questions of law were as follows:

A) Whether the Appellate Tribunal SRB erred in holding that the applicant is engaged in the provision of "Business Support Services" under the Tariff Heading 9805.9200 of the Second Schedule to the SSTS Act;

B) Whether the Appellate Tribunal SRB was justified in taxing the entire value of applicant's invoice even though only one component of the invoice related to the fee for the provision of services;

C) Whether the Appellate Tribunal SRB erred in deciding that the applicant would be liable to pay default surcharge and penalty.

Decision:

The High Court decided the matter partly in favour of the Appellant in the following manner:

- The order of the Tribunal regarding change of tariff heading was upheld.

- The revenue component that constitutes value of service provided or rendered has to be clear and other component, which does not constitute value of service should be disintegrated under the SSTS Act.

- Sales tax on services is applicable on the value of services rendered or provided in terms of provisions of section 5 of the SSTS Act which is fee for rendering taxable services and not any other components therein. This is based on the premise that including such other components would invade the jurisdiction of other statutes as the invoice could contain a component of

an amount likely to be reimbursed which amount either has already been subjected to a treatment on the basis of other applicable laws, or otherwise.

- While giving above findings, the High Court also referred the decision of Delhi High Court in a case *pari-materia* to the instant case; wherein the court concluded that "the value of the service is nothing more and nothing less than the consideration paid as *quid pro quo* for which service can be brought to charge" which was also upheld by the Indian Supreme Court.

- The High Court deleted the default surcharge and penalty, as the proceeding was contested on lawful ground and there was no element seen of willful and deliberate negligence on part of the Appellant.

Thus the Court has upheld the application of tariff heading "BSS" in connection with the services provided by the Appellant; however, it has not allowed the inclusion of other components except fee in the value of service for the purpose of charging SST.

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