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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 December 2023.

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Income Tax Ordinance, 2001

A. SROs

1. S.R.O. 1846(I)/2023 dated December 22, 2023

Synchronized Withholding Administration and Payment System (SWAPS) or SWAPS agent is defined under section 62 of the Income Tax Ordinance, 2001 (the Ordinance) as any person or class of persons notified by the Federal Board of Revenue (FBR) to collect or deduct withholding taxes through SWAPS.

Through the above-mentioned SRO, FBR has proposed amendment in Income Tax Rules, 2002 (the Rules) through insertion of SWAPS Rules in Part IV of Chapter IX of the Rules. The changes proposed are summarized below for reference:

- Following definitions have been introduced under Rule 47 of the Rules:

    a. **Digital Invoice** means an invoice generated from FBR's web-based portal or computerized system integrated in the manner prescribed by the Board from time to time;

    b. **SWAPS** means FBR's web-based portal or any computerized system of the notified SWAPS Agents integrated with FBR as notified from time to time for the purpose of processing payments for goods and services;

    c. **SWAPS ID** means a unique number for identifying transactions carried out by a SWAPS Agent; and

    d. **SWAPS Payment Receipt** means proof of payment relating to transactions carried out by a SWAPS Agent.

- Every SWAPS Agent shall update its IRIS profile upon notification under Sub-rule (1) of Rule (1) under Rule 48 of the Rules.

- Rule 49 of the proposed Rules specifies obligations and requirements in which notified SWAPS Agent shall install and integrate such Fiscal Electronic Device (FED) and software as approved by FBR for carrying out any transaction liable to withholding tax in the mode and manner prescribed in the Rules.

- A SWAPS agent, unless the date is notified by the FBR, are restricted to carry out any transaction:

    - otherwise than through SWAPS;
    - without receiving a digital invoice;
    - unless the CNIC, NTN, and IBAN of the withholdee bear the same title.

- The SWAPS payment receipts shall include the particulars specified in Rule 50 of the Rules and will be considered as the only proof of collection or deduction of tax including for claiming a refund, or tax credit.

- Under Rule 52 of the Rules, SWAP agent may request Commissioner Inland Revenue through IRIS for extension in time for registration or integration as SWAPS Agent, stating the reasons for suchDelay which can be allowed for a period not exceeding 30 and not exceeding 90 days in aggregate.

- In case of non-compliance, SWAP agent shall be subject to penal provisions prescribed under the Ordinance.

2. S.R.O. 1845(I)/2023 dated December 22, 2023

Amendments proposed by FBR through the above-mentioned SRO in Rules 33B, 33C and 33E of the Income Tax Rules, 2002 (the Rules) related to online integration of businesses are summarized below for reference:

- **Amendments in Rule 33B – Obligations and Requirements:**

  - Among other amendments, the SRO proposes time period of three months from the issuance of the relevant rules for notifying FBR, through the Computerized System of all the notified establishments from which they intend to carry on business and shall register each Point of sale (POS) to activate the integration duly providing the prescribed information.

  - After clause (f) of sub-rule 1, a new clause (g) is introduced that requires license number of accredited POS Software provider to be furnished with other prescribed information as mentioned above.

- **Amendments in Rule 33C - Accreditation of points of sales (POS) systems:**

  - Replacing sub-rule (2) of Rule 33C with a new provision that requires FBR's nominated committee to determine accreditation for Electronic Fiscal Devices (EFDs) brands, models, and specifications during the application process.

  - Changing the name of sub-rules (4) and (5) of rule 33C, and replacing them with a new provision that requires the licensing committee to communicate details of accredited brands, models, and specifications to the vendor and publish them on its website.

  - Adding new sub-rules (6), (7), (8), and (10) to rule 33C that cover recommendations for license renewal, appointment of a licensing committee convener, supervision of the system, and revocation or cancellation of licenses due to non-compliance or other reasons.

  - Adding a new sub-rule (11) to rule 33C that empowering FBR to suspend the licenses in certain circumstances pending further investigation.

- **Amendment in Rule 33E – Application for grant of license:**

The SRO proposes to substitute the current Rule 33, prescribing rules for online integration during intervening period, with an Application for grant of license in which setting out requirements for application for EFDs integration licenses, including information about the company's profile, personnel, financials, clientele, registration status, and other documents as required by instructions or orders issued by the Board.

B. Reported Decisions:

1. REVIEW OF EARLIER EXPRESSED ORDER IS NOT PROHIBITED UNDER THE ORDINANCE IT IS RATHER PERMISSIBLE BY WAY OF RECTIFICATION APPLICATION

2023 PTD (Trib.) 1582
APPELLATE TRIBUNAL INLAND REVENUE
MUHAMMAD MUTI-UR-REHMAN, LAHORE
VS
THE COMMISSIONER INLAND REVENUE RTO, LAHORE
APPLICABLE SECTIONS: 221 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The taxpayer (the Appellant) in the instant case filed appeal against the Order issued by the Commissioner Inland Revenue Appeal [the CIR(A)] before the Appellate Tribunal Inland Revenue (the Tribunal) and raised various legal and factual objections against the orders of the authorities below. The Tribunal vide its order held that the CIR(A) has effectively and rightly turned down the legal objections of appellant whereas for factual grounds, remanded the case back to the Assessing Officer (the AO) with the directions to decide the case afresh.

Being aggrieved the Appellant filed rectification application before the Tribunal to review its order based on the following grounds:

- The Tribunal has not given specific finding on the ground, inter alia, raised by the Appellant

that the AO has not considered the originally assessed income as per return of income, while computing the impugned tax demand instead he has considered amended assessed income which already has been annulled by the Commissioner Inland Revenue Appeals during appeal proceedings against assessment order of the same year.

- The legal grounds taken by the Appellant were in light of the judgments of this Tribunal as well as higher judicial fora, which were binding on the learned CIR(A). However, the CIR(A) did not consider such legal grounds and judgment while passing the order. Thus, by upholding the learned CIR(A)'s findings on the legal issues, this Tribunal not only negated its earlier decisions of the Benches but also perpetuated the illegal findings of the learned CIR(A).

On the contrary, the tax authorities, being respondent opposed the rectification application on the plea that it would amount to "review" of the earlier Order of this Tribunal, whereas this Tribunal is not vested with the power of review.

Decision:

The Tribunal recalled its earlier order and directed to fix the main appeal for fresh hearing and disposed of the appeal as under:

- The word "review" means re-examination of a "view" earlier expressed clearly by a Court or other forum of law. Where there has been no view expressed on certain vital issues going to the roots of a case, and having bearing on the final outcome of the case, directing adjudication of the un-determined issues under section 221 of the Ordinance cannot be said to be a "review". It is simple "rectification" of "mistake" of non-adjudication of vital issues having direct bearing on the fate of the case.

- "Review" is not prohibited under the Ordinance it is rather permissible by way of rectification. Mere title of "Rectification of mistakes" in Section 221 of the Ordinance does not change the nature of power given by express wording of a Section.

2. NO TAX WITHHOLDING IS REQUIRED FOR PAYMENTS THAT WERE MADE THROUGH BOOK ADJUSTMENTS TO CO-INSURERS BY THE LEAD INSURER.

2023 PTD (Trib.) 1628
APPELLATE TRIBUNAL INLAND REVENUE, LAHORE
COMMISSIONER INLAND REVENUE, LTU, LAHORE
VS
ADAM JEE INSURANCE COMPANY LIMITED
APPLICABLE SECTIONS: 233, 158(C), 161 AND 205 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The Assessing Officer passed the ex-parte order dated March 20, 2015, under section 161 of the Ordinance by creating the tax demand. On an appeal filed by the taxpayer, the CIRA vide Order dated April 30, 2015 remanded back the matter to the Assessing Officer for de novo consideration with direction to finalize the proceedings after giving adequate opportunity to the taxpayer.

The Assessing Officer finalized the reassessment proceeding under section 161 of the Ordinance by observing default of the taxpayer on account of tax withholding in respect of payments made under sections 233 and 149 of the Ordinance.

Default on Commission Payment

The taxpayer was confronted with respect to non-withholding of tax on payment of commission. The taxpayer asserted that the subject payments represent discount and inter-Company account settlement, hence no tax was required to be withheld. It was further submitted that in in insurance business, it is a normal course of procedure that two or more insurer companies by creating consortium jointly insure a particular thing against which companies divide premium amount according to the settlement and one principal Lead Insurer company pays the amount of commission in total and also withhold the tax accordingly. As per the agreement between the insurers, the Lead Insurer is required to collect the entire amount of insurance premium and compliance of tax withholding under section 233 is also on the Lead Insurer.

The taxpayer being co-insurer shared the payment of commission by the Lead Insurer company and adjusted the payment of commission income through book adjustments and inter-company transaction. Accordingly, since the Lead Insurer company duly withheld tax on these transactions and the taxpayer being co-insurer is not liable to withheld tax again on same transaction.

The Assessing Officer turned down the taxpayer contention and created a tax demand by observing that deductions under section 233 were required even where payments were made through book adjustments to co-insurers.

The CIRA set aside the impugned tax demand by taking different view that the taxpayer made inter-company transaction and matter also pertained to tax year prior to the insertion of section 158(c) vide Finance Act, 2015 and Rule 43B(d) through SRO 958(I)/2015 dated September 29, 2015, therefore, withholding of tax was not required on payments of commission to co-insurers.

Default under salaries Payments (Director's fee)

Taxpayer was confronted with respect to non-withholding of tax under section 153(1)(b) on payment of Director's fee.

CIRA deleted the same by observing that the fee paid to the directors has been made liable to withholding tax vide Finance Act, 2014 through insertion of subsection (3) of the section 149 of the Ordinance whereas the instant matter pertains to tax year 2013. Being aggrieved by the above decision the Assessing Officer filed appeal before ATIR.

Decision:

ATIR in its decision held that:

- It is the duty of Lead Insurer company to ensure the discharge of deduction of advance tax against the payment made to commission agent.

- There is no separate transaction between Lead Insurer and the co-insurer for the purpose of collection of advance tax under section 233 of the Ordinance.

- The co-insurance agreement is only in the nature of general regulation for sharing the risk and premium involved in an insurance policy and the entire insurance premium as well payment to the commission agent has already suffered tax at the time of its payment in the hand of Lead Insurer. If there is any non-deduction on the payment made to the agent, the Lead Insurer may be required but not the co-insurer who has not made any payment directly to the commission agent.

- The director has not provided any technical or professional services to the taxpayer and therefore, payment of sitting fees does not constitute payment for rendering services under section 153(1)(b). Had it been included in section 153(1)(b), there was no need of insertion of subsection (3) in section 149 specifically providing deduction of tax at the time of payment made for directorship fee. CIRA, therefore, rightly deleted the tax under this head.

3. IT IS OBLIGATORY UPON THE AUTHORITY TO DISMISS A CASE WHICH IS BARRED BY TIME

2023 PTD (TRIB.) 1662
APPELLATE TRIBUNAL INLAND REVENUE
MAIN FEROZE SALAH UD DIN
VS
THE COMMISSIONER INLAND REVENUE, RTO, LAHORE
APPLICABLE SECTIONS: 132, 131, AND 121 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The taxpayer (the Appellant) is an individual engaged in the business, who filed his return for the tax year 2017 and the same constituted deemed assessment under section 120(1) of the Ordinance. The case of the Appellant was selected for audit undersection 214C of the Ordinance and intimation whereof was given to the taxpayer. The Appellant failed to submit any record in compliance to the notices for audit and the Assessing Officer (the AO) issued the audit report to the taxpayer. Based on the noted discrepancies, a show-cause notice was issued as to why best judgment assessment may not be made against the Appellant. The

Appellant failed to respond the same and the AO vide order dated February 28, 2023 under section 121 of the Ordinance determined the amended total income of the Appellant. Being aggrieved, the taxpayer preferred first appeal before the Commissioner Inland Revenue Appeal [the CIR(A)].

The CIRA vide order dated January 31, 2023 remanded back the matter and directed the Appellant to explain all the discrepancies and held that in case of non-compliance or unsatisfactory reply /explanation, the amount which is not adequately explained would be added in the total income. The Appellant instituted second appeal before the Appellate Tribunal Inland Revenue (the Tribunal), inter alia, on the following grounds:

- That the respondent has passed an order under section 122(1) (Order to amend self or best judgment or provisional assessment) without issuing any notice under section 121 (Best judgment assessment) or section 123 (Provisional assessment in certain cases) of the Ordinance.

- That the Respondent could not have gone beyond the period of 5 years in the case of order passed under section 121 of the Ordinance and could not have gone back from a period of 6 years in case of order passed under section 122 of the Ordinance. Hence the additions made therein are barred by law, hence void.

Decision:

The Tribunal set aside both the orders passed by the AO as well as the CIRA and appeal filed by the Appellant was allowed on point of limitation without touching the factual merits of the case.

- The tax year in issue is 2017 and the limitation to adjudicate under section 121 ends on June 30, 2022 whereas the order under section 121 was passed by the AO on February 28, 2023 and the same is beyond period of limitation so prescribed under section 121(3) of the Ordinance.

- There is no cavil to the fact that the limitation is a moot point in any litigation and once it is asserted, it has to be decided on the basis of facts and law laid down by the superior Courts. Thus, the Tribunal cannot re-examine the issue already settled and decided by the August Supreme Court which is binding on the Tribunal under Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973.

4. THE COMMISSIONER HAS POWER TO ISSUE NOTICES AND CONDUCT THE AUDIT FOR ONE OR MORE PERIODS WHICH COME WITHIN THE PERIOD OF SIX YEARS.

2023 PTD 1704
LAHORE HIGH COURT
SAMMAN GHEE MILLS PRIVATE LIMITED
VS
FEDERAL BOARD OF REVENUE AND OTHERS

Brief Facts:

The taxpayer being Private Limited Company was issued notices by the Assessing Officer selecting it for income tax audit for tax years 2016, 2018, 2019 and 2020, under section 177(1) of the Ordinance.

Being aggrieved by the above notices, the taxpayer filed Writ Petition, seeking setting aside of those notices being contrary to law, issued under unlawful authority.

This writ petition was clubbed with some connected matters involving similar questions of law and was dismissed by the Single Judge.

The taxpayer challenged the above decision in the LHC and contended that once selected for audit for a particular tax year it could not be selected again for audit for another tax year without giving reasonable cause and strong reason.

Decision:

Lahore Court dismissed the appeal as under:

While reading over first two line of the notices it is clear that the taxpayer was selected under section 177 of the Ordinance and reason for selection for audit were duly and briefly mentioned in the notice.

As far the powers of Commissioner under section 177 have been questioned, it was held that section 177(1) of the Ordinance provides that:

- The Commissioner may, after recording reasons in writing, call for record or documents including books of accounts of the taxpayer.

- The reason shall be communicated to the taxpayer while calling record or documents including books of accounts of the taxpayer.

- Provided further that the Commissioner shall not call for records or documents of the taxpayer after expiry of six years from the end of the tax year in which they relate.

In view of the above, there is left no doubt that issuance of notices and mentioning of reason therein are entirely in accordance with section 177(1) of the Ordinance.

Further, there is nothing in section 177 that could bar the Commissioner from issuing notices and conducting the audit for one or more periods which come within the period of six years.

5. THE NATIONAL SAVING CENTRE ACT ONLY TO FACILITATE THE PUBLIC IN THE TRIBAL AREAS; INCOME IS DERIVED IN PAKISTAN AS THE FUNDS ARE INVESTED BY THE DIRECTORATE.OF NATIONAL SAVING SCHEME.

2023 PTD 1779
SUPREME COURT OF PAKISTAN
DIRECTOR GENERAL CENTRE DIRECTORATE
OF SAVING AND OTHERS
VS
ABID HUSSAIN AND OTHERS

Brief Facts:

The responded asserting that they were resident of the Para Chinnar, Kurram Agency, which prior to the amendment of the Constitution through the 25th Amendment Act, 2018, was part of the then Tribal Area. Their grievance was regarding the tax withholding by the National Saving Centre. They contended that since the Income Tax Ordinance, 2001 had not been extended to the Tribal Areas, therefore, the tax withholding relating to the certificates obtained by them from the National Saving Centre was illegal and unconstitutional.

The Petition was dismissed by a Single Judge of the High Court; however, the Intra Court Appeal was allowed by the Division Bench and tax withholding was declared as unconstitutional.

The Director General Centre Directorate challenged the decision of the HC in SC.

Decision:

SC allowed the above and set aside the matter as under:

The National Saving Centre does not invest the funds received from the account holder, the funds collected by the National Saving Centre are invested by the Directorate and they fall within the ambit of the expression "government security". For the purpose of the Ordinance, the income is deemed to have arisen or accrued in Pakistan.

Clause (a) of subsection (1) of section 151 of the Ordinance, inter alia, provides that the person pays yield on an account, deposit or certificate under the National Saving Scheme or Saving Account, then it becomes a mandatory statutory obligation of the payers of the profit to deduct tax at the rate specified in Part III of the First Schedule from gross amount of the yield or profit paid to the recipient. It is the statutory duty of the Directorate to comply with the express requirement provided under section 151(1)(a) of the Ordinance.

The National Saving Centre, therefore, act only to facilitate the public in the Tribal Areas to avail the benefits of the various National Saving Scheme offered by the Directorate.

The income of the Directorate does not rise nor accrues in the Tribal Areas.

6. JUDGEMENT PASSED BY ONE BENCH OF SINDH HIGH COURT IS BINDING ON THE OTHER BENCH OF THE SAME COURT AND MERELY GRANTING OF APPROVAL FOR FILING OF APPEAL BY SUPREME COURT OF PAKISTAN IS NOT A PRECDENT UNDER ARTICLE 189 OF THE CONSTITUTION OF PAKISTAN

2023 PTD 1829
SINDH HIGH COURT
SEARLE COMPANY LIMITED AND OTHERS
VS

FEDERATION OF PAKISTAN AND OTHERS
APPLICABLE SECTIONS: SECTION 5A OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE) AND ARTICLE 189 OF THE CONSTITUTION OF PAKISTAN

Brief Facts:

The Appellants in the instant case filed appeal before the Sindh High Court (SHC) challenging the legality of section 5A of the Ordinance i.e. Tax on Undistributed Reserves that was introduced through Finance Act, 2015. As per section 5A, tax was imposed at the rate of ten percent on every public company other than a scheduled bank or a modaraba, that derives profits for a tax year but does not distribute cash dividends within six months of the end of the said tax year or distributes dividends to such an extent that its reserves, after such distribution, are in excess of hundred percent of its paid up capital. Further, the Appellants prayed for relief in this regard by the SHC.

The SHC was required to decide the following questions of law:

- Whether the amounts maintained in the free reserves of public companies constitute income within the meaning of Entry no. 47, Fourth Schedule of the Constitution?
- Whether section 5A of the Ordinance as inserted through section 5(3) of the Finance Act, 2015 is ultravires the provisions of the Constitution of Pakistan, 1973?
- What should the decree be?

Decision:

While the suits were pending before the SHC, legality of section 5A was decided by another bench of the same court in the case of Sapphire Textile Mills Limited vs. Federation of Pakistan. Section 5A of the Ordinance with its amendments from time to time were struck down and declared as ultravires to the Constitution of Pakistan. As a consequence, show-cause / demand notices, or constituents thereof seeking enforcement of section 5A were set aside.

During the proceedings of the case, it was brought to the attention of the Court that Hon'ble Supreme Court of Pakistan (SCP) has granted approval to the department for filing of appeal in the case of Sapphire Textile Mills Limited against the decision of SHC. It was held by the judge of SHC that only granting of approval for filing of appeal by the SCP does not constitute a binding judgement under Article 189 of the Constitution of Pakistan which states that decision of SC is binding on other courts since the decision on the matter is pending.

It was, therefore, held that since judgment of SCP is not present on the matter till the finalization of the case by SHC, therefore, the judgment delivered in the case of Sapphire Textile Mills Limited by one of the benches of SHC is binding on the other. Accordingly, section 5A introduced through Finance Act, 2015 was struck down and relief was granted to the Appellants.

7. WHILE DELEGATING THE POWER TO THE OFFICER, THE JURISDICTION ORDER MUST MENTION THE ORDER SECTION.

2023 PTD 1843
SUPREME COURT OF PAKISTAN
CIVIL PETITION NO 51 OF 2020
COMMISSIONER INLAND REVENUE, ZONE-I, RTO, PESHAWAR AND ANOTHER
VS
AJMAL ALI SHIRAZ MESSRS SHIRAZ RESTAURANT, PESHAWAR
APPLICABLE SECTIONS: 233, 158(C), 161 & 205

Brief Facts:
The matter is pertaining to the amendment of assessment which power, under section 122 of the Ordinance, is bestowed upon the Commissioner.

It was contended that the Order amending the assessment was passed by the Deputy Commissioner, Regional Tax Office, Peshawar, who was not authorized to amend the assessment.

Commissioner Inland Revenue contended that the Deputy Commissioner was delegated powers to amend the assessment vide order No.616, (the Order) dated December 5, 2009, issued by the Commissioner Inland Revenue (Audit-I), Regional Tax Office, Peshawar.

Decision:

SC dismissed the petition as under:

- The Order passed does not refer to section 122 of the Ordinance with regard to amendment of assessment.
- The Order was neither gazette nor available on the website of FBR. The taxpayers should know who is exercising authority and whether such exercise of authority is permissible.
- The Order does not delegate the statutory power of the Commissioner to Deputy Commissioner, therefore, the purported amendment made to the assessment order was not sustainable.

8. MERE ALLEGATION OF MALA FIDES IS NOT ENOUGH TO DISLODGE THE CORRECTNESS ATTACHED TO THE OFFICIAL ACTS

2023 128 (TAX) 501
SINDH HIGH COURT
SALEEM BUTT
VS
PAKISTAN THROUGH SECRETARY REVENUE DIVISION AND 2 OTHERS
APPLICABLE SECTIONS: 120,177 AND 177(1) OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The Petitioner challenged the notice issued under section177(1) of the Ordinance by the Commissioner Inland Revenue, calling upon the Petitioner to provide record for audit of his income tax affairs for the tax year 2013. The Petitioner did not file a reply to the notice but instead filed the suit for a declaration that "section 177 of the Ordinance and the audit notice under section 177 to be mala fide, completely without jurisdiction, unconstitutional, unlawful, void ab-initio and of no legal effect, while annulling the same." A consequential relief for injunction was also sought.

Through an earlier Suit, the Petitioner had also challenged a notice issued by the Directorate of the Intelligence and Investigation (Inland Revenue) to call for record under section 176 of the Ordinance.

Decision:

The SHC decided the suit against the petitioner in the following manner in light of the various judgments by the August Courts:

- Where a statute is not ex-facie repugnant to Fundamental Rights but is capable of being so administered, it cannot be struck down unless the party challenging it can prove that it has been actually so administered. The Petitioner had also to demonstrate that the powers exercised by the Commissioner Inland Revenue under said provision had actually lead to an infringement of the Petitioner's Fundamental Right under Article 25 of the Constitution, which is not the case in hand.
- It is settled law that a mere allegation of mala fides is not enough to dislodge the presumption of correctness attached to official acts, and before the allegation of mala fides in fact can be allowed to be proved, such mala fides have to be pleaded with particulars. Apart from a bare averment of mala fides, the plaint does not give any particulars. Resultantly, the allegation of mala fides requires no probe.

Sindh Sales Tax on Services Act, 2011

A. Notifications:

Federal Sales Tax

1. S.R.O. No. 1525-DI (1)/2023 dated December 12, 2023

Through this SRO, FBR has notified following registered persons in terms of Rule 150Q of the SRO 1525 (1) /2023 whereby option to issue e-invoice has been substituted with mandatory requirement for issuance of e-invoice through system for the notified registered persons.

- All importers and manufacturers of fast-moving consumer goods (FMCG)
- All wholesalers (including dealers) of FMCG
- All wholesaler-cum-retailers involved in bulk import and supply of FMCG on a wholesale basis to retailers

"fast-moving consumer goods" refers to consumer goods that are sold through retail marketing based on daily demand from consumers, excluding durable goods.

2. S.R.O. 1842(I)/2023 dated December 21, 2023

As per clause (g) of subsection (43) of section 2 to the ST Act (inserted vide Finance (Supplementary) Act, 2022), Tier-I retailers include a retailer whose deductible withholding tax under sections 236G or 236H of the Income Tax Ordinance, 2001 during the immediately preceding twelve consecutive months has exceeded the threshold as may be specified by the Board through notification in the official Gazette.

Through this notification, a new sub-rule (5) has been added to the Rule 150ZEA of Chapter XIVAA of the ST Rules, specifying the threshold of deductible withholding tax under section 236H of the Income Tax Ordinance, 2001, as that exceeding Rs. 100,000 during the immediately preceding twelve consecutive months.

It is notable that the retailers covered under section 236H are retailers of pharmaceuticals, poultry and animal feed, edible oil and ghee, auto-parts, tyres, varnishes, chemicals, cosmetics, IT equipment, electronics, sugar, cement, iron and steel products, motorcycles, pesticides, cigarettes, glass, textile, beverages, paint or foam sector.

Sindh Sales Tax on Services

3. SRB-3-4/62/2023 dated December 28, 2023

A new rule 17A has been introduced to the Sindh Sales Tax on Services Rules, 2011 specifying procedures for the registered persons to apply for corrections to be made in Computerized Payment Receipts (CPR) including correction of tax period due to any mistakes made in good faith.

In this regard, following documents would be required:

i. Written application on the business letter head, specifying justification in support of request for correction, proposed to be made, in CPR;

ii. Copy of the relevant verified Return;

iii. copy of the Computerized Payment Receipt;

iv. In case the mistake in the CPR was due to the Bank, a letter from the bank and affidavit from the person in whose name the payment was deposited;

v. For correction of National Tax Number on CPR, affidavit from the person on whose name the payment has been deposited; and

vi. Any other document as may be required by the Commissioner.

The Commissioner after examining and verification whether the CPR has not been previously claimed against any payment due, will approve the request after obtaining concurrence of the intended approval from the concerned supervisory Member of the Board.

The Commissioner will then inform the applicant and the concerned officers of SRB, as well as the Chief Manager, PRAL in SRB, about the approved changes.

The Commissioner and Chief Manager, PRAL will also maintain records of these changes. If the request is refused, a letter of refusal will be served on the applicant, stating the reasons for refusal.

4. SRB-3-4/62/2023 dated December 29, 2023

New amendment to the rules have been made to the Sindh Sales Tax Special Procedure (Tax on Specified Services) Rules, 2023 as discussed below;

i. In sub-rule (2) of rule 1, a proviso has been inserted specifying non applicability of these rules in cases where the recipient of specified services is a company which is on the Active Taxpayers List maintained either by SRB under the Act or by FBR under the ST Act.

ii. The scope of the specified services covered under these rules has been enhanced through insertion of the following entry:

S. No.	Description	Tariff heading	Rate
3.	Services provided or rendered by market research agency 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.	9818.3000	13%

Sales Tax Act, 1990

A. Reported Decisions

1. UNDER SALES TAX ACT IT IS DEPARTMENT'S DUTY TO ESTABLISH FACTS ON THE STANDARD OF BALANCE OF PROBABILITIES

2023 PTD 1492
SUPREME COURT OF PAKISTAN
COMMISSIONER INLAND REVENUE KARACHI
Vs
M/S AL-ABID SILK MILLS LTD

Applicable Provisions: 25, 8(1)(c)(A) of the ST Act, 1990.

Brief Facts:

In the instant case, pursuant to a report of the Directorate General, Intelligence and Investigation ('Directorate of I I') the department issued a SCN alleging that eight distinct entities were involved in issuing fake/flying invoices and had not deposited the tax in the treasury. The registered person was called upon to explain why the input tax claimed against these alleged fake/flying invoices should not be recovered along with default surcharge and additional tax. However, no meaningful effort was made by the sales tax officials to conduct an audit nor was a proper inquiry made by exercising powers conferred under the ST Act in order to verify the allegations made in the report. The SCN proceedings were culminated into passing of order against the registered person, against which the appeals preferred by the registered person were dismissed by both the Commissioner Inland Revenue (Appeals) and the Appellate Tribunal Inland Revenue. The registered person invoked the jurisdiction of the High Court under section 47 of the ST Act, proposing questions of law arising from the judgment of the Tribunal.

Decision:

The Supreme Court dismissed the petition by taking the view that the Department had failed to establish the allegations against the registered person, as it had not fulfilled its duty to prove that the tax had not been paid or charged.

The Court also held that there was no provision in the ST Act that placed a reverse onus on the registered person, as there was in other fiscal statutes. The Department's SCN proceedings were concluded against the registered person based on mere presumptions, without first verifying the facts. The Court found that the Department's duty to establish facts on the standard of balance of probabilities was on them under ST Act.

The Court's further held that the LHC's interpretation of the provisions of the Act in this case have found to be unimpeachable.

2. NO PREJUDICE WAS CAUSED TO THE TAXPAYER DUE TO THE OMMISSION OF MERELY MENTIONING SECTION 11(3) INSTEAD OF SECTION 36 OF THE ACT DID NOT RENDERED THE NOTICES INVALID UNDER THE LAW

2023 PTD 1528
LAHORE HIGH COURT

COMMISSIONER INLAND REVENUE, LTU, KARACHI
VS
MESSERS AHMAD STRAW BOARD PRIVATE LIMITED

Applicable Provisions: 11, 36 & 47 of the ST Act, 1990.

Brief Facts:

In the instant case, the respondent registered person was confronted for claiming inadmissible input tax adjustment against the invoices of blacklisted units, without any physical transfer of goods, thus, demands of sales tax along with default surcharge and penalty were raised by the department. Feeling aggrieved, the respondent filed appeal before Commissioner (Appeals), which were partly allowed. In further appeals, learned Appellate Tribunal observed that Show-Cause notices ought to have been issued under Section 36 of the Act instead of Section 11(3) as latter was introduced in statute book vide Finance Act, 2012 and the matters were relating to the years 2008 to 2012 based on which the

Appellate Tribunal proceeded to vacate the orders of Taxation Officer.

Being aggrieved, Applicant department filed reference application before the High Court with following question of law;

"Whether on the facts and circumstances of the case, the amendment in section 11 of the ST Act, made vide FA 2012, is procedural in nature and applies to all the pending adjudications?"

Decision:

The High Court set aside the orders in all cases and remanded back to the Appellate Tribunal for decision afresh after providing an opportunity of being heard to both parties.

The Court held that that it is manifestly clear that Appellate Tribunal has misunderstood the factual as well as legal planes of the matter, which has rendered the impugned orders unsustainable in law.

The Court placed reliance on the cases i.e. 2008 SCMR 615, 2007 PTD 967 and 2016 SCMR 816 and further held that no prejudice was caused to the respondent due to the omission that merely mentioning of section 11(3) instead of section 36 of the Act. It did not render the notices invalid under the law.

3. IT IS THE RESPONSIBILTY OF THE TAXPAYER TO ENSURE COMPLIANCE OF THE LEGAL PROVISONS

2023 PTD 1606
APPELLATE TRIBUNAL INLAND REVENUE

M/S CITY CASH AND CARRY, FAISALABAD
VS
COMMISSIONER INLAND REVENUE

Applicable Provisions: 3(9A), 11, 33(24) & 40C of the ST Act.

Brief Facts:

M/s. City Cash and Carry, was integrated with FBR's Computerized System for monitoring and reporting sales and business transactions through a POS software. As an integrated retailer, the appellant was required to accurately declare its entire sales through the POS system. However, it was found that the appellant issued invoices outside of the integrated POS system and an invoice was confiscated. The appellant was issued a show-cause notice for potentially violating section 33(24) of the ST Act, which imposes penalty for such violations. Officer concluded the proceedings and finalized order-in-original by imposing penalty of Rs. 500,000 on the ground that no one attended the proceedings on behalf of the appellant.

Feeling aggrieved, the appellant then filed an appeal before the Commissioner (Appeals), which was rejected. The appellant approached Appellate Tribunal for second appeal wherein the appellant contended that due to internet connectivity issue of the software, invoices could not be issued in the prescribed manner, however, the appellant taxpayer has duly shown the same in monthly sales tax return, hence, committed no violation of law and tax evasion.

Decision:

Appellate Tribunal upheld the decision of Commissioner (Appeals) and dismissed the appeal filed by taxpayer on the following grounds;

- ATIR referred case of M/s Fiza Noor Creations (Pvt.) which held that 'sales tax'
- Issuance of invoice other than prescribed manner as given in the provisions of the sales tax law is an admitted position and the appellant appears to be habitual in committing such default as penalty was also imposed to the registered person against other invoices of different dates. It is the responsibility of the taxpayer to ensure compliance of the legal provisions which has not been done in the instant case. The argument of internet connectivity issue is neither convincing nor substantiated.
- The appellant's lack of participation in the proceedings below has made it evident that they have not pursued the matter with due diligence and instead, seemingly avoided the proceedings before the learned authorities below.
- For the argument taken that section 11 of the ST Act, applies only to short payments of tax and cannot be applied to penalties, includes not only tax but also additional tax, default surcharge, fines, and penalties

payable under the ST Act or its rules. Sales tax (including penalty) can only be assessed and recovered under section 11 of ST Act.

4. IMPOSITION OF FURTHER AND EXTRA TAXES IS ILLEGAL ON SUPPLIES MADE TO A PERSON WHO IS NOT REQUIRED TO OBTAIN REGISTRATION

2023 PTD 1667
LAHORE HIGH COURT

DAWAAT SARAYE
VS
FEDRATION OF PAKISTAN AND OTHER

Applicable provisions: 14, 14(1), 13(2), 3(1A) and 3(5) of the ST Act.

Brief facts:

M/s Dawaat Saraye filed writ petition before the High Court against imposition of further and additional taxes by the Commissioner for non-registration under the Act, contending that being engaged in providing exempt supplies, it was not required to be registered under the sales tax law and that is whythe name of the business was not on active taxpayer list of sales tax.

The petitioner argued that Section 14(2) of the Act envisages an option for a person who is not engaged in making taxable supplies in Pakistan by stipulating words/phrases in the section 14(2) as "if required to be registered" and "may apply for registration". It was further argued that the tone of the provision of section 14 does not compel one to read 'may' as 'shall'. Using the word 'may' is an option with the person not engaged in making taxable supplies, if he intends to import or export.

Decision:

The Court allowed the petition in favor of the petitioner by taking the view that condition for levying further tax under Section 3(1A) of the Act is that taxable supplies are made to a person who has not obtained a registration number or is not on the active taxpayer list, whereas this condition is not applicable to the petitioner in this case.

The Court clarified that although the condition for making taxable supplies being electricity is fulfilled, however, the petitioner being a recipient of such supply is not required to be registered compulsorily, therefore he should not be subject to further tax under section 3(1A).

The Court further held that the phrase "who has not obtained registration number" implies that a person who is required to be registered under Section 14(1) of the Act or any other provision or federal law has not obtained registration. However, in this case, it was not established through an order after issuing a notice for registration that the petitioner was required to be registered under any other provision or federal law. Therefore, the imposition of further and extra taxes on the petitioner is illegal.

Khyber Pakhtunkhwa Sales Tax On Services Act, 2022

A. Reported Decisions

1. TRIBUNAL HAS COMMITED SERIOUS ERROR BY IGNORING THE TIME LIMITATION AND REMANDING BACK THE ORDER TO COLLECTOR APPEALS

2023 PTD 1782
PESHAWAR HIGH COURT

TELENOR MICROFINANCE BANK LIMITED
Vs
APPELLATE TRIBUNAL FOR SALES TAX ON SERVICES

Applicable Provisions:
19(2),20(2),27(2),40,40(1),40(3),64,65 and 68 of ST Act, 1990

Brief Facts:

Petitioner-bank issued with a show-cause notice wherein it was alleged that the bank claimed input tax against the output tax which is not permissible on account of receipt of services from the persons not registered with Khyber Pakhtunkhwa Revenue Authority (KPRA), thereby, disallowed input tax adjustment along with imposing liability on account of failure to withhold tax, thus, creating a tax demand under section 27(2) read with section 19(2) and 20(2) of the Act.

In its response, the issue of limitation was also raised by the petitioner which was disregarded and the officer passed the final assessment order, imposing liability of sales tax along with default surcharge and penalty.

Being aggrieved, petitioner filed appeal before the Collector (Appeals) which was rejected. The petitioner feeling dissatisfied with the decision and preferred an appeal before the Appellate Tribunal, who remanded the matter to the authorities of KPRA for a fresh decision on merits while setting aside the orders of both authorities. However, petitioner bank filed the reference application before the PHC with following questions of law:

a. Whether on facts and under the circumstances of the case, the Tribunal was justified in accepting the general condonation by KPRA in violation of the judgment of Hon'ble Supreme Court of Pakistan?

b. Whether on facts and under the circumstances of the case, the Tribunal was justified in accepting the distortion and re-opening of a past and closed transaction in violation of the judgment of the Hon'ble Supreme Court?

c. Whether on facts and under the circumstances of the case the Tribunal was justified in remanding back the case of Assessing Authority for curing defects in show cause notice and order-in-original in violation of judgments of Hon'ble Supreme Court of Pakistan and Hon'ble Higher Courts of the Country?

d. Whether on facts and under circumstances of the case the Tribunal was justified in ignoring the judgments of higher judicial fora that were binding upon it under Articles 189, 201 of the Constitution of Pakistan?

Decision:

The instant reference was returned answering the aforesaid two questions of law (c) and (d) positively.

The Court held that the Additional Collector exceeded the time limit set out in sub-section 3 of section 40 of the KP Finance Act for passing the assessment order after issuance of the show cause notice to the petitioner. The legislators have granted the assessment officer the authority to extend this time limit under sub-section (3) of section 40, but in this case, the Additional Collector did not exercise this jurisdiction and instead approached the authority to condone the delay caused in passing the assessment order within the time limit set out in section 99 of the KP Act.

The Court also held that the learned Tribunal has also committed a legal error by remanding the matter to the Additional Collector for passing a fresh reassessment order without answering whether the assessment order was barred by time and thus could not be reopened. As a result, the judgment of the learned Tribunal has been set aside, and the appeal decided by it shall be deemed pending before it for answering the legal question raised by the petitioner.

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.

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