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Tax Bulletin

June 2024

Tax

Foreword

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

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Income Tax Ordinance, 2001

A. Reported Decisions:

1. MONITORING PROCEEDINGS UNDER SECTION 161 OF THE ORDINANCE IS INDEPENDENT FROM THE PRECONDITION OF AUDIT UNDER SECTION 177 OF THE ORDINANCE

129 TAX 494
SUPREME COURT OF PAKISTAN

MESSRS ISLAMABAD ELECTRIC SUPPLY COMPANY LIMITED (IESCO)
VS
The APPELLATE TRIBUNAL INLAND REVENUE (H.Q), ISLAMABAD & OTHERS

APPLICABLE SECTIONS: 161, 177 AND 205 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

The petitioner in the instant case is a public limited company dealing in the supply of electricity to the consumers. The tax officer initiated monitoring proceedings of the petitioner and passed order under sections 161 and 205 of the Ordinance creating tax demand including default surcharge for non-deduction of withholding tax. Being aggrieved, the petitioner filed appeals before the Commissioner Appeals but could not succeed, thereafter, the appeal was filed before the Appellate Tribunal Inland Revenue (ATIR) which was also decided against the petitioner. Subsequently, the petitioner filed References in the High Court of Islamabad (IHC) but the question of law framed in the Tax References was also answered in negative upholding the order of the ATIR. The following question of law was framed before the IHC:

- *Whether under the facts and circumstances of the case, was the tax officer justified to hold proceedings and pass order under sections 161/205 of the Ordinance, without proceeding under section 177 of the Ordinance.*

Being aggrieved, the petitioner filed petition before the Hon'ble Supreme Court of Pakistan (SCP) on the basis that order under sections 161 and 205 of Ordinance cannot be passed without initiating proceedings under section 177 of the Ordinance which is a precondition before taking any adverse action under the said sections.

Decision:

The Hon'ble SCP decided the matter against the petitioner on the following basis:

- The course of action and benchmark enumerated under section 161 of the Ordinance is not contingent upon the compliance of pre-audit requirements mentioned under section 177, nor does section 177 of the Ordinance override or overlap the provisions contained under section 161 of the Ordinance as a precondition of audit, rather both the provisions are, in all fairness, seemingly independent with self-governing corollaries.

- So far as section 205 of the Ordinance is concerned, it is by and large related to default surcharge which obviously emanates the *characterization* of defaults in different scenarios, including where a person who fails to collect tax as required or fails to pay an amount of tax collected or deducted as required under section 160 of the Ordinance on or before the due date for payment is liable for default surcharge at a rate mentioned in the section.

2. IMMUNITY FROM TAXATION CANNOT BE CLAIMED SOLELY ON THE BASIS THAT THE BUSINESS PREMISES ARE ESTABLISHED IN FATA

129 TAX 475
SUPREME COURT OF PAKISTAN

CHIEF COMMISSIONER/ COMMISSIONER INLAND REVENUE, PESHAWAR
VS
M/S. AKBAR KHAN FILLING STATION AND OTHERS

APPLICABLE SECTIONS: 129, 133, 156A AND 170 OF THE INCOME TAX ORDINANCE, 2001 (THE ORDINANCE)

Brief Facts:

Section 156A of the Ordinance requires every person selling petroleum products to a petrol pump operator to deduct tax from the amount of commission or discount allowed to the operator at the rate specified in Division VIA, Part III of the First Schedule to the Ordinance. The tax deductible under the said section shall be final tax on the income arising from the sale of petroleum products.

In the instant case, the respondents, being the buyer of petroleum products, filed refund application under section 170 of the Ordinance on account of tax deducted under section 156A of the Ordinance on the basis that their business locations are established in Federally Administered Tribal Area (FATA) where the enforcement of the Income Tax Ordinance is not applicable. In this regard, reference application was filed by the tax department before the High Court of Peshawar which was decided against the department. Hence, petition was filed by the department before the Hon'ble SCP.

Decision:

The Hon'ble SCP allowed the appeals filed by the tax department and set aside the judgments of the High Court and other appellate forums. It was held that immunity from taxation cannot be claimed solely on the basis that the business premises are established in FATA, and instead, the taxpayer must establish that taxable income is not being derived from areas where the statute is enforced and applicable.

The Court rejected the respondents' claim for refund of tax deducted under section 156A of the Ordinance, finding that the contractual arrangement between the companies selling petroleum products to the respondents was not properly disclosed. The Court held that the deduction of tax fell under the final tax regime and was correctly made by the seller companies outside FATA.

3. NO EXEMPTION CERTIFICATE IS REQUIRED WHERE TITLE OF GOODS TRANSFERRED FROM OUTSIDE PAKISTAN

(2024) 129 TAX 140
APPELLATE TRIBUNAL INLAND REVENUE, KARACHI

ARTISTIC ENERGY (PRIVATE) LIMITED, KARACHI
VS
THE COMMISSIONER-IR, ZONE-II, CTO, KARACHI

APPLICABLE SECTIONS: 2(41),107,101(3),109,129,152,152(5),152(7),152(7)(ii),152(7)(a)(iii),161,161(1),163,205 OF THE INCOME TAX ORDINANCE

Brief Facts:

The officer passed the Order under section 161(1) of the Ordinance by treating the taxpayer as an assessee in default on certain payments made without deduction of tax.

Being aggrieved by the above decision, taxpayer filed appeal in CIRA, who vide his order, decided the matter in favour of the tax department. Taxpayer preferred an appeal before ATIR.

Argument:

Taxpayer argued that they entered into two separate contracts / agreements with two separate and distinct entities as under:

- Off-shore contract with Hydrochina Corporation (HC) for supply of machinery
- On-shore contract with Hydrochina International Engineering Company Limited Pakistan (HIECLP) for construction services.

  HC is a non-resident company, having no permanent establishment (PE), in Pakistan whereas, HIECLP is branch office of a non-resident company in Pakistan.

  Taxpayer was not required to deduct tax while making payment on account of import of plant, since the title of such goods passed outside Pakistan, hence there was no requirement to even obtain an exemption certificate under section 152(5) read with section 152(7) of the Ordinance.

  The tax department argued that above transaction for sale of goods was part of an overall arrangement whereby the supply is made in connection with the overall arrangement for the supply of goods, installation, construction, assembly, commission, guarantees or supervisory activities between Hydrochina Corporation and Hydrochina International Engineering Company Limited (Branch Office).

The tax department further argued that both the contracts are in the nature of Engineering, Procurement and Construction (EPC) and have been bifurcated for supply of machinery and installation thereof only for the purpose of avoidance of tax on payment made to HC for purchase of machinery.

Decision:

ATIR decided the matter in favour of taxpayer as follows:

- Since 1922 Act, there has been a settled principle that the provisions of withholding income tax in so far as non-residents are concerned can only apply to such payments which represent non-resident's income chargeable to tax in Pakistan.
- The requirement to obtain an exemption certificate is inapplicable to a payer if the case falls within the purview of sub-section (7) of section 152 of the Ordinance.
- Based on his reading of both the offshore and onshore contracts, the assessing officer came to the conclusion that the contracts have been bifurcated into offshore and onshore contracts between a subsidiary and branch office to avoid tax. We have noted that in doing so, he has tried to assume the powers conferred upon the assessing officer under section 109 of the Ordinance. We, therefore, hold that the action of the assessing officer in relation to disregarding the corporate structure of offshore and onshore contractors tantamount to an action undersection 109(1)(d) which was neither warranted in this case nor it was applicable.
- If the interpretation of both the officers below with regard to the provisions of section 152(7), 2(41) and 101(3) are assumed to be correct then all amendments brought through Finance Act, 2018 particularly in relation to the new concept of 'cohesive business operation' becomes redundant. Needless to say, no redundancy can be attributed to the legislature.
- HIECL is a subsidiary of HC, however, holding shares by a parent company (HC) in its subsidiary (HIECL) would be of no legal implications leading to infer that HC is carrying out its activities in Pakistan through PE as per the definition of PE (as discussed in para 8 of Article 5 of the DTT). In view of this, the findings of the CIRA and Assessing officer based on the provisions of DTT and provisions of section 101 are grossly misinterpreted both from the viewpoint of the DTT provisions and the provisions of section 101 of the Ordinance.
- FBR in its clarification No.4(67)ITP/2009 dated 25-02-2010 has also clarified that the treaty has an overriding effect in so far as the matter of relief from tax payable under the Ordinance for determination of Pakistan source income of non-resident persons having no PE in Pakistan and determination of income attributable to operations carried on within or outside Pakistan is concerned. In such cases the provisions of section 152 are not applicable.
- In order for a PE to exist under the general definition, the non-resident must have a place of business (which could be constituted through the presence of any facility or machinery), such place of business must be fixed (in that it must be available at a specific place), and the business of the non-resident must be conducted through such place. However, where the non-resident person merely sells its goods from outside of the country, no PE is deemed to exist, and the non-resident may not be taxed in such country.
- Keeping in view the above analysis, it is clear that the assessing officer has completely misinterpreted the force of attraction rule which does not have any application to EPC Contracts. One may in fact note that the above discussion takes into account a situation where the PE of the same person was engaged in onshore activities relating to installation and assembly or goods manufactured by the head office outside the source country. Even in such a case, the UN experts felt that the force of attraction rule cannot be interpreted to tax the income relating to activities carried outside the source country.

4. THE HIGH COURT CANNOT REAPPRAISE FACTS TO SECOND GUESS FACTUAL DETERMINATIONS RENDERED BY THE ATIR

2021 PTD 1827 = (2024) 129 TAX 610
ISLAMABAD HIGH COURT

COMMISSIONER INLAND REVENUE, LEGAL ZONE, LARGE TAXPAYERS OFFICE
VS
WATEEN TELECOM LIMITED AND OTHERS

APPLICABLE SECTIONS: 22(2),122(9),133,137(2) OF THE INCOME TAX ORDINANCE

Brief Facts:

The Order under section 122(9) which reflected the handwritten date as June 29, 2016, but was purportedly passed on July 14, 2016, was challenged before the learned CIRA on the basis that Order-in-Original was passed beyond the limitation period and was not sustainable in the eyes of law.

CIRA remanded the matter back to the Commissioner for adjudication afresh under section 122(2) of the Ordinance and stated that amendment was framed in a fast mode without providing due opportunity of being heard to the taxpayer as enshrined in Article 10A of the Constitution and Section 24(A) of the General Clauses Act, 1924. Moreover, this is violative of FBR Circular No. 7 of 1994 which envisages that at least three notices of 15 days may be issued so as to provide ample time to the taxpayer to put forth their stance.

Being aggrieved, an appeal was filed before the ATIR, who also decided the matter in favour of taxpayer.

The tax department filed a reference application in the IHC raising following questions:

(i) What is the scope of jurisdiction of this Court under section 133 of the Ordinance and whether in exercise of such jurisdiction, this Court can sit in appeal over factual determinations made by the learned Tribunal.

(ii) Was the original Order issued beyond limitation period as prescribed under section 122(2) of the Ordinance and can the delay in passing the Order under section 122(1) be condoned by the appellate authorities provided for under the Ordinance.

(iii) Can the CIRA extend the period of limitation prescribed under section122(2) of the Ordinance in the event that the Original Order had been passed on the fag-end of the limitation period by remanding the matter back to the Commissioner to be decided afresh.

Decision:

IHC dismissed the appeal and decided the matter as follows:

- The jurisdiction of the High Court under section 133 of the Ordinance is appellate in nature, but as the third appellate forum provided under the Ordinance, the High Court cannot reappraise facts to second guess factual determinations rendered by the ATIR, even if it agrees with them. The ATIR is the final adjudicator of facts and unless its misreading or non-reading of evidence results in its failure to determine a material issue of law that then comes to the High Court for adjudication, the High Court will be loath to engage in reappraisal of facts even for purposes of adjudicating a question of law.

- The Ordinance creates no power to condone any delay in passing a re-assessment order beyond the period of limitation prescribed under section 122(2). The expiry of the limitation period creates a vested right in the taxpayer to treat the tax affairs for any year predating the limitation period under section 122(2) as a past and closed transaction and such vested right cannot be usurped by the tax department directly or indirectly.

- CIRA has no power or jurisdiction to indirectly extend the statutory prescribed period of limitation provided under section 122(2) by remanding the issue of reassessment of tax returns filed by a taxpayer (as deemed assessment) to the assessing officer beyond the limitation period. Where an order for re-assessment passed within the limitation period is not sustainable in the eyes of law and the flaw inflicting it is that it defeats the Article 10A rights of a taxpayer having been passed in a perfunctory or mechanical fashion to meet the statutory limitation deadline, remanding the case back to the

assessing officer to defeat the limitation period would tantamount to wanton abuse and disregard of the Ordinance, and such order would suffer from mala fide in law and liable to be set aside for being a fraud on the statute.

5. IN ORDER TO CONSTITUTE BUSINESS INCOME, BENEFIT OR PERQUISITE MUST HAVE A FAIR MARKET VALUE, NOT NECESSARILY WHETHER IT CAN BE CONVERTED INTO MONEY AND THE PERSON MAY HAVE RECEIVED THE VALUE OF THAT BENEFIT OR PERQUISITE DURING OR UNDER A PAST, PRESENT, OR PROSPECTIVE BUSINESS RELATIONSHIP.

2024 SLD 2722 = 2024 SCMR 788 = 2024 PTD 637
SUPREME COURT OF PAKISTAN

COMMISSIONER INLAND REVENUE, ISLAMABAD
VS
FAUJI FOUNDATION AND OTHER

APPLICABLE SECTIONS: 18(1)(d),122(5),122(9) OF THE INCOME TAX ORDINANCE

Brief Facts:

The taxpayer is a charitable trust which derives income from a number of industrial and commercial concerns operating in fertilizers, power, oil and gas exploration and distribution, oil terminal operations, financial services, cement, sugar, cereal, employment services and security service sectors. On October 11, 2012, the taxpayer e-filed its return of income for the Tax Year 2012.

The assessing officer found that the taxpayer's certain income chargeable to tax had escaped assessment. As such, a notice under section 122(9) of the Ordinance was issued.

The taxpayer argued that all its income was taxed, and as nothing had escaped assessment, no amendment was required in terms of section 122(5) of the Ordinance. The taxpayer further stated that hypothetical/ notional income could not be taxed under the Ordinance, which was expressly brought within the deeming provisions of Sections 101, 30 and 39 and, as such, the increase in value of the shares held as long-term investment was a notional income and could only be taxed at the time of its disposal. Based on this stance, the taxpayer summed up that the machinery of section 122(5) could not be set in motion because no income chargeable to tax had escaped assessment and, therefore, the action taken by the assessing officer to amend the assessment was void ab initio.

The assessing officer found the objection of the taxpayer untenable and passed the order under section 122(5) of the Ordinance. On appeal, the CIRA did not find any infirmity in the findings by the assessing officer, which was also upheld by the ATIR.

The taxpayer then took its application under section 133 of the Ordinance to the High Court, and by referring to questions of law, sought their answers. Out of the proposed questions, some were about the meaning of definite information. A question was also asked whether section 18 of the Ordinance, imposes any tax on notional gain by revaluation of shares to market value. In the same vein, a question was also raised whether the increase in the market value without sale or disposal of shares is subject to tax.

On consideration of the matter, the High Court answered that the taxpayer's investment in the financial statements was recorded as a notional gain and not as a realized gain in income, therefore, the same was not chargeable to tax. The High Court said that the notional gain in the value of shares held by the taxpayer as recorded in its balance sheet was not an income from business. As such, it was finally held that under the facts and circumstances of the case, the ATIR had reached a wrong conclusion that the provisions of section 18(1)(d) read with 122(5) were correctly invoked, and the amendment proceedings for the deemed assessment order were invalid.

Being aggrieved by the above decision, the tax department filed appeal in Supreme Court. The only question presented to Supreme Court for consideration was whether the increase in the fair market value of the subsidiary company's shares held by the taxpayer as long-term investment was taxable under the head "income from business" in terms of section 18(1)(d) of the Ordinance.

Decision:

Supreme court decided the matter in favour of taxpayer and held that:

- The first requirement is that any benefit or perquisite must have a fair market value, not necessarily whether it can be converted into money. The second requirement is that a person may have

received the value of that benefit or perquisite during or under a past, present, or prospective business relationship. The coexistence of both is necessary. The absence of one of them will not constitute income from a business.

- It was for the tax department to establish that the gain from the long-term investment by the taxpayer in the form of shares in its subsidiary company met the above test and was, on that account, liable to be taxed as business income.
- In the present case, the tax department has not brought any material on record which discloses definite information that the taxpayer had made the said investment in furtherance of its business or in connection therewith. Thus, the taxpayer's gain from its investment cannot be treated as business income in terms of section 18(1)(d).
- The order amending the original assessment speaks elaborately that the assessing officer had not acquired any definite information subsequent to the original assessment order. On the contrary, the assessing officer based on the information provided in the return by the taxpayer, proceeded to amend the assessment. He had only made re-analysis of existing information and came to a conclusion that was different from the one that was drawn in the original assessment order. We are, therefore, poised to conclude that the notice issued under section 122(9) was without jurisdiction, and the order passed in consequence of it was also void.

6. SUPREME COURT (SC) IN ITS DECISION VALIDATE THE JUDGMENT OF SINDH HIGH COURT REGARDING THE INTERPRETATION OF PROFIT FROM THE OPERATION OF SHIP IN INTERNATIONAL TRAFFIC.

2024 PTD 662
SUPREME COURT OF PAKISTAN

COMMISSIONER INLAND REVENUE KARACHI
VS
A.P. MOLLER MAERSK AND OTHER

APPLICABLE SECTIONS: 107 & ARTICLE 8 OF THE DOUBLE TAX TREATY BETWEEN PAKISTAN AND KINGDOM OF BELGIUM AND KINGDOM OF DENMARK

Brief Facts:

Appeals were filed by the tax department in the cases before the Supreme Court of Pakistan against the decisions of the Sindh High Court related to the interpretation of Article 8 of the Double Taxation Treaty (DTT) between Pakistan and Belgium and the DTT between Pakistan and Denmark regarding profits from the operation of ships in international traffic. The respondent is a non-resident entity.

The question placed before the Honorable Supreme Court is whether the income arising from container service charges (CSC), container detention charges (CDC), and terminal handling charges (THC) falls within the category of "profit from operations of ships in international traffic" in the context of double taxation conventions concluded between Pakistan and Denmark as well as between Pakistan and Belgium.

Decision:

The Supreme Court relied on the Commentary on Article 8 of the OECD Model Convention, which provides guidance on qualifying activities and related profits with respect to income falling under the head of "profit from the operation of ships in international traffic." This expression covers profit from activities directly connected with such operations as well as profit from activities that are not directly connected with the operation of the enterprise's ship in international traffic, as long as they are ancillary to such operations. Activities that the enterprise does not need to carry out for the purpose of its own operation of ships in international traffic but which make a minor contribution relative to such operations and are so closely related to such operations that they should not be regarded as a separate business or source of income should be considered to be ancillary to the operation of ships in international traffic.

The Supreme Court also held that the taxability of the respondent, being a non-resident, entitles them to the benefit of concessions under DTT Article 8 in both conventions, given the primary purpose of tax treaties is to avoid and relieve double taxation through equitable and acceptable distribution of tax claims between countries.

The Honorable Supreme Court concluded that profits arising from CDC, CSC, and THC are

connected with the business operations of international traffic. Consequently, the revenue earned by shipping entities in international traffic must be handled in accordance with the provisions of the Double Taxation Treaty (DTT). Therefore, these petitions were dismissed.

7. INCOME ALREADY TAXED UNDER AN AMNESTY SCHEME IS NOT SUBJECT TO FURTHER TAXATION.

2024 (129) Tax (195)

APPELLATE TRIBUNAL INLAND REVENUE, LAHORE

MESSRS SHAHPOSH GARMENTS, GUJRANWALA
VS
THE CIR ZONE-II, RTO, GUJRANWALA

APPLICABLE SECTIONS: 18 , 20, 111(1)(d)(I),120,120(a), 120(4), 122(1)(5))ii) and 122(9) OF THE INCOME TAX ORDINANCE

Brief Facts:

Brief facts are that the income tax return for the tax Year-2014 was filed by declaring net income of Rs. 2,668,235 as against declared sales of Rs.30,214,798. Assessment stood finalized under section 120 of the Ordinance, 2001.

Later on, "definite information" was received from the Directorate of Intelligence and Investigation IR, Lahore through its letter C.No. DD-IV/2-376/2018/2544 dated 14-05-2018 in the shape of gross sales, bank and cash ledgers, etcDuring the course of investigation, it was alleged based on the record that appellant is involved in suppression of sales.

In the notice, the officer confronted the suppression of sales in the return based on comparison of sales as per gross sales ledger with sales proceeds from the bank credit entries.

Appellant contested the order passed by ADCIR as well as Commissioner (Appeals) whereby the amount of gross sales was held to be its income and was taxed accordingly. Appellant contend that it had rightly availed Amnesty Scheme under the Voluntary Declaration of Domestic Assets Ordinance, 2018, where under, its S.10 at its Serial No. 1, had declared Undisclosed Income after deducting all sort of business expenditures permissible under law and had correctly discharged its liability and therefore as such, no interference was called for in the declaration.

Decision

The ATIR has confirmed that the appellant has correctly availed the Amnesty Scheme under the Voluntary Declaration of Domestic Assets Ordinance, 2018, by declaring undisclosed income after deducting business expenditures. The court has also ruled that the issuance of a notice regarding the same taxed amount constitutes double jeopardy, which is illegal and violates the fundamental rights under Article 13 of the Constitution of Pakistan. Additionally, the court has declared that the impugned liability is raised by taxing total gross sales instead of net profits, which is illegal and unfounded. Since the appellant has already discharged his liabilities through the tax amnesty scheme, the impugned notices and orders are hereby vacated.

Sales Tax Act, 1990

A. Reported Decisions:

1. SUPPLY OF GOODS WITHOUT OWNERSHIP RIGHTS IS NOT CHARGEABLE TO SALES TAX – DIRECTOR GENERAL OF REVENUE RECEIPT AUDIT (DGRRA) HAS NO JURISDICTION TO CONDUCT AUDIT UNDER THE ST ACT.
129 TAX 181

APPELLATE TRIBUNAL INLAND REVENUE

M/S. PESHAWAR ELECRIC SUPPLY COMPANY (PESCO)
VS
THE COMMISSIONER INLAND REVENUE

Applicable provisions: Section 2(33), 2(41), 2(45), 3, 11(2), 25, 30, 32A, 33(5), 34, 38 & 72B of the ST Act.

Brief facts:

In the instant case, M/s Peshawar Electric Supply Company (PESCO) provided services of transmission lines to another electric supply company i.e. M/s Tribal Electric Supply Company (TESCO) for transmission of electricity from National Transmission and Distribution Company (NTDC) to PESCO. In this regard, show-cause notice was issued to the appellant contending that the transmission of electric supply i.e. wheeling of electric power is subject to sales tax at the rate of 17% under section 3 of the ST Act. Further, the show cause notice was issued pursuant to audit conducted by the staff of Director General of Revenue Receipt Audit (DGRRA).

Being aggrieved, the appellant preferred an appeal before the Commissioner (Appeals); however, the Commissioner (Appeals) upheld the order-in-original. The appellant thereafter filed second appeal before the Appellate Tribunal.

Decision:

The Appellate Tribunal decided the appeal in favor of the appellant and vacated the order of the Commissioner (Appeals) being unlawful and void ab initio.

The Tribunal held that to charge sales tax on supplies, two conditions of making taxable supplies and taxable activity must exist simultaneously under section 3(1) of the ST Act. Supply of goods can only take place if the goods are sold or there is transfer of right to dispose of such goods as an owner. NTDC had never sold or allowed sale of electricity by PESCO rather it is given to PESCO for transportation to TESCO. Therefore, it does not constitute supply and is not subject to sales tax under the ST Act.

The Tribunal also held that DGRRA has no jurisdiction to conduct audit under ST Act. Show cause notice issued on the basis of audit findings of DGRRA and superstructure built based on that Show Cause notice is illegal.

2. SELECTION OF CASES FOR AUDIT UNDER THE ST ACT AND THE FEDERAL EXCISE ACT, 2005 WITHOUT ASSIGNING ANY REASON IS UNLAWFUL

2024 PTD 681
SINDH HIGH COURT

M/S. DEWAN SUGAR MILLS LIMITED
VS
FEDERATION OF PAKISTAN AND OTHERS

Applicable provisions: Section: 25, 25(1), 25(2), 51 of the Sales Tax Act, 1990 and Section: 45, 46 and 46(1) of the Federal Excise Act, 2005

Brief facts:

The Plaintiffs in all of the listed suits, most of whom are sugar mills, were issued notices by the Commissioner Inland Revenue, under section 25 of the ST Act, and section 46 of the Federal Excise Act, 2005, for selection of case for audit and requiring them to produce record and documents for the purposes of audit. The cases were selected for audit without assigning any reason.

Being aggrieved, the plaintiff filed suit before the Sindh High Court (SHC) against selection of cases for audit.

Decision:

The Hon'ble SHC while deciding suits in favor of the plaintiffs, vacated the notices issued for selection of audit being unlawful.

In view of the judgment of Hon'ble Court, failure to provide reasons in the impugned notices for selecting the Plaintiffs for audit is also contrary to legal provisions, arbitrary, and amounts to a roving and fishing inquiry into the tax affairs of the Plaintiffs. Therefore, selection of cases for audit without disclosing reason for audit are unlawful.

3. UPHOLDING REGISTRATION UNDER SRO 608(I)/2014 BASED ON AREA OF THE SHOP IS NOT LEGALLY JUSTIFIED.

2024 TAX 117
APPELLATE TRIBUNAL INLAND REVENUE

SHAHID NAWA SINDHU
VS
THE COMMISSIONER INLAND REVENUE

Applicable provisions: Section 2(43A), 3(9A), 14, 46(1) and 46(1)(b) of the ST Act.

Brief facts:

In the instant case, the appellant was compulsorily registered in the business category of "Retailer" in the sales tax regime since October 18, 2014 in terms of the criteria of retailers specified under SRO 608(I)/2014 dated July 02, 2014. The appellant applied for de-registration of sales tax on the plea that he did not fall in any category as per mentioned in SRO. 608(I)/2014 dated July 2, 2014. However, the application for de-registration of sales tax registration was rejected by the Commissioner Inland Revenue (CIR). Being aggrieved, the appellant filed appeal directly before the Appellate Tribunal under section 46(1)(b) of the ST Act with the contention that application for de-registration was rejected without adjudicating the issue of whether the appellant was liable to be registered under SRO 608(I)/2014.

The Tribunal vacated the order of the CIR with direction to reconsider the matter of de-registration as per the registration criteria prevalent at the time of re-adjudication. In compliance to the Tribunal order, the learned CIR reconsidered the application for de-registration, however, it was rejected on premise of a verification/survey report of business premises conducted prior to the remand back order and concluded that the appellant was lawfully registered. The appellant being dissatisfied with this order preferred second appeal before the Tribunal under section 46(1)(b) of the ST Act.

Decision:

The Tribunal decided the appeal in favour of the appellant and observed that the appellant is engaged in the business of retail of furniture. Therefore, as per the survey report of the tax department, the appellant did not fall in any of the categories mentioned in the SRO 608 for registering a person as retailer. Hence, the action to maintain and uphold the registration of the appellant under the SRO 608 is not only legally flawed but is also contrary to the report of tax department's own officer.

The Tribunal held that the appellant's application for deregistration was declined on the sole ground that the covered area of the shop of the appellant was more than the area excluded from registration as provided in section 2(43A) of the ST Act. However, it is obviously clear that the SRO 608 did not provide requirement for registration based on the area of the shop of the retailer.

The Tribunal directed the tax authorities to proceed with fresh registration proceedings under section 2(43A) of the ST Act as amended by the Finance Act, 2022, if the appellant is liable to be registered under aforesaid provisions. The Tribunal also directed that the tax department must conduct fresh proceedings and confront the basis for registration in writing before registering the appellant.

Sindh Sales Tax on Services Act, 2011

A. Notification:

1. No.SRB-3-4/18/2024 dated May 10, 2024

Through recent amendment brought into section 4(3)(a) of the Sindh Sales Tax on Services Act, 2011 (SSTSA), the commission or fee paid to employee by the employer has been brought into the scope of the term' economic activity'. As a consequence, a requirement to obtain sales tax registration and charge sales tax through issuance of sales tax invoice had arisen for each of such employees earning any fee or commission from employers.

In order to relax such requirement, SRB has, through above said notification, amended rule 41B of the Sindh Sales Tax on Services (Withholding) Rules, 2014 whereby now a person (employee) covered under section 4(3)(a) of the SSTSA is not required to register for sales tax, provided that his employer is registered under sections 24, 24A, or 24B of the Act, or is a withholding agent under the Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 who deducts and deposits the entire amount of Sindh sales tax payable on the employee's services in the Sindh Government's account "B-02384" in the prescribed manner.

It is pertinent to note that though the above exclusion from the requirement of obtaining registration would provide relief to the employees from procedural hassles of obtaining registration, issuance of sales tax invoice and filing of sales tax return etc.; however, on the other hand, as a result of this amendment, input tax involved in respect of such transactions would not be adjustable for both the employees (in respect of any taxable inputs utilized by employee in provision of such services to employer) as well as for the employers (in respect of the whole sales tax withheld and deposited by the employer on commission or fee paid to employee).

2. No.SRB-3-4/19/2024 dated May 10, 2024

Through recent amendments brought in the year 2023 into the SSSTWH Rules, it has been made mandatory for the government organizations including State Owned Enterprises (SOEs) to withhold and deposit SST at the rate of 4/5th of the sales tax charged by SRB registered persons as against the previous requirement to withhold and deposit 1/5th of the SST charged. However, the SOE was nowhere defined under the SSTWH Rules.

Through this notification, SRB has introduced the definition of State-Owned Enterprise in the SSTWH Rules as per which such term shall include the Statutory State Owned Enterprises and shall have the same meaning as provided under respective clauses of section 2 to the State-Owned Enterprises (Governance and Operations) Act, 2023.

SRB has made further amendments in SSTWH Rules whereby the scope of SSTWH Agents has been extended through inclusion of SRB or FBR registered persons being recipient of commission agent's services from their own employee.

B. Reported Decisions:

1. VALUE OF SERVICES UNDER TARIFF HEADING "LABOR AND MANPOWER" AND "SECURITY GUARD SERVICES" DOES NOT INCLUDE SALARIES AND ALLOWANCES

129 TAX 479
SUPREME COURT OF PAKISTAN
SINDH REVENUE BOARD (SRB)
VS
QUICK FOOD INDUSTRIES (PVT.) LIMITED AND OTHERS

Applicable provisions: Section 2(55A), 2(78), 3(1), 4(3)(a), 5(1)(a), 8(1) of Sindh Sales Tax on Services Act, 2011

Brief facts:

Petitioners falling under the tariff heading "Labor and manpower supply services" and "Security Guard Services" filed petition before the SHC regarding value of taxable services whether Sindh Sales Tax on Services (SST) is to be levied on the gross amount charged inclusive of salaries and allowances that are paid to security personnel and labor and manpower in providing services. The Hon'ble SHC concluded that SST is chargeable on service charges only and cannot include salaries in calculation of value of services since it is not part of service itself.

Being aggrieved of the order of the Sindh High Court, SRB filed petition before the Hon'ble Supreme Court of Pakistan (SCP).

Decision:

The Hon'ble SCP decided the petition in favor of the respondents and against SRB in the following manner:

- The apex court held that the value of services does not include salaries and allowances charged by the service provider because these amounts are actually paid by the service recipient and does not form part of economic activity conducted by service provider
- The value of taxable service is determined on the basis of the value of economic activity carried out in the provision of the service, and salaries being reimbursable expenses, are not part of the taxable service or its value; thus, they are not included in value of the service.
- Therefore, the sales tax on services can only be levied on consideration paid for service provided or rendered, and salaries paid by the employer to the employees are not part of the service rendered for this purpose, and so are not taxable.

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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.