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Tax Bulletin

JULY 2023

Tax

Foreword

This publication contains brief commentary on Circulars and SROs issued during June 2023 and important reported decisions.

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Karachi
July 11, 2023

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Executive Summary

Income Tax Ordinance, 2001

A. SRO

1. S.R.O. 776(I)/2023

Through this SRO, changes made by FBR vide S.R.O. 640(I)/2023 dated May 31, 2023 have been approved. Resultantly, amendments in Rule 13N and 19H and new Rule 19I related to taxation of Capital gains falling under NCCPL regime have become part of the Income Tax Rules, 2002.

SRO 640(I)/2023 dated May 31, 2023 made following amendments in the Rules:

Rule 13N: Special procedures for computation of capital gains and collection of tax:

Through the amendments made via Finance Act, a proviso was added to section 37A (1) which provides that section 37A will not apply to disposal of shares of listed company including an IPO, made otherwise than through registered stock exchange and which are not settled through NCCPL. In such circumstances, disposal of listed securities will be subject to provisions of section 37 i.e. at normal corporate tax rates.

Sub-rule 3A of rule 13N, provided that Asset Management Companies and PMEX shall continue to determine, compute and collect tax on capital gains on open ended mutual funds and future commodity contracts and shall deposit the same with NCCPL within 10 working days of the month end. This is an exception to sub-rule 1 which states that NCCPL shall collect tax on capital gains as provided in Eight Schedule to the Ordinance.

An amendment is made in rule 13N by adding reference to the second proviso to sub-section (1) of section 37A.

Considering the above amendment in Rules, the amendment introduced in section 37A, as discussed above, will not apply for open ended mutual funds where Asset Management Companies and PMEX are required to collect and deposit tax to NCCPL. As such, these transactions will still be taxed under section 37A, though these are not directly settled through NCCPL.

Rule 19H:

Rule 19H was introduced vide SRO 960(I) / 2021 dated August 02, 2021 for providing clarification and computation of capital gains and determination of fair market value under section 101A (Gain on disposal of assets outside Pakistan).

Section 37(6) of the Ordinance states that the person acquiring a capital asset, being shares of a company, shall deduct advance tax from the gross amount paid as consideration for the shares at 10% of the fair market value of the shares which shall be paid to the Commissioner within 15 days of payment. Section 37(7) of the Ordinance provides that notwithstanding the provisions of section 68, the value of shares for the purpose of section 37(6) shall be fair market value as determined under section 101A(4), without reduction of liabilities.

Considering the above provisions of section 37, now amendment has been made in the Rule 19H to include reference to section 37(7) of the Ordinance.

Rule 19I: Application of this rule:

New rule, 19I has been introduced for applicability of second proviso of sub-section 1 of section 37 of the Ordinance.

It states that section 37A shall not apply to the disposal of shares of listed companies otherwise than through registered stock exchange and which are not settled through NCCPL. Further, for the purpose of second proviso to sub-section (1) of section 37A, shares of a listed company shall not include units of a mutual fund or collective investment scheme or a REIT scheme or derivative products. It is clarified that the provisions of section 37A shall remain applicable on transactions of shares of listed companies as recorded in the system of NCCPL and reported in accordance with Eighth Schedule of the Income Tax Ordinance 2001. Thus the provisions of section 37A shall remain applicable on disposal of such units, schemes or products.

B. Reported Decisions

1. CONDITIONS SPECIFIED UNDER THE RELEVANT PROVISIONS OF LAW TO BE STRICTLY ADHERED FOR MAKING BEST JUDGMENT ASSESSMENT OR AMENDMENT OF ASSESSMENT

127 TAX 103
APPELLATE TRIBUNAL INLAND REVENUE

M/S. NOA HEMIS PHARMACEUTICALS, KARACHI
VS
THE COMMISSIONER INLAND REVENUE, KARACHI

APPLICABLE SECTIONS: 23(4), 111, 114, 115, 120, 121, 122, 174, 176, 177, 214C OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The Appellant taxpayer in the instant case is an individual engaged in the business of pharmaceuticals and medicines. Taxpayer's return of income was selected for audit under section 214C of the Ordinance. The assessing officer issued notices for intimation of audit and obtaining information under sections 177 and 176 of the Ordinance. As per the arguments of the assessing officer, the Authorized Representative (AR) of the taxpayer requested adjournment on the due date of compliance and subsequently neither anyone appeared in the office nor any details were submitted. Resultantly, the officer issued show-cause notice under section 122(9) of the Ordinance and passed an adverse order under section 121(1)(d) of the Ordinance as best judgment assessment. Being aggrieved, the taxpayer filed appeal before the Commissioner Appeals which was dismissed on the basis of absence of the taxpayer in the hearings fixed. After the decision of Commissioner Appeals, the taxpayer filed appeal before the Appellate Tribunal Inland Revenue (ATIR) on the following grounds:

- No audit report was issued under section 177(6) of the Ordinance before invoking section 122;

- Mandatory requirement of providing opportunity to rebut audit observations under section 177 was not fulfilled in the given case, hence the entire proceeding is void-ab-initio; and

- Definite information was not available with the assessing officer that is a pre-requisite for amendment of assessment under the relevant provisions of the Ordinance.

Decision:

The ATIR remanded back the case to the assessing officer for deciding the case strictly on merit in accordance with the law applicable on the basis of following observations:

- For best judgment assessment, notice shall be issued to the taxpayer for initiating the proceedings under section 121 of the Ordinance and any one of the conditions mentioned under sub-section (1) shall meet. Best judgment is not possible to be reached by mere subjective satisfaction but also involves an objective assessment of the facts available. Further, the assessing officer should also give a valid reason for arriving at a particular figure of income.

On the basis of available facts, it is evident that notice under section 121 was not issued nor the impugned ex-parte order fulfilled the declared requirements of best judgment assessment.

- Submissions of the taxpayer including details / documents / reconciliations were disregarded, therefore, the order cannot be assessed as best judgment assessment.

- Notice under section 122(9) was issued subsequent to selection and conduct of audit as such the order should have been passed under sub-section (5) of section 122 for amendment of assessment. If the provisions under section 177(10) were invoked then best judgment assessment should have been made under section 121(1)(d) of the Ordinance.

- The ATIR held that an assessment made under section 120 of the Ordinance cannot be amended merely by issuing notice under section 122(9) of the Ordinance. A complete procedure needs to be followed that requires the assessing officer to issue an audit report under section 177(6) of the Ordinance even if the taxpayer is non-responsive. After obtaining rebuttal of the audit findings, if the officer is satisfied that assessment needs to be amended, only then he can issue notice under section 122(9) read with section 122(1) of the Ordinance after obtaining jurisdiction over the case and fulfilling conditions of section 122(5) of the Ordinance. If this is an amendment of assessment under section 122(5A) then definite information is missing in the instant case.

2. SELECTION OF AUDIT SHOULD BE INDEPENDENT AND BASED ON IMPARTIALITY AS PER THE POWERS VESTED UNDER THE LEGAL PROVISIONS OF THE LAW.

(2023) 127 TAX 721
LAHORE HIGH OURT

MESSRS D.G. KHAN CEMENT COMPANY LIMITED
VS
THE FEDERAL BOARD OF REVENUE

APPLICABLE SECTIONS: 177 AND 214C OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

Number of taxpayers belonging to different sectors of the economy such as Edible Oil Manufacturers, Auto Industry, Aerated Water Manufacturers, Beverages, Traders of Electronics, Cement and Housing Societies were selected for audit by the Commissioners Inland Revenue (CIR) as sector-wise selection on the basis of directions issued by the FBR to the Chief Commissioner and other field formations. Being aggrieved, the taxpayers filed constitutional petitions challenging the audit selection mainly on the following grounds:

- FBR cannot interfere in the independent discretionary powers of the CIR to select and conduct audit.

- Selection for audit under section 177 of the Ordinance by the CIR and under section 214C of the Ordinance by the FBR are two independent methods of selection for audit. Whereas issuing directives by the FBR to the CIR for audit selection in the instant cases have compromised both these independent processes of selection of audit.

Decision:

The Lahore High Court through this judgment accepted all the petitions, involving similar questions of law, and declared such selection of audit to be without lawful authority and of no legal effect in the following manner without preventing CIR concerned from exercising his independent authority under section 177 of the Ordinance to proceed afresh in individual cases strictly in accordance with law:

- It is well settled legal position that when a particular authority is vested with the

power to discharge statutory duty then it is that authority alone, who has to apply its independent mind and arrive at its own conclusion without being influenced by any other authority.

- By issuing directives by the FBR to the CIR along with timelines for various steps commencing from the selection for audit till passing of assessment orders, seemed to be interference with the competence conferred to the CIR under the Ordinance.

- The powers and functions of FBR include, inter alia, to adopt modem effective tax administration methods and to direct or advise where necessary, investigation into suspected tax evasion, tax fraud, money laundering and to coordinate with the relevant law enforcing agencies. However, these powers and functions do not authorize FBR to interfere in statutory functions, duties and discretion of the CIR.

- Section 206 of the Ordinance that endows FBR with powers to interpret provisions of the Ordinance by issuing circulars for such purpose cannot be employed by the FBR to direct the CIR to exercise his discretionary authority for selection of audit cases.

- FBR can also not exercise its authority under sections 213 and 214 of the Ordinance under the garb of providing guidance in such manner that it controls or fetters the discretionary audit selection authority vested in the CIR.

3. INSTALLMENT PAYMENTS FROM THE CUSTOMERS UNDER THE AGREEMENT FOR SALE OF DEVELOPED PROPERTY ARE CONSTRUED AS LONG TERM CONTRACT FOR THE PURPOSE OF TAXATION UNDER THE ORDINANCE

(2023) 127 TAX 680
ISLAMABAD HIGH COURT

MESSRS EMAAR DHA ISLAMABAD LIMITED
VS
COMMISSIONER INLAND REVENUE (LEGAL)

APPLICABLE SECTIONS: 21C, 36, 100D, 111, 122 AND 177 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The petitioner (the company) was selected for audit under section 177 of the Ordinance and, inter alia, was required to satisfy the tax department as to why proceeds for sale of developed property shall not attract the chargeability of income under the head 'Income from Business' form a long term contract on the basis of the percentage of completion method. Accordingly, the assessment was amended by the tax department by making various additions under sections 21(c), 36 and 111 of the Ordinance.

Being aggrieved, the company filed appeal before the Commissioner Appeals, who upheld the subject additions made in the taxable income. The company then preferred an appeal before the Appellate Tribunal Inland Revenue (the ATIR) who also upheld the aforementioned additions. Subsequently, the company filed income tax reference application (the ITRA) before the Islamabad High Court (the IHC) by contending as under:

- The company being a developer and not a construction contractor had only long term contract with the contractors to undertake the construction of property within the development project, who eventually were required to treat their revenue under section 36 of the Ordinance.

- Land and property, being developed by the company, are treated as stock-in-trade and revenue in relation to which is offered for tax at the time of sale to customers, therefore, all amounts received from the customers till the transfer of title in relation to the land were treated as stock-in-trade and not charged in profit and loss account and,

therefore, additions under section 21(c) of the Ordinance are not sustainable.

- The additions made under section 111 of the Ordinance and confirmation thereof by the authorities below i.e. Commissioner (Appeals) and the ATIR need to be construed as misreading of the provisions and facts of the case.

Decision:

The IHC answered **in negative** all the points raised by the company in the ITRA and concurred with the findings of the authorities below i.e. Commissioner (Appeals) and the ATIR in the following manner:

- The receipts of the company in lieu of installment payments can neither be regarded as equity nor as debt of the company but these receipts constitute the sale consideration paid by the customers (advances) in lieu of property to be constructed and sold by the company and, accordingly, the company is not allowed to withhold such receipts as its own capital investment till the final transfer of subject property. Further, as per the International Accounting Standard 11, revenue arising from contracts for service such as those of project managers and architects is dealt as construction contract. Thus the company is required to offer such revenue from the customers (as installment payments) for tax to the State in proportion to the amount of work completed as agreement for sale with customer fall under the definition of long-term contract as mentioned under section 36(3) of the Ordinance.

- In connection with the above discussion, the company is required to account for the cost allocated to the contract and incurred before the end of the tax year, therefore, section 21(c) of the Ordinance has rightly been invoked.

- As regards the additions under section 111 of the Ordinance, it is construed that ATIR is the last fact finding authority and anything not produced satisfactorily before the below appellate forums cannot be plead before the Higher Courts.

4. AMENDMENTS MADE TO SECTION 65B VIDE FINANCE ACT 2019 INFRINGE VESTED RIGSHTS OF PETITIONER ON PAST AND CLOSED TRANSACTIONS

127 TAX 639
SINDH HIGH COURT
SAPPHIRE TEXTILE MILLS LIMITED VERSUS
FEDERATION OF PAKISTAN and OTHERS

APPLICABLE SECTIONS: 65B (1), 65B (2), 65B (3),

Brief Facts:

As envisaged under Section 65B of the Ordinance, before amendments introduced vide Finance Act 2019, tax credit at the rate of 10% was available in respect of acquisition and installation of plant and machinery until June 30, 2021. Finance Act 2019 curtailed the said credit period to June 30, 2019 and reduced the rate of tax credit from 10% to 5%. The said amendments were challenged through various constitution petitions before the Honorable Sindh Court (SHC). There were following two categories of petitioners who were affected by the amendments introduced vide Finance Act 2019:

(i) Those who purchased and installed the plant and machinery by June 30, 2019 but were deprived of half of the tax credit due to reduction in the rate of credit by 5%;

(ii) Those who had purchased the relevant plant and machinery prior to amendment introduced vide Finance Act 2019; however, completed the installation before June 30, 2021 but still could not claim the tax credit due to curtailment of period, allowed for acquisition and installation to avail the credit, till June 30, 2019.

The petitioners contended as under:

(i) Section 65B of the Ordinance, as it stood before the amendments brought through

vide Finance Act 2019, extended a benefit in shape of tax credit to qualified persons and resultantly, accrued a vested right of the taxpayers upon past and closed transactions who had made investment in prescribed manner.

(ii) The curtailment of the benefit, provided in shape of tax credit, amounted to impermissible vitiation of vested right on past and closed transactions.

Decision:

The SHC decided the petitions in favour of petitioners and held that:

a) The two categories identified were found to have protected vested rights and such rights could not be vitiated in the manner intended by the amendment to section 65B of the Ordinance by the Finance Act 2019.

b) Tax credit under section 65B at the rate of 10% shall be available where plant and machinery was purchased before June 30, 2019 and installed before June 30, 2021.

c) Tax credit shall be allowed to be claimed in tax year in which the plant and machinery is installed.

d) Tax department shall determine whether the pertinent plant and machinery were purchased and installed within the period specified supra.

Sindh Sales Tax Act, 2011

Notifications

1. SRB-3-4/27/2023, DATED JUNE 8, 2023

ACTIVE AND NON-ACTIVE REGISTERED PERSON

Through this notification, Sindh Board of Revenue has, by exercising powers conferred under section 72 of the Sindh Sales Tax on Services Act, 2011 (SSTS Act), made further amendments in Sindh Sales Tax on Services Rules, 2011 (SSTSR). Rules 9A and 9B are inserted to identify situations when a registered person will be treated as non-active, and the consequences of being non-active including the procedure for restoration of such active status have been specified in said rules.

These rules are summarized as below:

a. A person registered with SRB would become Non-Active:

i. Upon suspension of registration.

ii. Due to failure to e-file returns consecutively for four tax periods.

b. Consequences of becoming Non Active:

i. Non eligibility to claim of refund under the SSTS Act.

ii. Non eligibility to avail any exemption or concession under the Act or under the rules and notifications issued under the Act.

iii. Non eligibility to participate in the competitive bidding under the Sindh Public Procurement Rules, 2010.

iv. Inability for the person acquiring taxable services from a non-active person to claim input tax on such services.

v. The business premises of the non-active person shall be liable to be sealed in terms of clause (b) of section 54B of the SSTS Act.

c. Restoration of status as an active person:

i. Upon e-filing the prescribed tax return / statement in the prescribed manner with evidence of payment of the tax due; or

ii. Through issuance of an order by the concerned Commissioner SRB or the Board after satisfying itself that the conditions for restoration of status as an active person, are complied.

2. SRB-3-4/28/2023, dated June 9, 2023

EXEMPTION OF SINDH SALES TAX ON CERTAIN SPECIFIED SERVICES FOR MATERNAL AND CHILD HEALTH CARE FACILITIES FUNDED BY JICA

Through this notification, SRB exempts following services directly received or procured by Health Department, Government of Sindh in relation to the project for the extension of maternal and child health care facilities in Sindh. The project is funded by way of grant provided by Japan International Cooperative Agency (JICA).

S.No.	Tariff heading	Description of Services
1	9809.0000	Services provided or rendered by persons engaged in contractual execution of work or furnishing supplies.
2	9814.2000	Contractors of building (including water supply, gas supply and sanitary works), roads and bridges, electrical and mechanical works (including air conditioning), horticultural works, multi-discipline works (including turn-key projects) and similar other works.
3	9815.4000	Management consultants.
4	9815.5000	Technical, scientific and engineering consultants.
5	9824.0000	Construction services.
6	9839.0000	Erection, commissioning and installation services.

3. SRB-3-4/29/2023, DATED JUNE 12, 2023

ADDITION OF CERTAIN SERVICE PROVIDERS, WHO ARE TO FILE QUARTELY RETURN

Through this notification, the Board has added following service providers in notification SRB-3-4/10/2011, dated October 18, 2011 which requires quarterly filing of return for specified services:

Description
Persons providing or rendering the standalone services of cosmetic dental surgery, orthodontics, aesthetic dentistry and other such similar processes of cosmetic dental services classifiable under tariff heading 9842.0000 of the Second Schedule to the Act.

4. SRB-3-4/33/2023, DATED JUNE 26, 2023

PLACE OF PROVISION OF SERVICES FOR INSURANCE AGENT

Through this amending notification, the Board has aligned the Sindh's place of provision of services rules with other jurisdictions in the case of Insurance Agent. As a result of said amendment, the place of provision of service for insurance agent will be the location of the insurance agent instead of location of the office or branch of the insurance company paying commission to the insurance agent.

Sales Tax Act, 1990

Reported Decisions

1. REFUND OF INPUT TAX NOT CLAIMED IN RETURN

2023 PTD 320
(2023) 127 TAX 625

THE SUPREME COURT OF PAKISTAN
COMMISSIONER INLAND REVENUE, KARACHI
Vs
M/S ATTOCK CEMENT PAKISTAN LIMITED

Applicable Provisions: Sections 7(1), 8(1)(a), 10(2) & 66 of the Sales Tax Act (ST Act)

Brief Facts:

M/s. Attock Cement Pakistan Limited (the Company) filed refund claim of input taxes paid on the import of new cement grinding mill machinery and spare parts on June 11, 1997 which were to be filed within one year under section 66 of the ST Act.

The claim was subsequently rejected by the Assistant Collector (Refund) Sales Tax contending that input tax adjustment cannot be adjusted as per section 8 of the ST Act as the cement had become exempt through Finance Act, 1997, therefore input tax adjustment on cement machinery and spare parts cannot be allowed. It was also contended that the company failed to adjust the input tax in the relevant tax period as specified in section 7(1) of the ST Act. The Company challenged the OIO before the Commissioner Appeals which was dismissed.

The respondent company filed appeal before the Tribunal against the confirmation of OIO by the Commissioner Appeals. The Tribunal decided the case in the favour of the respondent company holding that the new machinery had commenced production of cement in May 1997, while the production and supply of 'pure slag' continued before and after the grant of exemption of sales tax on cement under the Sales Tax Act. The Tribunal also held that the time limitation in section 7(1) of the ST Act was introduced through Finance Act, 1998, therefore, such amendment could not be applied retrospectively. As to section 66 of the Sales Tax Act, the Tribunal held that the same was not applicable to the case of the respondent-company. The High Court also maintained the findings of the Tribunal.

Being aggrieved of the decision of High Court, the tax department filed an appeal before the Supreme Court of Pakistan, which addressed the issue by considering following questions of law:

i. Whether the adjustment of "Input tax" from the "Output Tax" could be availed without any time limitation.

ii. Whether section 66 was applicable in the facts of the present case, if so, whether, the application dated June 11, 1997 made by the respondent company can be considered as refund application under section 66.

Decision:

The Supreme Court decided the controversy regarding the failure of the respondent company in claiming the input tax on machine and spare parts as subsequently the cement became exempt and therefore the respondent company was not able to adjust its input taxes in the return.

The Court stated that the claim of the respondent company made in its application dated June 11, 1997 makes out a case for refund of the "over paid output tax" for the respondent company which "inadvertently" did

not adjust the input tax against the output tax in the return filed after the import of new machinery and spare parts. The Court held that the facility of making adjustment of input tax was available to the respondent company till July 1, 1997 when the supply of cement was taxable, and after exemption of cement by Finance Act 1997, there was no question of payment of output tax and hence input tax on machinery/spare parts could not have been adjusted by the respondent company. Thus the only remedy available was to seek the refund of excess amount of output tax paid by the respondent company under section 66 of the ST Act.

The Court therefore held that the respondent-company would be entitled to the refund, under section 66 of the ST Act, of the 'input tax' paid by it on machine and the spare parts, which was not adjusted in its tax returns.

2. DISALLOWANCE OF INPUT TAX U/S 8 OF THE ST ACT

(2023) 127 TAX 673
THE LAHORE HIGH COURT (LHC)

M/S DG KHAN CEMENT COMPANY LIMITED (APPELLANT)
Vs
FEDERAL BOARD OF REVENUE, (THE DEPARTMENT)

Applicable Provisions: Sections 2, 7, 8, 11(2) of the Sales Tax Act (ST Act), Federal Board of Revenue Act, 2007 & Constitution of Pakistan, 1973

Brief Facts:

The Appellant preferred constitutional petition before LHC against impugned SCN and subsequent notice issued under section 11(2) of the ST Act confronting disallowance of adjustment of input tax paid on pipes etc. under the garb of section 8(1)(h) of the ST Act. The Appellant contended that such items were purchased for the purpose of making taxable supplies, accordingly, it is legally entitled to claim the input tax in terms of sections 7 and 8 of the ST Act. The Appellant also placed reliance on the judgements passed by the LHC in the cases of Nishat Mills Limited and Coca Cola Beverages Pakistan.

Decision:

The Court observed that the only point involved in the matter is whether the inputs have been utilized for the purpose of taxable supplies or not as the Appellant claimed that the items, on which input tax has been adjusted, have been used only in its industrial establishment. Accordingly, the Court directed the Department to form a team of experts to conduct a physical verification of the appellant's premises and examine each invoice to determine whether the goods were used for the purpose of taxable activity or making taxable supplies and after completion of the said exercise, the relevant adjudicating authority would then decide the matter based on the findings and in accordance with the law.

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