YOUSUF ADIL

Tax Bulletin

March 2022

Foreword

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

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Karachi
March 11, 2022

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Income Tax Ordinance, 2001

A. SRO

SRO No. 175(I)/2022
dated February 3, 2022

Amendment in rule 33G of the Income Tax Rules, 2002

Federal Board of Revenue (FBR) has issued the above-mentioned SRO whereby amendment proposed through S.R.O. no. 50(I)/2022 dated January 13, 2022, for integration of Foreign Exchange Dealers / Exchange Companies with FBR has been made part of the income tax rules.

As per rule 33G, FBR shall ensure to provide a facility on its website to a customer of an integrated enterprise person to verify and ensure that the invoice or bill issued to him has been duly communicated to the FBR's Computerized System and in case of non-verification, he may upload the image of invoice or bill to the FBR's portal.

B. Reported Decisions

1. 2022 PTD 11
PESHAWAR HIGH COURT
(MINGORA BENCH)

Applicable Section: 53, Second Schedule, Part-I, Clause 146, Part-IV, Clause 110 of the Income Tax Ordinance, 2001

Brief Facts:

The Petitioners, being the employees of the Provincial Government of Khyber Pakhtunkhwa (KPK) posted, serving and receiving their salaries in the former Provincially Administered Tribal Areas (hereinafter referred to as "Ex-PATA"), challenged deduction of income tax from their salaries which they have been receiving from the provincial government KPK on the grounds that their salary income should be exempt from tax as per SRO No. 1213(I)/2018 dated October 5, 2018.

Decision

The High Court **dismissed** the petition of the employees on the following points:

1. The province of Khyber Pakhtunkhwa has passed the Khyber Pakhtunkhwa Civil Servants Act, 1973, as per Article 240 read with Article 260 of the Constitution of Islamic Republic of Pakistan, 1973 which provide for appointments and conditions of service of a person in the service of Pakistan including in the services of a Province and posts in connection with the affairs of a province, by or under Act of the provincial assembly. The Act provides that every civil servant shall be liable to serve anywhere within or outside the province, in any post under the Federal Government, or any Provincial Government or Local authority, or a corporation or body set up or established by any such Government. Merely, on the basis of posting of a civil servant "Ex-PATA", he cannot claim exemption from payment of income tax unless such an exemption is granted to him under section 53 – "Exemptions and tax concessions in the Second Schedule'' of Ordinance where no specific exemption has been provided to the employees of the provincial government serving in Ex-PATA from payment of income tax.

2. SRO 1213, does not provide any specific exemption from payment of income tax on the salaries paid to the provincial government employees posted in Ex-PATA.

3. Only incomes of those persons, which had not been chargeable to tax prior to the Twenty-fifth Amendment, had been given exemptions by the SRO 1213. Since the income of the petitioners had

never been exempted from payment of income tax before the promulgation of the Twenty-fifth Amendment, the petitioners would not be able to claim an exemption under SRO No. 1213.

2. 2022 PTD 51
LAHORE HIGH COURT

Applicable Sections: 161, 162, 174, 174(3) of the Income Tax Ordinance, 2001.

Brief Facts:

The taxpayer filed a petition in respect of the notices issued under section 161(1A) of the Ordinance by the tax department, stating that the notices and reminders issued under section 161 of the Ordinance requiring production of documents for the tax year 2014 were unlawful, as the same were beyond the time limitation period of six years for record maintenance, as set out under section 174(3) of the Ordinance. However, the tax department was of the view that no time limit is set out for proceedings under sections 161 & 162 of the Ordinance and the taxpayer was legally bound to produce the documentary evidence, even after the expiry of the six-year period to which they relate.

The questions raised in the petitions are as under:

1. Whether the limitation period of six years for maintaining records as required under section 174(3) of the Ordinance had been expired for the tax year 2014 including whether there were any pending proceedings, in which case, the taxpayer would have been under an obligation to maintain the required documents until the final decision of the proceedings.

2. Whether Section 161 was independent of section 174 in terms of any time limitation for maintaining records including if is so, whether the department held any onus of justification for the action taken belatedly.

3. Even though the statutory time limit had been barred, whether the department could continue legal proceedings under section 161 of the Ordinance by seeking details and explanations but, in fact, without any demand for documentary evidence.

Decision:

The High court **accepted** the taxpayer's petition and decided the case as follows:

1. Set aside the notices issued by the tax department under section 161 for the requisite of documentary evidence as those were hit by the time limitation period of six years as mentioned under section 174 (3) of the Ordinance, on the ground that no legal proceeding is pending that could have otherwise obliged the taxpayer to maintain the records beyond the period of six years.

2. If the Commissioner takes any action under section 161 against a taxpayer for a failure to deduct tax and such action taken is beyond the period up to which the taxpayer had to maintain its books of account, etc. under section 174 then this would require proper justification from the Commissioner i.e. the onus would then be on the Commissioner to explain why such action was being taken belatedly. If there is a proper justification, then the onus would stand discharged and the action would be sustainable in law (subject to any other defenses available to the taxpayer). If, however, there is no proper justification, then the onus would not be discharged and the action would be liable to be set aside.

3. Sections 161 and 174 are independent and no time limitation period is mentioned under section 161 so the tax department may continue the proceedings under section 161 of the Ordinance on the basis of information already submitted by the taxpayer and available in their records but without

placing any burden on the taxpayer to produce the relevant documents.

3. (2022)125 TAX 1=2021 PTD 1582 SUPREME COURT OF PAKISTAN

Applicable Sections: 170, 171 of the Income Tax Ordinance, 2001

Brief Facts:

The appellant (taxpayer) filed its return of income for the tax year 2006 without offering to tax the amount of compensation received on account of delayed issuance of refund i.e. treated it as capital receipt instead of revenue, whereas such amount was disclosed as 'other operating income' in the financial statements for the year.

The tax officer treated the amount of compensation as revenue receipt and taxed the same. The action of the tax officer was upheld by the Commissioner Appeals. The Appellate Tribunal, on an appeal filed by the taxpayer, against the Commissioner Appeal's order concluded that such compensation was a capital amount and could not be brought to tax.

The taxpayer then approached the Supreme Court against the High Court's decision, which had decided the matter in favor of the tax department.

The question of law raised by the taxpayer before the Supreme Court was whether the compensation payable to a taxpayer under section 171 on account of a delay in the payment of a refund is to be regarded as a capital or a revenue receipt?

Decision

The Supreme Court **dismissed** the appeal and held that compensation on delayed refund is not a capital receipt based on the following grounds:

1. The character of the compensation is not of principal payment i.e. refund payable under section 170.
2. The audited accounts of the appellant contradict the contention that the compensation was of a capital nature, as the same was reported under "Other Operating Income", which is part of the Profit and Loss Account.

4. (2022)125 TAX 5 ISLAMABAD HIGH COURT

Applicable Sections: 120, 120(1A), 121, 122, 122(1), 122(5), 122(2), 122(9), 127, 174, 177(1), 177(4), 177(9), 214C of the Income Tax Ordinance, 2001
Applicable Sections: 25, 25(1), 25(2) of the Sales Tax Act, 1990
Applicable Section: 46 of the Federal Excise Act, 2005
Applicable Section: 7 of the Federal Board of Revenue Act, 2007

Brief Facts

FBR issued circulars that instructed the Commissioners for audit selection of taxpayers on a sectoral basis and prescribed timelines for selection of audit, generation of audit reports, issuance of show-cause notices, and subsequent assessment orders.

The taxpayers challenged the impugned notices for audit selection under section 177(1) of the Income Tax Ordinance, 2001, section 25 of the Sales Tax Act, 1990 and section 46 of the Federal Excise Act, 2005, on the ground that such notices have been issued without lawful authority and in breach of provisions of the law. It was contended by the taxpayers that since the directive issued by the FBR was binding on the Commissioner, which impeded the discretion vested in the Commissioner to exercise his authority under respective audit selection provisions, independent of the FBR, and the initiation of an audit on the basis of such illegal directive was unlawful and based on extraneous consideration.

The question involved in these petitions relates to the statutory prerequisites for the exercise of authority by the Commissioner to conduct an audit under section 177(1) of the Income Tax Ordinance, 2001 ("Ordinance of

2001"), and sections 25 and 46 of the Sales Tax Act, 1990 ("Sales Tax Act") and the Federal Excise Act, 2005 ("Federal Excise Act"), respectively.

The additional question raised in some of the petitions is whether the Commissioner is vested with authority under section 177(1) of the Ordinance of 2001 to select a taxpayer for audit independent of any selection by the Federal Board of Revenue (FBR) under section 214C of the Ordinance of 2001, even though it was conceded that the said question has been decided by a larger bench of this Court in Pakistan Telecommunication Company Ltd. Vs Federation of Pakistan (2016 PTD 1484).

Decision

After detailed deliberations of the aforementioned issues, the High Court decided the case as follows:

1. FBR is vested with no authority under section 206 read with sections 213 and 214 of the Ordinance of 2001 or any provision of the Sales Tax Act or the Federal Excise Act to issue a directive or circular to the Commissioners directing such Commissioners to undertake sectoral audits or otherwise bind them in terms of how they are to exercise their discretionary authority under section 177(1) of the Ordinance of 2001 or section 25(1) of the Sales Tax Act or section 46 of the Federal Excise Act. Any such directive is devoid of justification and nullity. Thus, an audit selection notice issued by the Commissioner under section 177(1) to an Oil Marketing Company on the basis of the sectoral audit directive issued by FBR is tantamount to a notice issued for extraneous reasons and is liable to be set aside.

2. Audit proceedings initiated on the basis of a directive issued by the FBR having been declared to be void would also be devoid of lawful authority and would cease. This would; however, not inhibit the Commissioner from independently exercising his/her authority under section 177 of the Ordinance of 2001 on the basis of reasons that satisfy the requirements of section 177.

5. 2022 PTD 187
APPELLATE TRIBUNAL INLAND REVENUE (GUJRANWALA)

Applicable Sections: 8, 20, 111, 111(1)(d), 111(1)(d)(i), 120(A), 122(1), 122(5)(ii), 129(1) of the Income Tax Ordinance, 2001

Brief Facts:

The taxpayer filed the income tax return for the tax Year 2014 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, based on definite information, tax authorities issued notice under section 122(1)(5)(ii) of the Ordinance to taxpayer contending that he has not disclosed sales of Rs 1,382,367,343 and therefore, invoking section 111(d)(i) of the Ordinance, imposed tax on such undisclosed sales after deduction of undisclosed income of Rs 122,075,313 on which taxpayer claimed amnesty under Voluntary Declaration of Domestic Assets Ordinance, 2018.

The Commissioner Appeals upheld the tax officer's action of taxing the difference of the amount of undisclosed gross sales and the amount of income disclosed under the amnesty.

The taxpayer preferred an appeal before the Appellate Tribunal on the following grounds:

1. The appellant has already availed amnesty scheme under the Voluntary Declaration of Domestic Assets Ordinance, 2018 and under its section 10 at its Serial No. 1 has declared Undisclosed Income worth Rs. 122,075,313 belonging to the tax year2014.

2. Since, appellant has disclosed his true sales, cost of sales and all of

expenditures incurred and has faithfully worked out undisclosed income on its basis, therefore, no more tax liability could be imposed on him. As such, assessment and taxation of amnesty declared income is unwarranted, illegal and merits to be deleted on this score alone.

Decision

The Appellate Tribunal decided the matter in taxpayer's **favour** and held as under:

1. The scope of section 111(1)(d) of the Ordinance, 2001 is very definite for the persons allegedly concealing income or furnishing inaccurate particulars of income that is (i) suppression of any production, sales or any amount chargeable to tax or (ii) the suppression of any items of receipts liable to tax as a whole or in part. The appellant's counsel has rightly pointed for the production and sales are the particulars of income but not income by itself and which if found inaccurate cannot be taxed as income. The provisions of this section never offer suppressed sales to be treated as undisclosed income instead income from business does allow deductions of all business expenditures incurred on its carry taxing net profits instead of total gross sales. We agree with the contention of appellant that gross sales of a person cannot be treated his total income chargeable to tax instead it is the net profits earned from the business which has to be taxed.

2. The appellant has rightly availed amnesty scheme under the Voluntary Declaration of Domestic Assets Ordinance, 2018 where under its section 10 at its Serial No. 1, he has declared Undisclosed Income after deducting all sort of business expenditures permissible under law and has correctly discharged his liability as such, therefore, no interference is called for in the declaration made by him under this amnesty scheme.

3. Since, the appellant has already discharged his liabilities as of income tax through his declaration made under the tax amnesty scheme, therefore; impugned notices and consequent orders are hereby vacated.

6. 2022 PTD 97
APPELLATE TRIBUNAL INLAND REVENUE (LAHORE)

Applicable Sections: 24(11), 122, 120(1)(b), 122(2), 122(5A) of the Income Tax Ordinance, 2001

Brief Facts:

The taxpayer filed its return of income, which was deemed to be an assessment order under section 120(1)(b). The Additional Commissioner amended the assessment under section 122(5A) by making additions on account of 'Amortization of production cost of advertisement'.

The Commissioner Appeals decided the matter in taxpayer's favour considering its own history on same matter and based on the fact that no instance was brought on record by the learned Additional CIR that any of the subject ads was aired for more than a period of one year.

The tax department filed an appeal before the Appellate Tribunal against Commissioner Appeals Order.

Decision

The Appellate Tribunal upheld the decision of the Commissioner Appeals on the following grounds:

1. It was observed that the Additional CIR's treatment of amortizing the production cost of ads as intangibles was without fully appreciating the facts of the case as well as the applicable law. No instance was brought on record by the learned Additional CIR that any

of the subject ads was aired for more than a period of one year. Further, in own case of the respondent for tax year 2012, on similar issue the matter has been decided by this office in favour of the appellant through order No. 16 dated 16.09.2013. The CIR(A) by relying on the decisions cited on behalf of the Respondent company held that the appellant was entitled to such allowance and deleted the addition made by the ACIR. We have also noted that the department itself in number of cases allowed the relief to the taxpayers on the similar expenses therefore, the respondent cannot be treated discriminately.

2. For assuming the jurisdiction under section 122(5A) of the Ordinance, it is incumbent upon the taxing authority to prove the existence of erroneousness of the assessment to be amended in so far it is prejudicial to the interest of revenue and these two conditions must be co-exist. In the instant case, the ACIR has picked an expenditure namely "Amortization of marketing expenses" and has held that the same should have been amortized.

   In doing so, the assessing officer has tacitly conceded to the admissibility of the expense. Had any part of the expense been amortized and allowed in the next year or years, it would have increased revenue of the Department in the first year of the claim and equally decreased the revenue in the subsequent year; in nutshell, there would hardly been any loss of revenue. Therefore, we are of the view that the condition prejudicial to the interest of revenue attached with section 122(5A) ibid is of wide import for the reason that amortization is merely an arrangement of allowing the total expenses in more than one years. We are of the view that the words "prejudicial to the interest of revenue" need to be interpreted and understood as irreparable loss to the revenue and not a momentary and temporary loss which is equally recouped or compensated in the subsequent years when amortized expense is allowed. Amortization is only a deferment of part of the expense to the next year and is purely an accounting treatment.

7. 2021 PTD 1572 = (2022)125 TAX 113
Lahore High Court

Applicable Sections:
Sections 50, and 80C of the Repealed Income Tax Ordinance, 1979
Sections 153(1) and 161 of the Income Tax Ordinance, 2001

Brief Facts:

The petition was filed before the Lahore High Court by the tax department (applicant), aggrieved by the dismissal of their appeal filed before the Appellate Tribunal Inland Revenue (ATIR), for non-deduction of income tax at source on supply of raw material by the taxpayer to an associated company.

The question raised in the petition was whether the transfer of raw material to a sister concern attracts withholding tax provisions?

The tax department challenged the Tribunal's judgment mainly on the following grounds:

1. The expression "supply of goods" appearing in section 50(4)(a) of the repealed Ordinance, which is pari materia to section 153(1)(a) of the Income Tax Ordinance, 2001, includes both cash and credit purchases of goods;

2. Every person making payment in full or part for sale of goods is required to deduct tax from the gross amount payable (including sales tax, if any) at the time of making the payment; and

3. Every supply involves a sale as there is provision of goods in exchange of

consideration, therefore, transfer of raw material from one unit to another, even without any cash payment and only through book adjustments, is fully covered under section 50(4) of the repealed Ordinance.

Decision:

The reference was decided **against** the tax department. The Court upheld the decision of the ATIR on the following basis:

1. As per section 50(4) of the repealed Ordinance, event of tax deduction shall come into play only at the time of making payment. The language of provisions of Section 50(4) of the repealed Ordinance and sections 153(1) of the Ordinance clearly states that deduction of tax has direct nexus with "the time of making payment" and unless payment is actually made, aforesaid withholding provisions would not attract since actual payment has not been made by the respondent.

2. In the instant case, the unit (taxpayer), purchasing the cotton, holds stock and transfers the same to other associate companies at cost, as the need arises, without any cash involvement by making necessary book entries in relevant ledgers of the units and respective accounts are debited and credited accordingly.

   These transactions between associated companies are reflected through book entries and book adjustments and at the time of closing of the year, the same are netted off and balance is reflected in the record maintained by the associated companies. Since an instance of payment does not arrive, therefore, withholding tax provisions are not attracted in the given circumstances.

The readers are advised to assess the implications of this decision to their individual circumstances only after considering the application of Rule 43 B of the Income Tax Rules, 2002.

8. 2022 PTD 305 = (2022)125 TAX 65 Lahore High Court

Applicable Sections:
67, 122(1), 122(5), 122(9), 133, 154(4), 169(1) of the Income Tax Ordinance, 2001 Rules 13 and 231 of the Income Tax Rules, 2002 (the Rules)

Brief Facts:

The petition was filed before the Lahore High Court (LHC) by the tax department, aggrieved by the decision of Appellate Tribunal Inland Revenue (ATIR), which had decided the matter in favor of the taxpayer. The primary dispute in the instant case is regarding the apportionment of expenditures incurred and adjustments claimed by the respondent (taxpayer), involved in local sales, supplies and exports, under rule 231 of the Rules. The department emphasized the applicability of section 67 of the Ordinance, read with rule 13 of the Rules, for apportionment of expenses.

The question raised before the court was whether in the facts and circumstances of the case, learned ATIR has rightly applied/invoked rule 231 - Computation of export profits attributable to export sales to the case of the taxpayer?

Decision:

The reference application was decided in **favour** of the tax department and the matter was remanded back to the ATIR for de-novo determination and fresh decision on the appeal. The court placed reliance on the judgment reported as (2013 PTD 2095) = (108) Tax 137. The decision was made on the following basis:

1. Rule 231 relates to the computation of export profits relatable proportionately to the export sales, having no relevance to the case at hand i.e. apportionment of expenditures.

2. Rule 231 and rule 13 are distinct, claiming different character/attributes, and each one is attracted to a different set of situations/circumstances. Section 67, read with Rule 13, provides a mechanism for apportionment of expenditures, with respect to class or classes of income, as classified therein.

3. Income derived from export sales and tax deducted thereupon is treated as final tax in terms of sections 154(4) and 169(1) of the Ordinance and in terms of section 169(2)(a) of the Ordinance, where said section applies, the income generated thereunder shall not be chargeable to tax under any head of income in computing the taxable income of the person and no deduction is allowable under the Ordinance for any expenditure incurred in deriving such income.

4. Apportionment of expenditures, in the instant case, is required to be carried out under section 67 and rule 13 of the Rules and Rule 231 has no application in the context of the expenditures/ deductions claimed by the taxpayer.

9. 2022 PTD 109
Sindh High Court

Applicable sections:
2(20), 12, 18(b), 120, 122(9), 133, Schedule II, Part-III Clause 1(2) proviso of the Income Tax Ordinance, 2001

Brief Facts:

The petition was filed before the Sindh High Court (SHC) by permanent employees (doctors) of a private hospital working under independent employment contracts as faculty members (Teachers / Researchers), against the decision of the Appellate Tribunal, which had annulled the favorable order of the Commissioner Appeals on this issue.

The petitioners were aggrieved by the show-cause notices issued to them for tax year 2011 and the amendment of assessments by the tax department in respect of the disallowance of rebate, provided under Clause (1), Part III of the Second Schedule to the Ordinance, in relation to clinical incentives and supplements. The Tax officer excluded clinical supplements and clinical incentives from salary income of employees by contending that such income does not fall under the head salary.

The above rebate was available under the above-mentioned clause to full-time teachers and researchers employed in a non-profit organization at the rate of 25% of the tax payable on salary income. After the introduction of the Finance Act, 2019, through a proviso, teachers of the medical profession deriving income from private medical practice or receiving a share of the consideration received from patients were excluded from the applicability of the aforesaid rebate.

In the instant case, the question raised before the SHC was whether the payments for clinical supplements and incentives received by the Applicants from its employer are salary as defined under section 12 of the Income Tax Ordinance, 2001?

Decision:

The case was decided in **favour** of the taxpayers on following basis:

1. The question of whether remuneration paid to a person engaged to perform work is a salary or income from profession, vocation, or business depends upon the facts of the case and the terms of employment. There is a thin line of distinction which can be visibly drawn by scanning the contract. When a person joins service and surrenders his profession or exchanges it for service thereby permitting the employer to control the manner in which he must work, the remuneration paid to him will be classified as salary.

2. As per section 12, salary has been given a very exhaustive meaning and means / includes any amount received

by an employee from any employment, whether of a revenue or capital nature, including any pay, wages or other remuneration provided to an employee, including leave pay, payment in lieu of leave, overtime payment, bonus, commission, fees, gratuity or work condition supplements such as for unpleasant or dangerous working conditions, any perquisite, whether convertible to money or not. In fact, Salary includes all sorts of other heads of income which one can imagine.

3. In respect of applicability of proviso to Clause (1), Part III of the Second Schedule to the Ordinance, which was introduced by the Finance Act, 2019, providing that clause (1) shall not apply to teachers of the medical profession who derive income from private medical practice or who receive a share of the consideration received from patients, it was held that based on plain reading, it clearly shows that the intention of the legislature is to apply such amendment from 2019 onwards on such income of the Applicants, which has been excluded from the purview of an admissible rebate; and further shows that earlier it was not excluded. If it had not been admissible earlier, there would have been no need for inserting this proviso for exclusion of this particular income. The legislative intent by not giving retrospective effect to this proviso shows that what was not excluded earlier has now been excluded; however, with effect from Finance Act, 2019.

Sales Tax Act, 1990

A. SROs and General Order

1. SRO No. 183(I)/2022 dated February 10, 2022

Change in Petroleum Rates

As a result of change in OGRA notified petroleum prices, the rates of Sales tax have been revised with effect from January 16, 2022 as under:

S. No.	Description	PCT heading	Previous ST Rates	Revised ST Rates
1.	MS (Petrol)	2710.1210	*2.50% ad valorem*	*0.79% ad valorem*
2.	High speed diesel oil	2710.1931	*5.44% ad valorem*	*3.17% ad valorem*
3.	Kerosene	2710.1911	*8.30% ad valorem*	*5.30% ad valorem*
4.	Light diesel oil	2710.1921	*2.70% ad valorem*	*0.00% ad valorem*

2. Sales Tax General Order (STGO) No. 9 of 2022 dated February 04, 2022

Tier-1 Retailers - Integration with FBR's POS System

FBR has adopted practice of notifying retailers (who have not yet integrated with FBR's system) as Tier-1 Retailer [2(43A) of Sales Tax Act, 1990] through STGO; this STGO is issued every month in the first 5 days of the calendar month with effect from August 3, 2021.

Vide the subject STGO, a list of 1,358 identified Tier-1 Retailers, has been placed on FBR's web portal asking them to integrate with FBR's system by February 10, 2022 and the procedure of exclusion from this list of 1,358 identified Tier-1 Retailers shall apply as laid down in Para 2 of STGO 1 of 2022 dated August 3, 2021.

In case of failure to make the requisite integration by such notified persons, their adjustable input tax for the month of January would be disallowed up to 60% as per sub-section (6) to section 8B of the ST Act, without any further notice or proceedings, creating tax demand by the same amount.

3. SRO no. 251(I)/2022 dated February 16, 2022

Revocation redundant SROs

Through Finance (Supplementary) Act, 2022, exemptions/reduced ratings provided on various services, under the SROs listed below, became part of Table-2 of the Schedule to Islamabad Capital Territory (Tax on Services) Ordinance, 2001 (ICT Ordinance) as a result of which such exemption / reduced rating notifications became redundant. Consequently, FBR has revoked all below mentioned SROs by exercising the powers conferred by clause (a) of sub-section (2A) of section 3 of the ICT Ordinance, read with clause (b) of sub-section (2) of section 3 of the ST Act:

1. SRO 495(1)/2016, dated July 04, 2016;
2. SRO 589(1)/2017, dated July 01, 2017;
3. SRO 590(1)/2017, dated July 01, 2017;
4. SRO 781(1)/2018, dated the June 21, 2018;
5. S.R.O. 326(1)/2020, dated April 27, 2020; and
6. S.R.O. 77(1)/2021, dated January 21, 2021.

4. SRO no. 252/2022 dated February 16, 2022

Introduction of procedures for Sealing and De-Sealing of business premises of Tier-1 Retailers

As part of the Government’s policy to enhance revenue collection by bringing in retailers into the tax net, Chapter XIV-AD has been introduced in Sales Tax Rules,

2006 (ST Rules) through this SRO, providing procedure for the penalties of sealing of business premises (and de-sealing thereof) which were recently introduced under serial number 24 and 25A of section 33 of the ST Act through Finance (Supplementary) Act, 2022. The said rules provide for the following:

1. Procedure for sealing of business premises of integrated Tier-1 retailers who conduct transactions in a manner so as to avoid their monitoring, tracking, reporting or recording.

2. Procedure for sealing of business premises of non-integrated Tier-1 Retailers who are required to be integrated under the law.

3. Procedure for de-sealing of business premises of above retailers

The procedures for sealing and de-sealing of business premises are summarized as under:

Sealing of Business premises of Tier-1 Retailers	
Integrated	**Non Integrated**
CIR may initiate proceeding on getting information that the invoice issued by the Tier-1 Retailer: • does not carry the invoice number or QR Code as prescribed, • bears duplicate invoice number or counterfeit QR Code, • is defaced, or there is any other evidence of tampering. The sources of information may be: • Tax Asan Application or POS Dashboard. • Physically available or acquired via mystery shopping. • Any other reliable source. Such invoice shall be verified by the CIR through invoice number or QR code before declaring it as unverified. The CIR may request the Chief Commissioner having jurisdiction for issuance of approval of sealing premises (mentioning the name of team officials who would be carrying out the process of sealing) if he has evidence that the retailer has issued against single STRN: • 3 unverified invoices in a day. • 5 unverified invoices in 7 days.	The officer not below the rank of AC having jurisdiction shall report to the Commissioner regarding non-integration of a retailer who is required to be integrated, with recommendation for initiation of proceedings for sealing business. The Commissioner after conducting inquiry shall forward the report to the Chief Commissioner having jurisdiction citing cogent reasons for sealing (specifying names of the team officials who would be carrying out the process of sealing). The Chief Commissioner shall issue order for allowing or disallowing the sealing of business premises after recording the reasons therein, marking copy thereof for information and record to: • the Member IR Operations, and; • Chief (POS).

Sealing of Business premises of Tier-1 Retailers	
Integrated	**Non Integrated**
The Chief Commissioner shall issue order for allowing or disallowing the sealing of business premises after recording the reasons therein, marking copy thereof for information and record to: • the Member IR Operations, and; • Chief (POS).	

De-Sealing of Business premises of Tier-1 Retailers	
Integrated	**Non Integrated**
The CIR after confirming payment of penalty being higher of: • Rs.500,000 or • 200% of the amount of tax involved. will issue de-sealing order of the premises within 1 day of the payment of penalty. The CIR shall ensure software audit of all POS machines installed in all the branches of such retailer and	The CIR will issue de-sealing order, after: a. confirming payment of penalty as prescribed under section 25A of the ST Act of: (i) Rs.500,000 for 1st default. (ii) Rs.1 million for 2nd default after 15 days of order for 1st default. (iii) Rs.2 million for 3rd default after 15 days of order for 2nd default.

De-Sealing of Business premises of Tier-1 Retailers	
Integrated	**Non Integrated**
shall ascertain the exact quantum of under-declared sales within 3 working days after de-sealing of the business premises. Upon recovery of penalty imposed, demand created as a result of software audit shall not impede de-sealing of the business premises provided that all requirements of the respective rules are fully complied by the retailer.	(iv) Rs.3 million for 4th default after 15 days of order for 3rd default. b. integration of all POS machines installed in all its branches. The integration will be carried out in the presence of FBR team including a technical person. Within 3 days completion of integration of all POS machines installed, a certificate to this effect shall be issued by the CIR to the Chief Commissioner.

B. Reported Decision

2021 PTD 1379
Lahore High Court
Ghulam Hassan VS Federation of Pakistan through Ministry of Finance

Applicable Sections: 37, 38, 40 of Sales Tax Act, 1990 (ST Act)

Brief Facts:

In the instant case, the Additional Director, Directorate of Intelligence and Investigation, FBR, Faisalabad along with other staff raided and searched the premises of business place of a Registered Person (RP), without any notice and search warrant as contemplated in Section 40 of the ST Act.

Based on documents seized during search, the RP was issued notice under section 37 and 38 of the ST Act against which the RP filed constitutional petition before the Lahore High Court (LHC) which was dismissed by Single Judge. The said judgment of the Single Judge was further challenged by the RP before the Divisional Bench (DB) contending that the learned Single Judge has not rightly interpreted the provisions of Sections 38 and 40 of the ST Act, hence, his order is unsustainable in the eye of law.

The RP contended that the documents and record obtained through such search cannot be used against him under the garb of notice under Sections 37 and 38 of the ST Act. It was further argued that Section 38 only authorizes an officer of the department to have access to premises, stocks, accounts and records and does not permit search without warrant.

On the other hand, the version of Respondent-Department was that the team acted in accordance with the spirit of Section 38 of the ST Act, which not only empowers to have access to the premises, stocks, accounts and records but also to take into custody such records, statements, documents etc. as considered necessary.

Decision

The learned DB of LHC directed the respondents to return the documents / record, retrieved from the premises of the appellant and vacate the notice issued under Sections 37 and 38 of ST Act. The decision was given based on the following premises:

1. Section 40 of the Act provides specific procedures for search and controls the empowering access laid down in the general provisions of section 38. It is a cardinal principle of interpretation of statutes that a specific provision shall control the general provision.

2. Provisions of Section 38 are not by themselves search and seizure provisions and these, therefore, must give regard to specific provisions of Section 40, otherwise provisions of Section 40 requiring all searches to be made in accordance with the provisions of Code of Criminal Procedure would also become redundant.

3. Provisions of Section 40 of the ST Act are in pari-materia with provisions of Section 162 of the Customs Act, 1969 ("the Act of 1969").

4. Search carried out without recourse to the mandatory provisions, is illegal and any case made out on the basis of goods seized during such search cannot be used against the person from whose premises the same have been obtained. Reliance placed on the judgment of the Hon'ble Supreme Court reported as PTCL 1992 CL 155.

5. The department must have reasonable cause to believe that such a visit is warranted and must be recorded in writing, rather to initiate such a move on mere presumption or suspicion.

6. The visit must be limited to inspection of documents that are available in plain sight or made available voluntarily.

Sindh Sales Tax on Services Act, 2011

A. SRO

SRO No.SRB-3-4/03/2022 dated February 21, 2022

Integration of POS with SRB

Earlier, the requirement and procedures for online integration of restaurants were introduced and implemented by the Punjab Revenue Authority. Through this SRO, Sindh Revenue Board (SRB) has also introduced Sindh Sales Tax Special Procedures (Online Integration of Business) Rules, 2022 through which the following categories of restaurants are required to integrate their Point of Sales (PoS) Terminals with the SRB within 45 days of the notification (i.e. by May 07, 2022).

1. Services provided by International restaurant who are franchisers or franchisees.

2. Services provided by all restaurants having more than one branch in Sindh.

3. Services provided by all restaurant outlets located in air-conditioned shopping malls.

4. Services provided by restaurants through an online marketplace platform.

The rules are also applicable in case of an online market place acting as facilitator between the buyer and the seller or between a service provider and service recipient in respect of above specified services.

Above rules inter alia state that the integrated persons are required to issue a tax invoice in prescribed format through integrated PoS. Rules also define requirements and obligations for the PoS vendors, procedure for prize scheme and procedure for verification of invoices issued using PoS.

A service fee of Rs. 1 shall be charged on each invoice issued by the persons integrated under these rules except for the online market places solely operating as facilitator.

B. Reported Decisions

1. (2022)125 TAX 126
Sindh High Court
Summit Bank Limited and others
VS Sindh and others

Applicable Sections: Section 23 of the Sindh Sales Tax on Services Act, 2011 (SST Act)

Brief Facts:

The Petitioners challenged Show Cause Notices on the ground that these Show Cause Notices were time barred under section 23(2) of the SST Act. He contended that when returns for respective periods were filed, the Petitioners were covered by limitation of five years, whereas, through Sindh Finance Act, 2016, effective from July 01, 2016, the limitation period has been extended to 8 years, hence, admittedly all Show Cause Notices are time barred, being issued after expiry of 5 years.

On the other hand, learned counsel for Sindh Revenue Board contended that Show Cause Notices were within time as the limitation period was amended on July 01, 2016 extending the same to eight (8) years, whereas, limitation is procedural in nature in view of the cases reported; hence can be given retrospective effect.

Decision:

Petition was **dismissed** on the premise that the vested rights had not accrued to the petitioners since the amendment in section 23 via Sindh Finance Act, 2016 was introduced during the period in which the original limitation provided in 2011 Act had not expired. Though, the future amendments do not have power to reopen any case which has become time barred; however, in this

case, the amendment was brought when the cases had not become barred by time.

2. CP. No. D-5791 of 2016
Zona Pakistan (Pvt.) Ltd. VS Sindh & others

Applicable section: Sec 24B of Sind Sales Tax on Services Act, 2011 (SST Act)

Brief Facts:

In this case, domain of provinces for levying sales tax on income of indenters was constitutionally challenged by the indenters.

The issue arose when SCNs were issued by the AC, SRB requiring the indenters to be registered with Sindh Revenue Board under section 24B of the SST Act with consequential penal action under respective provisions of the SST Act and rules made thereunder.

The Indenters while challenging the said SCNs before the Court, claimed that the activity, being of extra territorial, is not covered under the domain of Provinces in terms of Article 141 of the Constitution as it is with the parliament to legislate and make laws in reference therewith.

To establish the fact that the indenting services are extra territorial, indenters argued that their principals are foreign entities having no place of business or office in Pakistan and apart from this the agreement and the relationships between them i.e. principal and indenters (including matters related to resolution of disputes) are also governed by foreign laws, hence, the foreign entity cannot be subjected to the local laws for the purposes of implementing the SST Act to recover taxes.

Applicants further argued that the foreign exchange Manual in its Chapter 21 titled as "Repatriation of Invisible Earnings of Foreign Exchange" specifically deals with the indenting houses/agents as is covered by Entry 9 of Federal Legislative List of Fourth Schedule of Constitution and hence is out of the provincial domain as far as the levy on repatriated amount is concerned.

It was also argued that in terms of Section 154 of the Income Tax Ordinance, 2001 the foreign remittance and foreign proceeds received by the indenters as commission should be final and conclusive tax to be deducted on such receipt.

Decision

The Hon'ble Sindh High Court decided that the Sindh sales tax is applicable on the indenting services being rendered by the indenters in the province of Sindh and accordingly the indenters are liable to be registered under THE SST ACT. The said judgment was given by the SHC on the following premises:

1. The sale and consumption of the goods being imported and exported is beyond the purview of sales tax on indenting services. What is required is that the indenters must be resident persons as defined under the SST Act and are providing a taxable service.

2. It is the foreign principal who receives services from indenters in Sindh under agreements which are not agreements of import and export of the goods.

3. Implementation of treaties etc. may be the exclusive domain of federation but it does not spill over Entry no. 49 of Fourth Schedule to the Constitution of Pakistan after its amendment, meant for imposition of taxes which consciously excludes tax on service after 18th Amendment and empowers the province to legislate on the subject under consideration.

4. It is also immaterial in the arrangement that the goods are being supplied to an area beyond the territorial limits of a particular province i.e. Sindh. Material consideration is that services once rendered in Sindh and materialized within the condition stipulated above, it constitutes an event for The SST Act.

3. 2022 PTD 85
Inland Revenue-Appellate Tribunal
Messrs Faizan and Brothers VS Assistant Commissioner, SRB Hyderabad

Applicable section: Sec 24B of Sind Sales Tax on Services Act, 2011 (SSTSA)

Brief Facts:

The entity was engaged in the business of distribution of goods/products of companies/ manufacturer in Sindh and is associated with Messrs English Biscuit Manufacturers (Private) Limited (EBM) for distribution and delivery of goods in Sindh.

SRB officer issued a Show-Cause Notice (SCN) under section 24B of the Act mentioning that the services of distribution of goods fall under Tariff Heading 9845.0000-Supply chain management or distribution (including delivery) services which is taxable under 2nd schedule of the SST Act and required the distributor to explain as to why it should not be compulsory registered with SRB.

In response, the distributor submitted that it purchases goods from the manufacturer and sells those to retailers in a specific area and that the SST is applicable in case the agreement is signed between the parties as principal and agent to sell goods on commission basis.

It was also contended that the Department has failed to look into the substance of the agreement of distribution and the department has wrongly treated the value addition as service charges which are protected under federal law.

Subsequently, the Officer-SRB passed Order of Compulsory Registration of the distributor under section 24B of the SST Act.

Feeling dissatisfied of the said order, the distributor filed an appeal before the Commissioner Appeals, SRB which was dismissed.

Being dis-satisfied with the order of Commissioner Appeals, SRB, the distributor filed appeal before the Inland Revenue Appellate Tribunal challenging the orders passed by the Commissioner Appeal and Assistant Commissioner.

Decision

The SRB Tribunal maintained the order of the Commissioner Appeals and **dismissed** the appeal of the appellant, giving the following decision:

The explanations provided with the definition of service as per the SST Act made it clear that the service or services involved in the supply of goods shall remain and continue to be treated as service or services.

The distributor concerned has place of business in Sindh and supplies goods to wholesalers and retailers within the area assigned to it as per the instructions and rate fixed by its principal. This activity of appellant is covered under Tariff Heading 9845.0000 given in Second Schedule of the the SST Act [i.e. Supply chain management or distribution (including delivery) services].

The Tribunal based its above findings due to existence of the following elements in the distribution arrangement which could distinguish the sales or resales made under such arrangement form an ordinary sale of goods:

1. The agreement requires distributor to maintain adequate stocks of the manufacturer to ensure prompt deliveries to customers.

2. Despite transfer of ownership of goods with the element of risk and reward, the sale of goods by manufacturer to the distributor is not a simple sale as the agreement requires distributor to deliver the goods as per instructions of the manufacturer.

3. Under the agreement the distributor is required to use best endeavors to

promote sale, which may not be a pre-condition in an ordinary sale of goods

4. Upon termination of agreement products lying un-sold will be taken back at the discretion of manufacturer which cannot be a condition under normal sale.

5. The agreement provides that the distributor will submit such periodic stocks report as may be required by the manufacturer.

While giving above findings, the Tribunal placed reliance on an earlier decision of the Divisional Bench of SRB Tribunal in an identical case of M/s JSN Traders, Hyderabad wherein the above matter had already been thrashed out in detail.

It is anticipated that the above decisions would create a dispute between the Federal and provincial sales tax authorities over exercising the right on collection of sales tax charged on value addition made on sales by the distributors unless the component of distribution services involved in the arrangement is separately identified or special procedure or mechanism is agreed amongst the federal and provincial authorities for such arrangements.

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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.