YOUSUF ADIL
PACE ALIGNED...

Tax Bulletin

January 2023

50 Years
1972 ~ 2022
PACE ALIGNED...

Foreword

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

This publication contains general information only, and Yousuf Adil, Chartered Accountants, is not by means of this publication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional advisor.

Yousuf Adil accepts no duty of care or liability for any loss occasioned to any person acting or refraining from action as a result of any material in this publication.

This publication can also be accessed on our Website.

www.yousufadil.com

Karachi
January 18, 2023

Contents

Executive Summary

Income Tax Ordinance, 2001

A. SROs

1. SRO 2200(I)/2022 dated December 12, 2022

Exemption to Reko Diq Mining Company (Private) Limited

Through the above SRO FBR has exempted all the assets of Reko Diq Mining Company (Private) Limited from the application of capital value tax.

2. SRO 2300(I)/2022 dated December 27, 2022

Revision in value of immovable properties

The Federal Board of Revenue (FBR) has revised the fair market value of immovable properties of Lahore through S.R.O. 2300(I)/2022 issued on December 27, 2022.

B. Reported Decisions

1. NOTICE U/S 138 IS MANDATORY

ISLAMABAD HIGH COURT
2022 PTD 1763
MESSRS PAKISTAN LNG LIMITED
VS
RESPONDENT(S): FEDERATION OF PAKISTAN, THROUGH SECRETARY REVENUE DIVISION, MINISTRY OF FINANCE, ISLAMABAD AND 2 OTHERS
APPLICABLE SECTIONS: 138, 138(1), 140 OF THE ORDINANCE

The taxpayer filed the instant writ petition before the High Court against the coercive measures, taken for recovery of tax demand confirmed by the CIRA, by attachment of taxpayer's bank account vide notice under section 140 of the Ordinance, without issuance of notice under section 138 of the Ordinance prior to recovery from bank account. Following question of law was put before the High Court:

a) Whether there is any obligation under the provisions of the Ordinance to issue a notice under Section 138 of the Ordinance before affecting recovery in exercise of authority under section 140 of the Ordinance.

Decision:

The HC decided the matter in favor of the taxpayer and held that the state owes following set of duties to the taxpayers:

a) The duty to act in a just, fair and reasonable manner while upholding the right of a citizen under Article 4 of the Constitution to be afforded the protection of law, and to not take action detrimental to the property of a citizen under Article 4(2)(a) of the Constitution except in accordance with law read together with Article 24 of the Constitution that prohibits the State from depriving a person of his property save in accordance with law.

b) The duty of the State to give fair notice to a citizen of any demand that the State has against the citizen to enable the citizen to discharge such demand without the need for the State to resort to use of its coercive powers, or to exercise the right to due process for determination of civil rights and obligations as guaranteed under Article 10-A of the Constitution.

c) The duty to uphold the right of a citizen to access justice before an independent Tribunal and seek the adjudication of civil rights and obligations before such Tribunal prior to the State exercising its coercive authority to realize a claim against the citizen**.**

Further, the State is under an obligation to inform the taxpayer prior to use of coercive means for recovery. Once a

taxpayer files an appeal against the assessment order, the thirty-day period prescribed under Section 137(2) of the Ordinance becomes irrelevant (unless the appeal is filed and decided within such 30-days period). The purpose of Section 138(1) of the Ordinance is to provide the taxpayer with a time-period to discharge the due taxes. The requirement to issue Section 138(1) notice is thus mandatory where the taxpayer files an appeal against an assessment order and the Commissioner Appeals or the ATIR affirms the assessment order. The provisions of the Ordinance cannot be interpreted in a manner that frustrates the statutory right of appeal or that of filing a reference made available to a taxpayer aggrieved by the order of the Commissioner Appeals or the Tribunal.

2. ORDER TO BE CONTESTED BEFORE COMMISSIONER APPEALS BEFORE APPROACHING ATIR

2022 PTD 1839

APPELLATE TRIBUNAL INLAND REVENUE LAHORE
MESSRS CHINA NATIONAL ELECTRIC WIRE AND CABLE IMPORT AND EXPORT CORPORATION, LAHORE
VS
THE COMMISSIONER INLAND REVENUE, RTO, LAHORE

APPLICABLE SECTIONS: 127, 128, 129, 129(4), 131, 131(1), 122 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

The Appellate Tribunal Inland Revenue while invoking its jurisdiction under section 221 of Ordinance on its own motion observed that it had committed some grave mistakes of law in its earlier order. Rival parties along with an amicus curiae (friend of court) appeared before the ATIR for its assistance. The learned DR contended that no written order has been passed by the CIRA under section 129 of the Ordinance; therefore, the ATIR was not legally justified to entertain appeal under section 131 of the Ordinance; consequently, the order passed by the ATIR has no legal sanctity and therefore, the same should be withdrawn ab-initio. Conversely, learned AR supported the order on the premise that the ATIR has a vast jurisdiction to entertain appeals under section 131 of Ordinance. The ATIR required the AR to assist / respond to the forum in respect of following question to decide the matter, which were replied in 'negative' by the Learned AR:

(i) Whether any appeal can be entertained by the ATIR directly against order passed by department under section 122(5A) of the ITO, 2001?

(ii) Whether any written communication/order was issued to the appellant after approaching the concerned CIRA against the orders passed by the adjudicating officer under section 122(5A)?

(iii) Whether the delay of more than 3200 days in filing of appeals under section 127 was communicated to the CIRA by the appellant?

(iv) Whether without availability/issuance of any written order by CIRA in terms of Section 127 read with Section 129 of the ITO, 2001, any disputed matter can be agitated before this Tribunal under Section 131 of the Ordinance?

Decision:

The ATIR held that the taxpayer should not have been entertained by this Tribunal under section 131 of the Ordinance as there was no written order in the field in terms of Section 129 of the Ordinance. The order passed by the ATIR was re-called and withdrawn.

3. GOVERNMENT SUBSIDY, PROVIDING RELIEF TO END CONSUMERS, IS NOT EXEMPT

2022 PTD 1844
BALOCHISTAN HIGH COURT

COMMISSIONER INLAND REVENUE
VS
QUETTA ELECTRIC SUPPLY COMPANY LIMITED, QUETTA
APPLICABLE SECTIONS: 113, 133(5), Clause (102A) Part I of the Second Schedule of the Income Tax Ordinance

Brief Facts:

M/s. Quetta Electric Supply Company is a limited company deriving income from the sale, transmission, and distribution of electric power. The return of income filed for tax year 2015 declared portion of revenue as exempt being Tariff Differential Subsidy (TDS) as such receipts were from government to the taxpayer company to provide relief to end consumers. The deemed assessment order for the subject tax year was amended by the Additional Deputy Commissioner Inland Revenue (ADCIR) on the ground that the amount received by the taxpayer from the Government as TDS are gross receipts within the meaning of "turnover" as per section 113(3) of the Ordinance and hence chargeable to minimum tax under section 113 of the Ordinance (turnover tax). In the amended assessment order (the Order), the ADCIR made the entire sales chargeable to minimum tax and created tax demand accordingly.

The taxpayer aggrieved with the order passed by the ADCIR filed appeal before the Commissioner IR (Appeals) Quetta (CIRA), who dismissed the appeal and upheld such order. The taxpayer being aggrieved by the order of the CIRA filed an appeal before the Appellate Tribunal (ATIR) that decided the matter in favor of taxpayer.

The tax department in return filed income tax reference application before the Baluchistan High Court (the BHC) and raised the question of law that whether TDS constitutes 'turnover' and liable to the charge of turnover tax.

Decision:

The BHC answered the proposed question in affirmative and ordered in the following manner:

1. Subsidy is provided total exemption from tax under Clause (102A) of Part I of the Second Schedule to the Ordinance in the hands of recipient only if provided as bailout package to the recipient company and not in the case where subsidy is meant to provide relief to end consumers of the company. Further, Part I of the Second Schedule to the Ordinance provides exemption from total income and not from specific provisions which are covered under Part IV of the Second Schedule to the Ordinance

2. The ATIR also erred in treating TDS as trade discount, which is generally mentioned on sale invoices and not charged from the buyers; however, for the case in hand TDS is note trade discount but amount receivable from government.

3. The company received full price of electricity sold to consumers partly from consumers and partly from the Government. Hence, such total amount constitutes gross revenue on account of sale of electricity and is liable to turnover tax.

4. TIME LIMITATION OF 60 DAYS FOR REFUND ORDER IS DIRECTORY NOT MANDATORY

ISLAMABAD HIGH COURT
2022 PTD 1876
COMMISSIONER OF INLAND REVENUE, ZONE-III, REGIONAL TAX OFFICE, ISLAMABAD
VS
PEARL SECURITY (PVT.) LIMITED
MESSRS CHINA NATIONAL ELECTRIC WIRE AND CABLE

IMPORT AND EXPORT CORPORATION

APPLICABLE SECTIONS: 133, 170, 170(4), 170(5)(b)OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

The taxpayer filed refund application in respect of excess tax payments claimed vide the return of income. The CIR rejected the refund claims disagreeing with the basis on which the refund was being claimed; however, the rejection order was passed after sixty days period prescribed under section 170 (4) of the Ordinance. The taxpayer filed appeal before CIRA who decided the matter in favor of the taxpayer and held that the impugned order could not be passed after expiry of aforementioned prescribed time period. Department's appeal before ATIR was also rejected along the same lines. Feeling aggrieved the CIR filed the tax reference before the IHC. Following question of law was considered by the HC to decide the matter:

- Whether the sixty days' timeframe under section 170(4) of the Ordinance was mandatory or directory in nature in presence of a remedy of filing an appeal before the CIRA under section 170(5)(b) of the Ordinance in case the refund order under section 170 is passed after expiry of sixty days?

Decision:

The HC decided the matter in favor of CIR as follows:

a) As per the canons of statutory construction for interpretation of legal provisions, no provision of a law shall be interpreted in a way which would render another provision of law as redundant.

b) Ignoring section 170 (5)(b) of the Ordinance altogether in the circumstances of this case is tantamount to making section 170 (5)(b) of the Ordinance as redundant. As, if the prescribed time period is considered mandatory there would be no reason to provide a relief in shape of appeal against the inaction of the CIR within prescribed time period because the said inaction is deemed to be resulting in a favorable refund order.

c) The taxpayer is estopped from assuming a favorable refund order by default where it had statutory recourse against the department's inaction (i.e. filing of appeal before the Commissioner Appeals), which it opted not to pursue. The sixty days timeframe under section 170(4) to pass the refund order is directory for as long as the right of appeal under section 170(5)(b) of the Ordinance subsists.

5. DEFINITE INFORMATION IS REQUIRED FOR PROCEEDINGS U/S 122(5)

2022 PTD 1889
BALUCHISTAN HIGH COURT (BHC)
COMMISSIONER INLAND REVENUE ZONE-I REGIONAL TAX OFFICE, QUETTA
VS
MESSRS BALOCHISTAN ONYX DEVELOPMENT CORPORATION LTD.
APPLICABLE SECTIONS: 122, 122(1), 122(4), 122(5), 133 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The case of the respondent, which is a private limited company engaged in the business of extraction and sales of marbles, was selected for audit under section 177 wherein tax demand was created vide order under section 122 (1) read with sub-section (5) of the Ordinance. The taxpayer filed appeal before Commissioner Appeals which was allowed and the order passed by adjudicating authority was set-aside. Tax Department's appeal before the Appellate Tribunal Inland Revenue

Karachi was also rejected ; ATIR held that the CIR did not have the jurisdiction to select the case for audit under section 177,furthermore, the assessment was required to be amended subject to availability of definite information within the meaning of section 122(5) read with 122(8) of the Ordinance. Feeling aggrieved the tax department filed reference application framing following questions of law before the HC:

a) Whether on the facts and circumstances of the case, the Learned Appellate Tribunal Inland Revenue was justified in holding that the CIR did not have the jurisdiction to select the case for audit under section 177(2) in view of the amendment made in Finance (Amendment) Ordinance 2009 dated 28-10-2009?

b) Whether on the facts and circumstances of the case, the Learned Appellate Tribunal Inland Revenue was justified in holding that the CIR/DCIR may amend the assessment under section 122(1), (4)/(5) after fulfilling the requirement of law, subject to definite information within the meaning of section 122(5) read with 122(8) of the Income Tax Ordinance 2001

Decision:

The HC decided the case in favor of the taxpayer company and held that:

a) The case pertains to tax year 2009 and section 177 of the Ordinance, as it stood at that time, provided that a taxpayer was to be selected for audit by the CIR on the basis of statutory criteria developed by the Board or on the basis of statuary criteria under section 177(4) (sub section 4 of section 177 was omitted through the Finance Act, 2010). The selection of the case was made contrary to the prescriptions of the said section prevailing at that time and thus, has rightly been declared illegal and without lawful authority by the CIRA and ATIR.

b) Perusal of section 122(5) of the Ordinance shows that information in a definite, final and conclusive form must already exist on record. Any information which is incomplete or requires further processing falls outside the domain of definite information and can be termed as departmental opinions or guesstimates. Perusal of order revealed that the proceedings were initiated without any definite information within the scope of section 122 (5) and merely on the basis of assumptions. The Commissioner Inland Revenue (Appeals) and Appellate Tribunal Inland Revenue have rightly recorded findings against the decision of adjudicating authority.

6. AUDIT PROCEEDINGS, WITHOUT FOLLOWING THE LAID DOWN PROCEDURES, ARE INVALID

2022 PTD 1895
APPELLATE TRIBUNAL INLAND REVENUE
COMMISSIONER INLAND REVENUE
VS
A.O. CLINIC, KARACHI
Applicable Sections: 21, 111, 122, 128, 174, 176 and 214C of the Income Tax Ordinance, 2001 (the Ordinance).

Brief Facts:

The taxpayer is an AOP engaged in the business of running a hospital. The return of income was filed declaring income at Rs. 6,912,104, which was selected for audit under section 214C of the Ordinance. Audit proceedings were initiated and Information Document Request (IDR) under section 176 was issued by the Deputy Commissioner Inland Revenue (DCIR). Subsequently, audit proceedings culminated in passing the order under section 122(1)/(5) of the Ordinance.

Being aggrieved with the treatment meted out, the taxpayer filed appeal before the learned Commissioner Appeals (CIRA) who held that the DCIR had not followed the audit proceedings/procedures as laid down by the appellate forums and thus quashed the order.

Feeling dissatisfied with the impugned order passed by the CIRA, the tax department filed appeal before the Appellate Tribunal (ATIR).

Decision:

The ATIR decided the appeal against the tax department and held as follows:

1. The DCIR has not followed the requirement of law in letter and spirit and passed the order without confronting the taxpayer all the charges/objection/issues raised in audit as to enable him to answer/explain them before invoking provisions of section 122 of the Ordinance.

2. The DCIR was under legal obligation to identify, specifically the nature of suppressed income and issue notice in terms of section 122(5) of the Ordinance highlighting the fact under which category the case falls. Non-issuance of such notice clearly meant that while passing the order DCIR was not in possession of definite information and, thus, the reason assigned for additions/disallowances while passing the amended assessment order, could not be termed as definite information. Therefore, the entire proceedings are void ab initio, and illegal.

3. No specific, separate and independent mandatory notice under section 111(1) of Ordinance issued and served upon the taxpayer. Therefore, the additions made under section 111 of the Ordinance are unjust, unfair, illegal and rightly deleted by the CIRA.

4. Where a law requires a thing should be done in a particular manner unless the same is done in the prescribed manner the same shall be illegal.

5. No tax shall be levied or collected except by authority of law. A tax can only be imposed by a legislative Act and not on executive order. The law imposing a tax must be a valid law, that is, it should not violate any provision of the Constitution and should be within the legislative competence of the legislature. It will be valid only if it is made in accordance with the procedure prescribed by the statute.

7. SUPER TAX CANNOT BE LEVIED RETROSPECTIVELY FROM TAX YEAR 2022

COMBINED ORDER
SINDH HIGH COURT
Petitioners
VS
Federation of Pakistan & Others
Applicable Sections: 4C of the Income Tax Ordinance, 2001 (the Ordinance).

Brief Facts:

Through the Finance Act 2022, a super tax was imposed from tax year 2022 and onwards at the specified rates on the income of every person with specific exclusions and conditions. The taxpayers through various petitions approached the Sindh High Court [the SHC] to challenge the vires of such super tax that it unlawfully vitiates vested rights in past and closed transactions, discriminatory and ultra vires to constitution. The SHC granted stay order(s) to such taxpayers subject to the condition that cheque of amount equivalent to super tax liability be submitted to the Nazir of the Court until any final decision by the SHC. Besides, the SHC also directed the Inland Revenue to grant extensions in time for filing of tax returns for tax year 2022 for such cases.

Decision:

The SHC through its consolidated short order covering all the filed petitions quashed the super tax for tax year 2022 and interpreted that the levy shall be applicable form tax year 2023. Further, it was also specified that instant order of SHC shall remain suspended for a period of sixty days and, accordingly, securities furnished to the Court pursuant to the earlier interim orders shall also remain intact for the said period.

8. PARLIAMENT HAS LEGISLATIVE RIGHT TO IMPOSE TAX ON FOREIGN ASSETS – PETITIONS AGAINST CVT DISMISSED

COMBINED ORDER
SINDH HIGH COURT
Petitioners
VS
Federation of Pakistan & Others

Brief Facts:

Through section 7 of the Finance Act, 1989, Capital Value Tax (CVT) was imposed on transfer of immovable properties, modaraba certificates, listed shares and motor vehicles, which was withdrawn gradually and with effect from April 19, 2020 CVT was abolished on all the assets. However, through Finance Act 2022, CVT was once again enacted with effect from tax year 2022.

Subsequently, the Federal Board of Revenue notified Capital Value Tax Rules, 2022 (CVT Rules) as to the procedure for levy, collection, recovery, refund, revision & appeals along-with Forms such as Statement of Foreign Assets, Motor Vehicles, Foreign Moveable Assets and Foreign Immoveable Assets.

Various taxpayers, inter alia, possessing foreign assets through various petitions approached the High Courts of the country to challenge such CVT on the following grounds:

1. CVT enacted through Finance Act by way of an act of Parliament who has no legislative competence to levy such tax on foreign assets of the Petitioners, pursuant to the 18th Amendment to the Constitution, which has curtailed the power of levying any tax on immovable properties, being a provincial subject.

2. Article 142 of the Constitution empowers the Parliament to legislate on subjects enumerated in the Federal Legislative List only, whereas, there is a proviso to Entry-50 of the Federal Legislative List to the 4th Schedule of the Constitution that excludes the taxes on immovable property.

Decision:

The SHC **dismissed** the petitions and pronounced the following:

1. Article 142(c) of the Constitution when read in conjunction with Sub-Article (a) and Sub-Article (b) of Article 142, reflects that while enacting the 18th Amendment, the Provincial Autonomy though being expanded by only providing a Federal Legislative List in respect of competence of the Parliament. What is not within the competence of the Province will stand reverted to the Parliament. Further, Article 142(d) clearly provides that Parliament shall have exclusive powers to make laws with respect of all matters pertaining to such areas in the Federation as are not included in any Province. For the present purposes, it is not in dispute that the foreign assets including immovable properties do not fall in any area within the Province.

2. 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, but in terms of Constitutional provisions the Parliament is empowered to levy taxes on foreign income of a resident person.

3. What is being taxed by the Parliament is the capital value of foreign assets, which now stands declared and is part of the Wealth Tax Returns of the Petitioners / resident person pursuant to the Foreign Assets (Declaration and Repatriation) Act, 2018, whereby the petitioners 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.

4. As to the moveable assets, no specific ground raised before the Court which

were not considered to be adjudicated accordingly.

9. MISTAKE OF LAW IS RECTIFIABLE – RECTIFICATION OF ORDER RELYING ON PAST DECISIONS OF THE SUPERIOR COURTS IS ALLOWABLE

126 TAX 467
LAHORE HIGH COURT
M/S KOT ADDU POWER COMPANY LIMITED
VS
THE COMMISSIONER INLAND REVENUE, REGIONAL TAX OFFICE, MULTAN, ETC

Applicable Sections: 122(1), 122(5A), 133, 210, 221 & 221(4) of the Income Tax Ordinance, 2001 (ITO).

Brief Facts:

Through the instant judgement, six Income Tax References (ITRs) were dismissed by the Honorable Lahore High Court (LHC) in favor of the tax department.

The Appellate Tribunal Inland Revenue (ATIR) through the order (Original Order') dated March 14, 2012 annulled the amended assessment order passed by the Additional Commissioner (the officer) on the ground that the officer cannot amend a deemed assessment under section 122(5A) of the Ordinance for the want of jurisdiction. Later on through different judgments the higher fora including a five-member larger bench of the ATIR decided otherwise thereof, and allowed that an officer can amend a deemed assessment under section 122(5A) by authority of the delegated power of the Commissioner bestowed upon him under section 210 of the Ordinance.

Subsequently, the tax department filed miscellaneous application before ATIR in support of the judgments to rectify its original order. The ATIR after considering the judgments held that it committed a mistake in the original order and passed rectified order dated June 29, 2015 and allowed the miscellaneous application to the tax department. Being aggrieved of the rectified order, the taxpayer filed the reference through which the following questions of law were placed before the LHC:

i. Whether on the facts and in the circumstances of the case, the learned ATIR can lawfully revisit, review or recall its order under the garb of rectification in the terms of section 221 of the Income Tax Ordinance, 2001?

ii. Whether on the facts and in the circumstances of the case, the learned ATIR on the basis of judgments of the superior courts, which were subsequent in time, could lawfully rectify or recall its earlier order?

iii. Whether on the facts and in the circumstances of the case, the learned ATIR in view of the specific provision as contained in section 221 of the Income Tax Ordinance, 2001 is not bestowed with the jurisdiction to recall its earlier order in the garb of exercise of powers of rectification, which shall tantamount to reviewing of earlier order, in the light of law laid down by the Hon'ble Apex Court in cases reported as 2007 PTD 967,1992 SCMR 687, 2000 PTD 306 and 2003 SCMR 401?

iv. Whether on the facts and in the circumstances of the case, the order dated 29th June, 2015 passed by the learned ATIR on application by Revenue is ab-initio void and illegal?

Decision:

The case was decided in favor of the tax department. It was held by LHC that:

- The core dispute purported with respect to exercise of jurisdiction under section 122(5A) of the Ordinance by Additional Commissioner to amend deemed assessment under section 122(1) is a settled question of law by the constitutional courts in various judgments, whereby it is held that

Additional Commissioner under the delegated powers under section 210 of the ITO has authority under section 122(5A) of the Ordinance to amend a deemed assessment order.

- The submissions by the appellant that decisions settling the issue of jurisdiction of the Additional Commissioner were made after the passing of original order are misconceived.

- The learned counsels for the applicant had wrongly understood:

    - that the original order cannot be rectified as the matter dealt therein has been closed by passing the original order;
    - that the time limitation to rectify the original order has lapsed as per section 221(4) of the ITO; and
    - that the rectified order is a review of the original order.

- The ATIR had rectified the mistake of missing out the applicability of law at the time of passing the original order and it had only implemented the pronouncement of constitutional courts which had resolved the controversy about the law and had not reconsidered the law and nor attempted to expound it. It had merely given effect by rectifying the original order to the pre-settled judicial pronouncements of the higher fora.

- It is wrongly assumed that the rectification of mistake apparent from record could only be called to arithmetical or typographical mistake apparent on the face of the order, on the other hand a mistake apparent from record can also be of fact and law which can also be rectified and jurisdiction of rectification also embraces it.

- Objection on the premise that the original order had attained finality and retrospective application of the decisions of the higher fora are not maintainable was also misstated as decisions on the jurisdiction of the officer under section 122(5A) of the Ordinance to amend a deemed assessment were not rare to find at the time when the original order was passed on March 14, 2012.

- Jurisdiction of the ATIR to rectify the mistake of law apparent from record was well within limits of the law. The judgments referred by the learned counsels explained merely scope and extent of rectification jurisdiction in their own unique facts and circumstances and has no connection with the instant case scenario.

10. ORDER PASSED BY COMMISSIONER APPEALS TO BE GIVEN EFFECT BY THE TAX AUTHORITIES, UNLESS REVERSED OR SUSPENDED BY HIGHER APPELLATE FORUMS

126 TAX 492
LAHORE HIGH COURT
M/S PRESSON DESCON INTERNATIONAL (PVT.), LTD.
VS
FEDERATION OF PAKISTAN, ETC.

Applicable Section: 124, 124(1), 124(2), 124(3), 124(4), 129, 132, 133, 148(7), 221, 226, 226(b)(ii) of the Income Tax Ordinance, 2001 (ITO).

Brief Facts:

The tax department filed rectification application on the rejection of the appeal before the ATIR with ill intention to use it as tactic to avoid passing of appeal effect order under section 124(4) on the basis of exclusion to limitation period as provided in section 226(b)(ii) of the ITO.

The petitioner filed a Writ Petition No. 10593 of 2022 in the Lahore High Court (LHC) for implementation of the order of the Commissioner Inland Revenue (Appeals) (CIRA) under section 124 of the Ordinance which attained finality as the appeal filed by the department before the Appellate Tribunal

Inland Revenue (ATIR) against the order of the CIRA was dismissed being time barred and also the plea for condonation of time was not entertained for not filing any such application, and thereafter the tax department did not file any reference under section 133 of the ITO before the High Court.

Decision:

The LHC decided the case in favour of the appellant and held that:

- An order cannot be avoided from implementation under section 124 of the ITO unless it has been reversed by a higher Appellate Court or suspended by it at the time of proceedings.

  In the instant case appeal by the respondent-department to ATIR was rejected and consciously no reference to the court was filed against it, thereby, the order of the CIRA has attained finality.

- Proceedings of rectification application before ATIR under section 221 of the ITO does not fall under section 226(b)(ii) of the ITO and it cannot be used as an excuse by the Commissioner to avoid implementation of section 124(4) and the Commissioner is mandated by the section to pass an appeal effect order.

11. FBR TO PROVIDE OPPORTUNITY TO THE TAXPAYER TO FILE HIS RETURN AS PER HIS OWN INTERPRETATION

126 TAX 548
LAHORE HIGH COURT
FEDERAL BOARD OF REVENUE
VS
FEDERATION OF PAKISTAN, ETC.

Applicable Sections: 114, 120, 122, 153(1)(b) of the Income Tax Ordinance, 2001 (ITO)
12(2), O.XLVII of the Civil Procedure Code (V of 1908)

Brief Facts:

The petitioner (the tax department) filed a Review Petition in the Lahore High Court (LHC) for review of the order dated October 14, 2021 passed by the LHC in Writ Petition No. 63124 of 2021.

In the earlier petition the LHC decided the matter in favour of the respondents (taxpayers). The taxpayer had contended before the Court that the tax department devised the return forms in such a manner that enforced the interpretation of section 153(1)(b) adopted by the tax department. The LHC considered that it is statutory right of every taxpayer to declare its income in the tax return under section 114 of the ITO according to his interpretation of law and the return so filed under the section 114 is treated to be assessment order under section 120. If in the form of return any option is blocked by the tax department or the options are arranged in such a manner that only favours tax departments interpretation of law, it will devoid the taxpayer from its statutory right to file return of income, according to his own interpretation of law.

The stance of the taxpayer was accepted in the order dated October 14, 2021 against which the department seeks review of the order of the LHC under the plea that giving relief to the taxpayer would take away Commissioner's right of interpretation granted under section 122 of the ITO.

Decision:

The LHC allowed the review petition filed by the tax department and held that:

- In Court's opinion the issue of the taxpayer was redressed by the proposal given by the tax department as they can compute their income according to their own interpretation.

- One of the grounds for acceptance of review petition is the mistake of law or fact that by accepting taxpayers' stance, it may had compromised the department's right of different

interpretation in the wake of section 122 of the ITO.

- On the undertaking by the department that grievance of the taxpayers will be sufficiently addressed, the petition is allowed and that the taxpayer shall be given fair opportunity of being heard before prescribing the next return format and if the department rejected the taxpayers' proposals the reasons for rejection shall be communicated in writing.

- The rights of the both department and taxpayer must be protected. The taxpayer has his own right under the ITO to compute his taxable income according to his own understanding and as compared to it, the department is also entrusted with the right to amend a deemed assessment order under section 122 according to its own interpretation.

Sales Tax Act, 1990

Reported Decisions

1. FURTHER TAX IS NOT CHARGEABLE TO THE END CONSUMER OR TO THE PERSONS NOT REQUIRED TO BE REGISTERED

(2022)126 TAX 228
Appellate Tribunal Inland Revenue
M/s Master Enterprises, Karachi
VS Commissioner Inland Revenue, Karachi

Applicable Provisions: Sections 3(1), 3(1A) of Sales Tax Act, 1990 (ST Act) Rules 58T(1), 58T(5) Sales Tax Special Procedure Rules, 2007 (SP Rules, 2007)

Brief Facts:

The Appellant is a manufacturer of foam and foam products and selling products with the brand name "Moltyfoam". The Appellant is selling goods, through dealers as well as through its own outlets and such outlets are duly registered. The Appellant was issued order creating a demand of further tax under section 3(1A) of the ST Act amounting to Rs. 29,452,501 on making supplies to unregistered persons. The Appellant filed appeal before the Commissioner Inland Revenue Appeals (CIRA) on the ground that extra tax has already been paid by it and its subsequent supply is exempt from sales tax under Rule 58T(5) of the SP Rules, 2007. It was further argued that further tax is not applicable on sales made to end consumer as per SRO 648. The CIRA, however, confirmed the demand raised in the order. The Company then filed appeal before Appellate Tribunal Inland Revenue (ATIR).

Decision:

The appeal was allowed on the following grounds:

- The ATIR observed that both DCIR and CIRA did not consider the details and documents presented by the Company during the assessment proceedings and at the appeal stage, in support of its contention that the retail sales were made to the dealers and to the general public from its retail outlets.
- Further tax is levied on the persons who are required to be registered under the law for making taxable supplies. In the instant case, the dealers of the Appellant were not required to be registered since they were engaged in making subsequent supplies which were rendered exempt from the charge of sales tax as per Rule 58T(5), owing to the fact that the Appellant had already paid extra tax at first stage. Accordingly, it was held that the dealers were not required to be registered, because they were exclusively engaged in making exempt supplies.

2. WITHHOLDING SALES TAX COLLECTED AND OTPUT TAX ARE TWO SEPARATE LIABILITIES

(2022)126 TAX 350
Supreme Court of Pakistan
Islamabad Electric Supply Company Ltd. (IESCO) and 3 others V/s Commissioner Inland Revenue Islamabad and others

Applicable Sections: Rule 58H of the Sales Tax Special Procedure Rules, 2007

Brief Facts:

The Appellants are electricity supply companies that supplied electricity to their consumers including steel-melters, steel re-rollers and composite units of steel melting and re-rolling (The Consumers) in respect of which they have collected sales tax under Rule 58H of the SP Rules, 2007 therefrom through their electricity bills being final discharge of their sales tax liability. The Appellants combined their own tax liability with the sales tax collected under rule 58H from the consumers, and the combined amount was disclosed as output tax in their sales tax returns, consequent to which show cause notices were issued to them in this

regard. The Appellants lost their case before all subordinate forums and therefore filed appeal before the Supreme Court.

Decision:

The Supreme Court also dismissed appeal on the following grounds:

- The output tax liabilities of the Appellants and of the consumers are two separate tax liabilities.
- The sales tax collected by the Appellants in terms of Rule 58H of the SSP Rules is in fact the output tax liability of the consumers and not of the Appellants. The Petitioners were only acting as collecting agents to collect the sales tax on behalf of the tax authorities.

3. NON-PAYMENT OF OUTPUT TAX BY THE SUPPLIER CAN NOT IMPAIR THE RIGHT OF THE BUYER TO RECEIVE THE REFUND OF INPUT TAX

2022 PTD 1776
PESHAWAR HIGH COURT
THE COMMISSIONER INLAND REVENUE PESHAWAR VS
M/S GADOON TEXTILE MILLS

Applicable Provisions: 8(ca), 47, 73 of the Sales Tax Act, 1990

Brief Facts:

The Appellant applied for refund before the tax department and in response he was issued a Show Cause Notice (SCN) on account of discrepancies appeared on the scrutiny of the STARR/CREST system regarding cross verification of input tax claimed by the Appellant against sales tax deposited by the suppliers. Being dissatisfied with the response of the Appellant, the Department rejected the claim as inadmissible input tax claim as per section 8(ca), through passing an assessment order.

Feeling aggrieved by the said order, the Appellant filed appeal before Commissioner (Appeals) which was partially accepted. Subsequently, second appeal was filed by the Appellant before the Appellate Tribunal who decided the matter in favour of the Appellant . The Department, being aggrieved of the order of ATIR, filed sales tax reference before the Peshawar High Court (PHC).

The applicant Department contented that the judgment of the Appellate Tribunal directing the Department to recover the due sales tax from the supplier and allowing credit of the same to the taxpayer after its recovery from the supplier, is contrary to section 8(ca) of the of the Sales Tax Act.

Whereas the respondent taxpayer relied upon section 73 of the ST Act which states that the only responsibility on the buyer is that he should pay through cross cheque drawn on a bank or by cross bank draft or cross pay order or any other cross banking instrument showing transfer of amount of the sale tax invoices in favour of the supplier from the business account of the buyer. It was further argued that he should not suffer for wrong doing of the suppliers if they have not paid the sales tax collected from the buyer, to the Department.

Decision:

The High Court dismissed the reference alongwith the connected tax references by treating the order of the learned Appellate Tribunal, a well-reasoned order, wherein the Department was directed to recover sale tax from suppliers and then issue refunds to buyer.

4. NON-COMPLIANCE OF SECTION 8B IS A MERE PROCEDURAL LAPSE AND DOES NOT CAUSE ANY LOSS TO EXCHEQUER

2022 PTD 1781
SINDH HIGH COURT
THE COMMISSIONER INLAND REVENUE ZONE-IV VS

M/S HAMDAM PAPER CORPORATION (PVT.) LTD

Applicable Provisions: Section 8B, 8B(2)(i), 8B(3), 47 of Sales Tax Act, 1990

Brief Facts:

The Appellant was issued a SCN confronting the claim of 100% input tax adjustment against output tax liability being contrary to the limit of 90% adjustment allowed as per section 8B of the ST Act. The taxpayer responded that had they have claimed input tax to the extent of 90% of the output tax, the balance amount, if any, would have been available to them by way of adjustment in next sales tax period or in the form of refund, as the case may be. It was therefore argued that in either case, its right for adjusting input tax against the output tax will not be extinguished, hence, there exist no default on this count. The Department rejecting this line of argument, passed order and directed to pay 10% sales tax along-with default surcharge and penalty.

Feeling aggrieved, the Appellant filed appeal before Commissioner Appeals (CIRA) wherein CIRA dismissed the action of the Department in creating tax demand based on provisions of Section 8B of the ST Act as no loss of revenue accrued to the exchequer; however, the CIRA confirmed the imposition of default surcharge and penalty. Subsequently, the department filed appeal before the Appellate Tribunal (ATIR). The ATIR upheld the decision of CIRA. The Department then filed sales tax reference before the Sindh High Court (SHC) with following questions of law:

1. Whether on fact and circumstances of the case learned ATIR was justified to allow adjustment of more than 90% of input tax against output tax in all consecutive twelve months despite non- compliance to section 8B(2)(i) which requires furnishing of statutory auditor's certificate?

2. Whether on facts and circumstances of the case the subsections (2) and (3) of section 8B gives the manner and time frame for adjustment or refund of the amount not allowed for adjustment under subsection (1) of section 8. Whether the tribunal as well as the CIR(A) is empowered to ignore the systems and procedures designed under the law in any circumstances?

Decision:

The Court upheld the decision of ATIR by relying on Lahore High Court judgment referred by the Respondent Company by reframing the question and answering the same in affirmative i.e. in favour of the Respondent and against the Petitioner on the below grounds;

- the Respondent claimed 100% adjustment of its input tax against the output tax, which although not permissible under Section 8B of the ST Act; however, have not caused any loss of revenue to the government exchequer. That is in case of non-adjustment of 10% of the excess/unadjusted amount in a tax period of a registered person, it will then be carried forward till its final adjustment and accordingly at the end of the financial year would result in refund situation if the input tax remains unadjusted against the output tax.

- the lapse on the part of the Respondent could be termed as technical / procedural mistake as by doing such act no gain was obtained by them and moreover the 90% adjustment will ultimately lead to a refund situation at the end of the financial year. On the other hand, the exchequer has got its due share either by way of 100% input tax adjustment against the output tax or 90% input tax adjustment with 10% cash payment in that very tax period.

Sindh Sales Tax on Services Act, 2011

SRB Notification

Notification no. SRB/TP/1/2023/47667 dated December 05, 2022

Through notification, the Sindh Revenue Board (SRB) has invited written tax proposals for Budget 2023-24 in the given format in relation to the provisions, procedures and rules of Sindh Sales Tax on Services. The last date for submission is January 27, 2023

Contact us

For more information, you may contact:

Atif Mufassir
Partner - National Leader Tax & Legal
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

Our offices

Karachi
Cavish Court, A-35, Block 7 & 8
KCHSU, Shahrah-e-Faisal
Karachi - 75350, Pakistan
Phones: + 92 (21) 34546494-97
Fax : + 92 (21) 34541314
Email: sghazi@yousufadil.com

Islamabad
18-B/1
Chohan Mansion, G-8 Markaz
Islamabad, Pakistan
Phones: + 92 (51) 8350601, + 92 (51) 8734400-3
Fax: + 92 (51) 8350602
Email: shahzad@yousufadil.com

Lahore
134-A, Abubakar Block
New Garden Town, Lahore, Pakistan
Phones: + 92 (42) 35913595-7, 35440520
Fax: + 92 (42) 35440521
Email: rmukhan@yousufadil.com

Multan
4th Floor Mehr Fatima Tower,
Opposite High Court,
Multan Cantt, Multan, Pakistan
Phones: + 92 (61) 4571131-2
Fax: + 92 (61) 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 683 professionals in four cities across Pakistan. For more information, please visit our website at www.yousufadil.com.