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Tax Bulletin

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Foreword

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

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A. Reported Decisions

1. 2022 PTD 1400
LAHORE HIGH COURT
Commissioner Inland Revenue, Lahore VS Coca Cola Pakistan Limited, Lahore

Applicable Sections: Section 21(c), 2(54), 67, 120, 122(5A), 133, 153(1)(b) of the Income Tax Ordinance, 2001 (The Ordinance).

Brief Facts:

The Taxpayer is engaged in the business of manufacture and sale of soft drinks with the brand name "Coca-Cola". It filed a Return of Income for Tax Year 2003, declaring a loss of Rs. 4,368,500 which is deemed an assessment order under section 120 of the Ordinance. The Original assessment order was amended by Tax Officer under section 122(5A) of the Ordinance determining income at Rs. 235,442,602. The additions were made in respect of the following matter:

(i) Disallowance of rebate provided to McDonalds for selling Taxpayer's products at its outlets by contending that the same were advertisement expenses of the taxpayer on which no tax was withheld under section 153 by the taxpayer, warranting disallowance under section 21(c).

(ii) Computing the apportionment of common expenses on turnover basis as compared to apportionment of expenses on gross profits followed by the taxpayer.

Being aggrieved, the Taxpayer filed an appeal before the Commissioner Appeals which was dismissed. The Taxpayer then filed an appeal before Appellate Tribunal [ATIR], which allowed the appeal and accepted the plea of the Appellant.

Subsequently, the petition was filed by the Commissioner of Inland Revenue (CIR) before the Lahore High Court against the order passed by the ATIR and raised the following question of law:

(i) Whether the learned Appellate Tribunal was justified to hold that amount of Rs. 7,893,898 which was disallowed by the department under section 21(c) of the Ordinance and did not attract withholding tax under section 153 by labeling it as Royalty instead of advertisement expenses?

(ii) Whether the learned Appellate Tribunal was justified to hold that Rule 13 of the Rules is not mandatory for purposes of apportionment of expenses under section 67 of the Ordinance?

Decision:

The case was decided by LHC as under:

LHC held that for invocation of provisions of Section 153(1)(b), it is necessary to comprehend the scope of expression 'services' used therein. LHC commented that every payment cannot be presumed to come within the scope of aforesaid term 'services' because such latitude would defeat and overlap other services within the contemplation of the Ordinance. The consideration of acquisition of exclusive rights, by its nature, does not come within the expression of 'services' as used in Section 153(1)(b) rather comes within the ambit of "royalty" defined in Section 2(54) of the Ordinance of 2001. There is no ambiguity that the rebate is a

reduction against sale consideration and hence, could not be equated with consideration for services simply for the reason that buyers of goods do not render any service to the seller.

In response to question 2 raised by the Petitioner on account of apportionment of common expenses, the LHC held that the common expenses of the respondent i.e. taxpayer were rightly apportioned by the Department as per section 67 of the Ordinance, read with rule 13(3) of the Rules on the basis of turnover and the observations of learned Appellate Tribunal that aforesaid Rule was not mandatory is not legally sustainable. The Rules/regulations are subordinate to the parent statute, and though for certain purposes, including the purpose of construction, they are to be treated as contained in the statute, their true nature as subordinate legislation is not lost.

2. 2022 PTD 1411
LAHORE HIGH COURT
The Commissioner Inland Revenue, Multan VS Muhammad Iqbal Rind & Sons

Applicable Sections: 120(1), 122(5A), 122(9), 133(1) and 231-A of the Income Tax Ordinance, 2001 (The Ordinance).

Brief Facts:

The taxpayer filed his Return of Income for tax year 2010 as commission agent and declared his income as Rs.130,000. During the examination of record by the Additional Commissioner [ADC], he identified that the tax payable on income declared in the return is Rs. 2,600 whereas, the total tax deduction claimed under section 231A related to cash withdrawals is amounting to Rs. 20,265. The ADC issued a show cause notice under section 122(5A) / (9) to the taxpayer, as the assessment order was found to be erroneous and prejudice to the interest of revenue. It was contended that during the year Rs 67,55,000 (amount worked back using tax deduction under section 231A) was withdrawn from the bank by the taxpayer, which does not commensurate with the declared results. The ADC issued notices under section 176 of the Ordinance to obtain bank statements of the taxpayers and on perusal of the bank statements identified that a total of Rs 24,003,000 were deposited in bank account of the respondent, treated the same to be his actual turnover / receipts for the tax year instead of income declared under the return and accordingly determined the business income to be Rs.19,202,400 and created tax liability of Rs. 4,800,600 and balance payable was assessed at Rs. 4,773,750. The Appellant filed an appeal before the Commissioner Inland Revenue CIR(A) who annulled the amended assessment order passed under section 122(5A) by ADC Being dissatisfied, the Department filed an appeal against the CIR(A) order before the ATIR, which also dismissed the appeal. Subsequently, the petition was filed by the CIR before the Lahore High Court, against the order passed by the ATIR and raised the following questions of law:

(i) Whether the learned ATIR was justified to uphold the order of CIR(A) under the facts and in the circumstances of the case.

(ii) Whether the learned ATIR was justified the uphold the decision, where the evidence which had not been produced in front of Assessing Officer and cannot be entertained as per section 128(5) of the Income Tax Ordinance, 2001

(iii) Whether is it correct to justify the CIR(A) order without discussing the Grounds of Department and thrashing out the facts of the case.

Decision:

The case was decided in favor of the respondent on the following grounds;
As per the provision of section 122(5A), the Commissioner can amend the assessment only in cases where twin conditions namely (a) The Assessment Order is erroneous; and (b) it is prejudicial to the interest of revenue are fulfilled. If any one of the above condition is absent i.e. Assessment Order is erroneous but not prejudicial to interest of revenue or vice versa, the said section cannot be invoked. Further, the said section cannot be invoked in order to correct each and every type of mistake or error in the Assessment Order. An incorrect application of law or assumptions of fact will meet the requirement of the order being "erroneous". Every loss of revenue cannot be treated has prejudicial to interest of revenue. In case if Commissioner does not agree with the assessment order, then it cannot be treated as erroneous or prejudicial to interest of revenue unless the view taken in the assessment Order is unsustainable in law. In addition, it is further clarify that the error and prejudice should be clearly manifest through show cause notice and cannot be used for any roving or fishing inquiry, various judgement are also placed in this regard. The decision of the Court relied by the ADC has obtained all bank statements of the taxpayer and worked back the figured which is not more than an assumption and speculate arithmetic calculation by the Tax Officer. The Authority of the Commissioner is to invoke section 176 and required the bank statements. However, he cannot have power to treat the total deposits as total receipts / revenue of the taxpayer.
In relation to question 2, to invoke section 122(5A) (9) the two condition must be met simultaneously, however, in the instant case such conditions were not met therefore, we are of the view that the order of the CIR(A) is well reasoned and hence no inference in the impugned order is called for.

3. 2022 PTD 1464 SINDH HIGH COURT Cellandgene Pharmaceutical International VS The Federation Of Pakistan

Applicable Sections: Section 177 of the Income Tax Ordinance, 2001 (the Ordinance)

Brief Facts:

The case of the petitioner was selected for audit proceedings under section 177(1) of the Ordinance. A petition against the said notice was filed before the Sindh High Court (SHC), wherein it was contended that the selection for Audit did not fulfill the criteria of section 177(7) of the Ordinance as there were no reasonable grounds to call for the audit since a similar exercise had been carried out in respect of a period preceding the subject period. The respondents submitted that section 177(7) specifically permitted audit in respect of successive tax years and in any event the previous audit had highlighted discrepancies leading to an amended assessment, that was accepted by the petitioner since no appeal was ever preferred.

Decision:

The honorable SHC rejected the petitions on the following grounds:

No case has been set forth before us to suggest that the grounds invoked for audit, vide the Impugned notice, are not reasonable; and finally it is observed that it was never the case of the petitioner that any vested Constitutional rights have been infringed by its selection for audit vide the notice.

The state has the right to examine the books of the taxpayer in order to ascertain the correct quantum of payment of tax, moreover, it is always mentioned in the notice that the Audit Proceedings would be dropped, if there is no adverse inference is discovered. Therefore, the court is of the view that selection of the Audit under section 177 of the petitioner for previous year does not prevent the department to initiate the said audit proceedings.

4. 2022 PTD 1467 SUPREME COURT OF PAKISTAN Farrukh Raza Sheikh VS The Appellate Tribunal Inland Revenue

Applicable Sections: Section 132(2) and 22(1) of the Income Tax Ordinance, 2001 (the Ordinance)
Brief facts:

The Taxpayer (Petitioner) challenged the Order under section 122(1) of the Ordinance, passed by the CIR – Appeals before the Appellate Tribunal Inland Revenue which was dismissed for non-prosecution on the basis that no one from either party appeared before the Tribunal. The said action was taken in accordance to the Rule 22(1) of the Appellate Tribunal Revenue Rules, 2010.

The petitioner being aggrieved filed a petition in the High Court on the contention that Tribunal cannot dismiss an appeal on non-prosecution. Section 132(2) of the Ordinance provides that Appellate Tribunal shall proceed with passing an ex-parte order on the basis of available records. The said petition was dismissed by the High Court, which was later challenged before the Honorable Supreme Court.

Decision:

The Honorable Supreme Court of Pakistan decided the matter in favor of the petitioner, on following basis

- The Rule 22(1) of the Tribunal cannot contradicts to section 132(1) of the Ordinance. As section 132(1) of the Ordinance provides that the Tribunal shall provide an opportunity of being heard to the parties during the process of appeal; however, where one of the party is in default and on the date of hearing the same is not available, the Tribunal may pass an ex-parte order and decide the matter on the basis of available record.

- Rule 22(1) of the Tribunal Rules provides that if the parties to the appeal fails to appear in the matter before the Tribunal, the Tribunal may dismiss the appeal on the basis of non-prosecution, which contradicts with the provision of section 132(1) of the Ordinance.

- It is a trite law that any rule may not override / offend or be inconsistent with any other provision of the relevant law i.e. Ordinance, in the said matter. In this view the Rule 22(1) of the Tribunal Rule, being inconsistent, is therefore, ultra vires and therefore, the appeal of the petitioner shall be considered as pending before the Tribunal and the same petition is converted into the appeal and allowed in favor of the petitioner.

5. 2022 PTD 1474 SINDH HIGH COURT Commissioner Inland Revenue VS Dawood Islamic Bank Limited (Now Burg Bank)

Applicable Sections: 108 and 109 of the Income Tax Ordinance, 2001 (the Ordinance)

Brief Facts:

A company named Sui Southern Gas Company (SSGC) was a normal customer of a BURJ BANK. Due to common directorship, both these entities were associates under the laws of SECP. As is the case with other customers, the respondent bank paid interest on deposits maintained by SSGC with the bank till the amount was withdrawn by SSGC.

However, the Deputy Commissioner Inland Revenue (DCIR) treated the withdrawal of the deposits by SSGC as an interest-free loan advanced by the bank to its associated company (SSGC) and therefore, contended that the interest should have been charged on market terms. Since the bank did not charge such interest to SSGC, the Officer proceeded to add deemed interest income of the Bank by invoking provisions of section 108 and 109 of the Ordinance and passed the Order accordingly.

The respondent, being aggrieved by the decision, filed an appeal before the Commissioner (Appeal), who confirmed the DCIR' order. Subsequently, the respondent bank filed an appeal before Appellate Tribunal who deleted such addition of the interest income worked out by the DCIR under-section 108 and 109 of the Ordinance.

The tax department filed a reference application before the Sindh High Court seeking its verdict on a question of law that whether the Tribunal was justified to annul the addition of such interest income instead of remanding back the case.

Decision:

The Court perused the findings of the Tribunal and dismissed the reference application of the tax department by stating that there was no question of law apparent in this matter and the perusal of findings and records of the Tribunal reflected that the DCIR had misperceived the repayment of deposit as an interest-free loan advanced by the bank and thereby, worked out and added interest on the said advance calculated on market terms, by invoking section 108 and 109 of the Ordinance.

6. 2022 PTD 1535 SINDH HIGH COURT Commissioner Inland Revenue VS Excel Pakistan (Private) Limited

Applicable Sections: Section 20, 32, 34, 122 & 133 of the Income Tax Ordinance, 2001 (the Ordinance) and 199 of Constitution of Pakistan 1973

Brief Facts:
The tax department (the Appellant) disallowed the claim of the Respondent made in respect of foreign currency exchange loss calculated on accounts payable to its foreign company on the premise that the same is not an actual but notional expense. The Commissioner Inland Revenue (Appeals) deleted the impugned addition which was also confirmed by the Appellate Tribunal Inland Revenue. The Appellant filed reference application before the Sindh High Court to consider following questions of law:

1. Whether under the facts and circumstances of the case, the learned Tribunal was justified to uphold the order of Commissioner (Appeals) allowing the notional exchange loss, without taking into account the principle that when the law required something to be done in certain way, it had to be done in that way or done not at all?

Decision:

The High Court decided the case in favor of the Respondent and held that:

- Section 20, 32 and 34(5) clearly stipulate that a liability accrued for the purpose of business expense during the year is an eligible deduction.
- Exchange loss, calculated on the accounts payable at the last day of financial year, is not a notional expense but an actual expense.
- An amount payable by the respondent to its foreign company has to be considered as an ascertained liability and allowance of the same has to be made on accrual basis as per the mercantile system of accounting, and the extra amount payable at the time of actual payments due to the devaluation of the rupee has to be taken care of in the accounts as an ascertained liability of the respondent as per the accounting system employed. Therefore, such exchange loss shall be considered as a lawful deduction in the hands of the respondent
- That the order of CIRA and ATIR do not suffer from any legal infirmity and have been passed in conformity with the provisions of Sections 32 read with Section 34 of the Ordinance. Therefore, answer to the aforementioned question of law is in affirmative i.e. in favor of the respondent.

7. 2022 PTD 1619 SINDH HIGH COURT Telenor Micro Finance Bank Ltd VS Commissioner Inland Revenue

Applicable Sections: Section 53, 133, 159, 161 and Clause (47B) of Part IV of Second Schedule of the Income Tax Ordinance, 2001 (the Ordinance)

Brief Facts:

Demand under section 161(1A) was raised against the applicant on account of non-compliance of notice under the said section. The Order was confirmed by both CIRA and ATIR. The applicant filed reference before the Sindh High Court on the ground that it was not required to withhold tax on its payment as the recipients of payments fall within the entries enumerated under clause (47B) Part IV of the Second Schedule to the Ordinance. Following question was put before the SHC in the instant reference:

Whether the applicant was liable to recover tax under section 161 of Income Tax Ordinance, 2001 in the absence of Certificate of exemption under section 159 of Income Tax Ordinance, 2001 that was to be issued on account of concession provided under clause (47B) of Part IV of the Second Schedule read with section 53 of Income Tax Ordinance, 2001?

Decision:

The SHC held that the question under consideration has already been settled by this court in the case of Meezan Islamic Fund and others v. D. O (WHT) FBR and others (2016 PTD 1204), which shall mutatis mutandis apply to instant tax reference before the Court. The SHC decided the case in favor of the Respondent and held that the concession envisaged under clause (47B) of Part IV of the Second Schedule of the Ordinance, 2001 cannot be availed by withholdee out-rightly and directly from the withholder unless there is a valid exemption certificate issued to it under section 159(1) of the Ordinance, 2001. Therefore, in absence of valid exemption certificate the applicant was liable to withhold tax as required under the Ordinance.

8. 2022 PTD 1627
LAHORE HIGH COURT
Ashiq Ali Chaudhary Vs Federal Board of Revenue

Applicable Sections: Section 127, 161 & 205 of the Income Tax Ordinance, 2001 (the Ordinance)

Brief Facts:

The Individual (the petitioner) filed the petition on the issue of electronic filing of appeal under section 127 of the Ordinance. It was submitted before the court that as per Rule 76 of the Income Tax Rules. 2002 read with SRO 1315(I)/2020 dated 09.12.2020, the remedy to file appeal is only available electronically. The Order under section 161 / 205 was passed against the petitioner without electronic bar code and consequently, the petitioner was unable to seek remedy available to him under the Ordinance to file appeal electronically under section 127. The petitioner pleaded the Court to direct the Respondents to allow him to file the appeal manually.

Decision:

The court held that if the stance of the petitioner regarding issuance of impugned order without bar code is found correct, then he is allowed to manually file the appeal under Section 127 of the Ordinance along with application for condonation of delay.

9. 2022 PTD 1632
ISLAMABAD HIGH COURT
Telenor Pakistan (Private) Limited VS The Appellate Tribunal Inland Revenue

Applicable Sections: Section 133 of the Income Tax Ordinance, 2001 (the Ordinance).

Brief Facts:

Through the instant judgement, 5 petitions were disposed of by the Honorable Islamabad High Court (IHC) in favor of the tax department. The petitioners applied to IHC to grant them sixty days period to reach out the Court to procure suitable remedy against the order of the IHC maintaining the order of the Income Tax Appellate Tribunal and meanwhile the department may be stopped to initiate any recovery proceedings.

Decision:

The case was decided in favor of the Department. It was held by IHC that:

The petitioners made the request on the basis of the following reported judgements:

- 2009 PTD 1880;
- 2003 YRL 1450; and
- PLD 2009 Kar. 69.

The scenarios in the referred judgements are squarely different as compared to the instant CMs and the tax department cannot be held back from recovering its revenue as it would result loss to the national exchequer. Therefore, the instant CMs petitions lacked merits and were dismissed in favor of the respondents.

10. 2022 PTD 1679
SINDH HIGH COURT
Sindh Irrigation and Drainage (SIDA) VS The Commissioner Of Income Tax

Applicable Section: 84 of the Income Tax Ordinance, 2001 (the Ordinance).

Brief Facts:

The Applicant entered into an agreement with a Joint Venture (JV) and withheld tax at the rate of 5% on

service payments treating the JV as a resident AOP. The department raised contention that one of the members of the AOP is non-resident and has filed its separate return of income as non-resident, therefore, the AOP shall be treated as non-resident and the rate of withholding on payments to the AOP should have been 15% instead of 5% and passed the assessment order treating the Applicant as assesse-in-default. The Applicant's appeal before the Commissioner (Appeals) and Appellate Tribunal were also decided in favor of the tax department. Thus, the Applicant filed reference to the Sindh High Court (SHC) and raised the following question of law:

"Whether on the facts and circumstances of the case, the learned Tribunal was justified in treating the joint venture AOP as Non-Resident by imposing withholding tax at the rate of 15% instead of 5%?"

Decision:

The Sindh High Court (SHC) decided the case in favor of the Applicant and held that:

- The introductory paragraph of the agreement used the phrase of 'joint venture' for the two entities with whom the applicant has made an agreement and both the entities agree to jointly perform their part. This conveys that both of them form an AOP, and the same is covered under sections 2(6) and 80 of the Ordinance.

- The contention of the respondent that one of the members of the AOP is non-resident because it has filed separate return of income of non-resident, therefore, the AOP shall be treated as non-resident, is mistaken and the residential status of the AOP shall be viewed independently of its members.

11. 2022 PTD 1690 ISLAMABAD HIGH COURT Sungi Development Foundation Employees Provident Fund Trustees VS Federation of Pakistan

Applicable Sections: 4(1)(s), 122(5A), 140, 170 of the Income Tax Ordinance, 2001 (the Ordinance)

Brief Facts:

In pursuance of tax demand generated under assessment proceedings against the person, the Taxation Officer proceeded to recover the tax demand from its bank under Section 140 of the Ordinance, on account of holding money on behalf of the person against whom tax demand was established. However, due to misreading of NTN on part of bank, the amount in question was mistakenly debited by the bank officials from the petitioner's account.

On approaching the Taxation Officer, the petitioner was asked to file refund application in terms of Section 170 of the Ordinance in order to take refund of confiscated amount.

The petitioner filed the petition before the Islamabad High Court by taking plea that petitioner is not connected with the tax affairs or liability of person under consideration and such action by the Taxation Officer with the help of custodian bank is illegal and without jurisdiction.

It is important to note that there is no mechanism defined under the Ordinance how to refund / return / adjust where an amount due from one taxpayer wrongly collected from another taxpayer especially when nothing is due or pending from second

taxpayer and in no way connected with the tax affairs of the first taxpayer.

Decision:

The Islamabad High Court decided the matter in **favor** of petitioner and pronounced the following;

- Section 170 of the Ordinance is not attracted in the instant case as the petitioner is neither liable for payment of any tax due nor tax was required to be paid in lieu of tax demand generated.

- Petitioner shall be given a cheque or pay order for an amount appropriated form his bank account together with an interest calculated at the rate of KIBOR plus two percent from the date of misappropriation to the date of cheque or pay order as the case may be.

- FTO shall conduct an inquiry to determine whether Taxation Officer is liable for abuse of authority and/or maladministration and submit the recommendation to the Court within a period of three months.

12. 2022 PTD 1722 APPELLATE TRIBUNAL INLAND REVENUE Zia Steel Re-Rolling Mills VS Commissioner of Inland Revenue

Applicable Sections: 182(1) of the Income Tax Ordinance, 2001 (the Ordinance)

Brief Facts:

The appellant did not e-file its income tax returns for tax year 2011 and 2012 for which the appellant was confronted through show cause notice which remain uncomplied with. Accordingly, penalties for subject tax years were imposed by the Assessing Officer by passing orders under Section 182 of the Ordinance. The appellant being aggrieved filed appeals before the Commissioner Inland Revenue Appeals who confirmed the penalty orders. The appellant filed an appeal before Appellate Tribunal Inland Revenue on the basis of following grounds:

- For tax year 2011, due date for filing of return was extended by FBR and, accordingly, the return was submitted within such stipulated time period.

- Before issuance of show cause notice (SCN), returns were submitted along with payment of admitted tax liability, therefore, question of penalty does not arise.

- Case in hand is fully covered in the amnesty given by the Federal Government through SRO 494(I)/2013 dated 10.06.2013, therefore, the appellant is entitled to get relief by deleting the impugned penalty.

Decision:

ATIR annulled the orders passed by both below authorities in light of various reported judgments by pronouncing that the appellant has duly paid the admitted tax liability within stipulated time and filing of return before the issuance of SCN and, therefore, such late filing of return has not caused any loss to the national exchequer, thus, penalty and default surcharge for late filing of returns cannot be upheld.

13. 2022 PTD 1730
ISLAMABAD HIGH COURT
M/S Pakistan Tobacco Company Ltd Vs Federation of Pakistan

Applicable Sections: 2(63), 4, 4B, Division 11A of Part I to First Schedule of the Income Tax Ordinance, 2001 (the Ordinance)

Brief Facts:

The petitioner approached the Islamabad High Court on the issue of Super Tax which is levied through Section 4B of the Ordinance, being additional tax and double tax imposed contrary to the legislative rights sanctioned to the taxpayers under the Constitution of Pakistan and, therefore, raised the following questions of law before the Islamabad High Court;

- Super tax promulgated for specific purpose i.e. for the benefit of rehabilitation of temporarily displaced persons and thus meant for contribution to the Federation and cannot be deemed as tax.

- Tax Statue can have only one charging section and in the presence of one charging section i.e. Section 4 of the Ordinance, there is no room for another charging section in the Ordinance on the same income.

- Super Tax has been imposed on specified category of taxpayers which is discriminatory and liable to be held ultra vires under Article 25 of the Constitution.

Decision:

Islamabad High Court while pronouncing the subject matter specifically referred and agreed the findings of Sindh High Court, Lahore High Court and Supreme Court wherein similar questions of law raised by various taxpayers on the levy of Super Tax and, accordingly dismissed the petition in the following manner;

- The expression 'tax' has a wide scope in the context of the Ordinance, and therefore, insertion of section 4B intended the levy of super tax for rehabilitation of displaced persons, leaves no doubt that the legislature had intended to treat it as a Tax and not a fee.

- Double taxation can only be imposed by clear and specific language. Super tax has been levied in addition to the income tax by a clear and independent provision. and for which charge, assessment and recovery procedure has also been provided.

- Super tax is neither discriminatory nor creates any unreasonable classification amongst the same class of persons upon whom its charge has been created, while applying the common burden through uniform rate of tax upon Banking Companies at 4% of the income, and person other than Banking Company, having income equal to or exceeding Rs.500 Million at 3% of the income.

14. (2022)126 TAX 27
APPELLATE TRIBUNAL INLAND REVENUE
Feroze P. Bhandara, Karachi and Commissioner Inland Revenue

Applicable Sections: 221 of the Income Tax Ordinance, 2001 (the Ordinance)

Brief Facts:

The miscellaneous application for rectification was filed by the applicant against the order of the Appellate Tribunal Inland Revenue (the ATIR) before ATIR by taking plea that Honorable Members of the ATIR have not followed the judgments of Honorable High Courts on point of law and judgement is considered infructuous when it fails to follow an earlier binding precedent and, therefore, the impugned order shall be rectified or recalled.

Decision:

The ATIR turned down the application in view of scope of Section 221 of the Ordinance in the following manner;

- The power of the authorities enumerated in Section 221 of the Ordinance is confined only to amend the enumerated orders with a view to rectify any error or mistake apparent from the record; however, for the case in hand the rectification application filed is a sort of seeking re-hearing and/or review or appeal in respect of ATIR's own order, but not rectification.

- It is well-settled that apparent mistake is something which appears to be incapable of argument or debate and, therefore, a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remain to be investigated cannot be corrected by way of rectification.

- The powers of the Tribunal for rectification of mistakes cannot be extended or allowed to be stretched to authorize the Tribunal to sit in judgment as an Appellate Court against its own order and reverse the same by finding faults or by taking additional grounds/evidence to a conclusion in favor of the applicant.

15. (2022)126 TAX 51 APPELLATE TRIBUNAL INLAND REVENUE Ms. Zahida Parveen VS Commissioner Inland Revenue

Applicable Sections: Section 111(1)(b), 111, 122, 122(1), 122(5), 122(9), 137(2), 218 of the Income Tax Ordinance 2001.

Brief Facts:

The Tax Officer (TO) amended the original assessment order through assessment proceedings that the plot gifted to the appellant by his real brother has not been declared by the appellant in his wealth statement for the subject tax year and invoked Section 111 of the Ordinance on account of undisclosed assets. Being aggrieved, the appellant filed an appeal before Commissioner Inland Revenue Appeals (CIRA) who upheld the order of TO without considering the facts of the case and, accordingly, an appeal before Appellate Tribunal Inland Revenue (the ATIR) was filed. However, in pursuance of promulgation of Assets Declaration Ordinance, 2019 (the AD Ordinance), the appellant declared undisclosed asset (the instant plot) in the declaration made under the AD Ordinance, and filed additional ground in this respect before the ATIR.

Decision:

The ATIR deleted the order of below authorities and decided the case in favor of applicant in the following manner;

- The case in hand is pending before the appellate forum and has not attained finality because

it is settled principle that order passed in original proceedings is not final unless it crosses all the forums set up under that law in which it can be challenged and the order of the last forum would become final. Therefore, subsequent to the declarations made under the AD Ordinance, the contention of the petitioner is in accordance with law and the rejection made by the below appellate forums is without any legal basis.

16. (2022) 126 TAX 71 APPELLATE TRIBUNAL INLAND REVENUE KARACHI Feroze P. Bhandara VS Commissioner Inland Revenue, Corporate Regional Tax Office Karachi

Applicable Sections / Provisions:
4B, 4B(4), 37, 37(A), 48 &100B - Clause 10 of Second Schedule to the Income Tax Ordinance, 2001

Brief Facts:

The appellant was an individual and a tax resident of USA for over 45 years. The appellant filed his tax return for tax year 2015 declaring capital gains from disposal of shares of a listed Company. The DCIR imposed super tax under section 4B of the Ordinance which was maintained by the Commissioner Appeals. The Appellant preferred to file appeal before Appellate tribunal on following grounds:

a) Relying on the decision of the Hon'ble High Court of Sindh reported as 1983 PTD 126 (H.C.) the appellant contended that capital gain on disposal of shares is part of "industrial and commercial profits" hence exempt under the Double Tax Treaty between Pakistan and United States of America (the DTT)

b) The relevant shares were inherited in the year 1960 which created vested right of exemption from super tax on capital gains under the Income Tax Act, 1922 and cannot be taken away by virtue of any subsequent change made therein.

c) Under Section 100B read with the eighth Schedule to the Income Tax Ordinance, 2001 only such gain on sale of shares is liable to tax which is "actually computed/collected by the NCPPL".

On the other hand, the DR argued that the said relief/exemption under the DTT is only available only to an 'enterprise' whereas the appellant (being an 'individual') does not, fall within the term 'enterprise'.

Decision:

The ATIR decided to maintain the orders of DCIR and Commissioner Appeals and decided the matter as under:

a) The ATIR referred to its earlier decision reported as 2000 PTD 1396 (Trib) in an identical case of USA resident and held that capital gain is a distinct class of income and does not relate to industrial and commercial profits and gains from business. No specific exemption is provided under any Article of the Pakistan USA tax treaty for capital gain.

b) The omission of clause (110) of the Second Schedule and insertion of Section 37A resulted in withdrawal of exemption. For the sake of argument, the vested right was only limited to tax @ 0% as per Division VII of Part I

of the First Schedule and not of outright exemptions

c) Furthermore, the appellant's contention that the capital gain is not subject to any tax, including super tax, other than the tax computed by NCCPL is misconceived. The capital gain earned by the appellant is subject to tax under section 37A hence such income falls under the definition of 'income' provided under section 4B and therefore, is also subject to Super tax under the said section. The ATIR decided to maintain the orders of below forums.

Sales Tax Act, 1990

A. Sales Tax General Orders (STGOs)

1. STGO No. 04 of 2023, dated October 5, 2022

Tier-l 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 further 81 persons identified as Tier-1 Retailers, has been placed on FBR's web portal requiring them to integrate with FBR's system by October 10, 2022. In case of failure to make the requisite integration by such notified persons, their adjustable input tax for the month of October 2022 would be disallowed up to 60% as per sub-section (6) of section 8B of the ST Act, without any further notice or proceedings, thus creating tax demand by the same amount.

Any of the notified retailer who claims itself to have been wrongly notified as Tier-1 Retailer and whose input tax adjustment has been reduced by 60%, may file Online application on IRIS portal for removal of this restriction following the procedure laid down in STGO No. 17 of 2022, dated May 13, 2022 and the Commissioner would decide the case in this regard.

B. SROs

1. SRO. 1963(I)/2022 – dated October 25, 2022

Through this SRO, the Federal Government has exempted sales tax on the goods supplied to Japan International Cooperation Agency (JICA), Japan and sales tax on services provided to them within Islamabad Capital territory.

C. Reported Decisions

1. 126 TAX 260
Supreme Court of Pakistan

Commissioner vs M/S. Pak Elektron Ltd

Relevant Provisions: Section 4 of Sales Tax Act and S.R.O. 530(I)/2005, Dated 06.06.2005

Brief Facts:

The respondent Company claimed zero rating on electricity meters used in the manufacturing premises in terms of SRO 530(I)/2005 dated June 6, 2005 (rescinded on June 11, 2008) whereby zero rating was allowed on imported plant, machinery, and equipment (whether or not manufactured locally), including parts thereof except for consumer durables and office machines.

The Department’s contention that electricity meters are consumer durables and are not eligible for classification as equipment, was rejected by the Appellate Tribunal on the premise that as per international interpretations electricity meters' have been prescribed as electricity metering equipment and therefore are classifiable as equipment eligible for zero-rating under the terms of SRO 530(I)/2005 dated June 06, 2005. The decision of the Tribunal was upheld by the Lahore High Court (LHC).

The said judgment of LHC was later on challenged before the Hon’ble Supreme Court of Pakistan (SC) by the Commissioner with the request to grant leave to appeal on the grounds that

electricity meters are consumer durables and are not eligible for classification as equipment within the meaning of said SRO of 2005.

Decision:

The Supreme Court dismissed the petition while giving reference to the judgment reported as 2017 PTD 603, in case of SIUT (also upheld by the Hon'ble SC through its subsequent judgment dated February 11, 2020) which goes against the interpretation urged by the Department.

2. 126 TAX 277 Islamabad High Court

Allama Iqbal Open University VS Federation of Pakistan and Others

Relevant Provisions: Section 11(4), 33(5), 34 of the Sales Tax Act (ST Act)

Brief Facts:

The instant petition was filed before the Islamabad High Court against coercive recovery of the sales tax demand made by the Department.

The Petitioner was alleged for failing to withhold sales tax at the rate of 1/5th on the purchases made from unregistered suppliers during the period from July, 2012 to June, 2013. The Department concluded the proceeding by creating sales tax demand amounting to Rs. 104,847,089. Being aggrieved, petitioner filed appeal before Commissioner Inland Revenue Appeals (CIRA) whereby CIRA dismissed the appeal and maintained the decision. The Petitioner then filed an appeal before Appellate Tribunal Inland Revenue (ATIR). However, during the pendency of the aforesaid appeal before the ATIR, the Department recovered Rs. 53,702,159 from the petitioner's bank accounts.

Later on, ATIR allowed the appeal and annulled the orders of Department and CIRA. Being aggrieved by the decision, respondent Department filed sales tax reference before the Islamabad High Court.

Petitioner made request to the Chief Commissioner in order to get refund of the amount that had been recovered from his account as well as registered complaint with Federal Tax Ombudsman but no one intervened in the matter on account of the pendency of sales tax reference before the Court. The petitioner then filed writ petition with the High Court for seeking directions to be issued to the respondents to refund the amount wrongfully deducted from petitioner's bank account.

During the proceedings, the Department informed the Court that the refund of the said recovered amount of Rs. 53,702,159 has been processed under section 66 of the ST Act and the same has been adjusted against another outstanding income tax demand of Rs.119,243,383 created through order passed under section 161 of the ITO, 2001 dated February 15, 2022 for which remand back proceedings are in progress as per directions of CIRA.

Decision:

The High Court decided the case in favour of the petitioner by directing department to release the withheld amount and pay interest for delay in the payment from the date of order of ATIR while giving the following findings:

- The said income tax order creating demand of Rs.119,243,383 against which refund of Rs.53,702,159 was adjusted, has been set-aside by the CIRA vide order dated April 05, 2022, the respondent Department is under an obligation to refund the said amount of Rs.53,702,159 to the petitioner without any further delay.

- Mere pendency of the Reference before the High Court is not a valid ground for the inaction on part of the respondent Department to give the benefit of the already sanctioned refund to the petitioner.

- The delay of more than six years on the part of the respondent Department to sanction the petitioner's claim for refund negates the concept, 'the Government is the best taxpayer.' Hence, for this delay of more than six years, the respondent Department is also under an obligation to pay interest in accordance with the provisions of the 1990 Act.

3. 2022 PTD 1377 Balochistan High Court

The Commissioner Inland Revenue, RTO, Quetta vs Messrs Hajvairy Steel Industries (Pvt.) Ltd.

Relevant Provisions: Section 3, 3(1), 3(1A), 3(2b) 3(6), 8(1)(b), 47 ST Act Rule 58-H of the Repealed Sales Tax Special Procedure Rules, 2007 (The Rules)

Brief Facts of the Case:

The registered person (Respondent) is a private limited company, engaged in the business of steel re-roller and steel-melter. The Respondent discharged liability of Sales tax for the periods of 2013 to 2016 with their monthly electricity bills by complying with the provisions of Rule 58H of The Rules.

The Additional Commissioner issued show-cause notices to the Company on the ground that further tax, under section 3(1A) of the ST Act, has not been paid on supplies made to unregistered person. Accordingly, order was passed against the Company, and the amount of further tax of Rs.40,450,626 along with default surcharge and penalty at the prescribed rates, was held recoverable form the Respondent.

The Respondent being aggrieved, filed an appeal before Commissioner Inland Revenue Appeals (CIRA). The CIRA, being dissatisfied with the order of the ADCIR, cancelled and set aside the demand raised through the order of ACIR.

Being aggrieved of the order of CIRA, the Department went into appeal before Appellate Tribunal Inland Revenue (ATIR). The ATIR, after examining the facts of the case and relevant provisions of the Act and Rules, upheld the order of CIRA and rejected the appeal filed by the Department.

Learned counsel for the Applicant/Department assailed the order of the learned Tribunal before the Balochistan High Court and argued that the respondent has been wrongly allowed exemption of further tax under section 3(1A) of the ST Act, which was provided to steel melters by the FBR through SRO No.585(I)/2017 dated July 01, 2017 with effect from July 01, 2017 whereas the tax periods involved pertain to years 2013 to 2016.

The Commissioner also relied on the decision of the Supreme Court (SC), in the case of M/S Zak Re- Rolling Mills (Pvt.) Ltd, v. ATIR reported as 2020 PTD 382; claiming that in the said judgment of SC it has been held that even if the sales tax is paid under a specific procedure envisaged in Rule 58H of the Sale Tax Special Procedure Rules, 2007, the registered person is not exempt from levy of further tax under Section 3(1A) of the ST Act.

Decision:

The honorable High Court decided the matter against the Department and confirmed the judgments of the CIRA and Appellate Tribunal, on the following basis:

- The provisions of section 3(1A) relating to further tax apply where taxable supplies are made to an unregistered person and shall be in addition to sales tax charged vide section 3 of the ST Act

- Section 71 contained a non obstante clause due to existence of the wordings "Notwithstanding anything contained in this Act…" and therefore, if a procedure is provided by the Board through section 71, the procedure will override the other provisions of the Act and the payment of sales tax shall be governed by the special procedure so provided.

Since the Respondent / Company had been discharging its sales tax liability vide Rule 58H of the Rules, further tax vide 3(1A) was not applicable on the Company. The respondent never took the ground of exemption from further tax introduced vide amending SRO No.585(I)/2017, therefore the argument of non-effectiveness of such exemption during in the periods under reference is irrelevant.

While discussing the reliance of the department on the Judgment of Supreme Court, the Honourable High Court mentioned that the petition of M/s. Zak Re-Rolling Mills (Pvt.) Ltd was dismissed by the Apex Court on the technical ground that the points raised before the Supreme Court were not raised in the Reference Application before the High Court and the same were not discussed and considered in the judgment of the High Court. Under Article 185(3) of the Constitution, the Apex Court only deal with questions of law that have been urged before the forum below.

* *Section 71* was *subsequently amended by Finance Act, 2019*

4. 2022 PTD 1455 Lahore High Court

Commissioner VS M/S Tariq & Sons

Relevant Provisions: Section 4, 47 of the ST Act

Brief Facts:

In this case, the registered person (Respondent) charged sales tax at reduced rate of 4% or 6% against supply of shoe adhesive vide SRO 283(I)/2011 dated April 1, 2011 which provides the condition that no input tax adjustment or refund shall be admissible to the supplier. Later on, owing to subsequent zero rating of such supplies vide SRO 1125(I)/2011 dated December 31, 2011, the respondent requested for refund or input tax adjustment for the period of May 2011 onwards, through retrospective application of the SRO 1125(I)/2011 dated December 31, 2011 which was rejected by the Department. The matter when challenged before Appellate Tribunal Inland Revenue (ATIR) was accepted by the ATIR while taking view that SRO 1125 has conferred benefit upon registered person, therefore, same could have been given retrospective effect.

The Department filed Reference Application before Lahore High Court and raised following question of law:

- Whether SRO 1125(I)/2011 dated December 31, 2011 will be effective

retrospectively by overriding the express provisions of already issued SRO 283(1) dated April 1, 2011 and SRO 1058(I)/2011 dated November 23, 2011, which have never been amended or repealed?

Decision:

Lahore High Court decided the reference application in favor of the Applicant Department with following observations:

- As SRO 1125(I)/2011 was specifically given effect from January 1, 2012, therefore, it could not have been given retrospective effect as SRO 1058(I)/2011 was operative which specifically restricted the adjustment of input tax. In absence of any indication of retrospective operation of SRO 1125(I)/2011, it must not be given retrospective effect.

- Further, the Hon'ble High Court observed that beneficial legislation is interpreted liberally, and benefit is applied retrospectively, when the legislation is done to address any ambiguity in the law or to provide any remedy. The Legislation cannot be interpreted retrospectively merely on the ground that the legislation is generically beneficial in nature.

5. 2022 PTD 1502 Lahore High Court

Unique Engineering Works (Pvt.) Ltd vs Federation of Pakistan & others

Relevant Provisions: Section 11A, 24, 34 of Sales Tax Act, 1990
174, 174(3) of Income Tax Ordinance, 2001

Brief Facts:

The petitioner was issued show cause notice under section 11A of the ST Act for tax year 2006 - 2007 alleging for short payment of tax with a direction to recover the short tax paid along with default surcharge and called upon to provide documentary evidence of certain transactions and details of payments.

The petitioner challenged the proceedings through filing petition before Lahore High Court and contended that the information for seeking the record and documents for the aforesaid tax year came to an end on June 30, 2013 and the same is now time barred. The petitioner placed reliance on the judgment passed in W.P. No. 21602/2021, wherein this issue has been decided with reference to the provisions of Income Tax Ordinance, 2001.

However, the learned counsel for respondents argued that the provisions of Section 24 of the Act do not bar proceedings initiated under section 34 of the Act. Learned counsel further argued that the issue in question is about failure to pay tax which can be investigated by the department at any given time. They further argued that the limitation period to maintain the record is for the purposes of assessment or any other proceedings which does not include the incidence of recovery of tax.

Learned counsel explained that limitation under Section 24 of the Act with reference to retention of record and documents does not mean or suggest that proceedings under Section 34 of the Act cannot continue or that the said proceedings should be quashed.

Decision:

Lahore High Court accepted the petition by the taxpayer by giving reference of the judgment quoted by the petitioner passed in W.P. No.21602/2021 which states that the taxpayer cannot be compelled to produce documents which the statute does not require it to

maintain beyond six years in terms of Section 174(3) of the Ordinance.

The LHC further quoted that the judgment passed by the Hon'ble Sindh High Court vide 2013 PTD 1659 (supra) went a step further to hold that there is some obligation on the department when it initiates actions beyond the six-year period and calls for documents and record which the taxpayer is not required to maintain under the law. The Court held that the purpose of setting a time limit for maintaining accounts and documents is to ensure that proceedings under the Ordinance are held within time and where there is a delay, the obligation then rests on the relevant Commissioner to justify the cause of delay and the reasons for seeking documents beyond the six years' period.

6. 2022 PTD 1508 Inland Revenue Appellate Tribunal

M/S Masood Textile Mills Limited VS The Commissioner

Relevant Provisions: Section 46 of the Sales Tax Act (VII of 1990)

Brief Facts:

In the instant case, appeal against the set-aside/ remand back order of CIRA was pending for adjudication before the ATIR however, in the meantime, the department initiated re-assessment proceedings in pursuance of that CIRA order. In this regard, the registered person filed miscellaneous application in order to seek grant of stay against initiation of the re-assessment proceedings.

Decision:

The Tribunal granted stay against initiation of reassessment proceedings by relying on judgment reported as 2005 PTD 678

- When an order of assessment is set aside in appeal by an authority and a further appeal is filed against such setting aside of the order before a higher authority then the Assessing Officer should not frame re-assessment and should wait for the decision of higher forum.

7. 2022 PTD 1542 Inland Revenue Appellate Tribunal M/S Anwar Traders Vs The Commissioner

Applicable Sections: 2(12), 3, 3(1A), 23, 26 of the Sales Tax Act, 1990

Brief Facts:

The Appellant was alleged of not paying further tax at the rate of 2% under section 3(1A) of the ST Act against the supplies made to unregistered person while scrutinizing the sales tax return of March 2018 to June 2018. In response, the Appellant made following submissions:

- the appellant has supplied Zinc Ingots to the 'Master of Mint' (who is engaged in making of currency coins which are exempt from payment of sales tax as being "money" which is excluded from the very definition of "goods" as given in section 2(12) of the Act which stands that "goods" include every kind of moveable property other than actionable claims, money, stocks, shares and securities.

- since currency notes and coins being included in money used as a medium of exchange at large are precluded from the very definition of goods, therefore, the coins are not taxable goods and no sales tax is chargeable thereon. Consequently, the recipient of supplies being not engaged in supply of taxable goods is not liable

to obtain registration under the ST Act.

- sales made to end-consumers are not subject to levy of further tax under the provisions of section 3(1A) read with S.R.O. 648(I)/2013 dated July 09, 2013 wherein, supply of goods made directly to end- consumers has been excluded from levy of further tax under section 3(1A) of the Act.

- the alleged goods i.e. Zinc Ingots has been imported and value addition tax is already paid at the time of their imports; therefore, no further tax remains payable on their subsequent supply even if it is made to unregistered persons.

Decision:

ATIR annulled the order with following observations that;

- The buyer M/s. Master of Mint is engaged in manufacturing of coins which is "money". The term, money is nowhere defined in the Sales Tax Act, 1990 or in the Rules made thereunder however, as per its definition given in the Black Laws Dictionary, it means and includes both currency notes and coins. There is no confliction in it that "Money" is excluded from the very purview of "Goods" as defined in section 2(12) of the Act hence it is established that currency and coins being money are precluded from the very purview of "goods" and in turn "taxable goods" as defined in the Sales Tax Act, 1990 and are therefore exempt from levy of sales tax.
- the person engaged in supply of coins is not required to be registered in the sales tax law hence, does not fall under the scope of section 3(1A) of the ST Act. It is clear that M/s. Master of Mint is manufacturing coins which are not subject to sales tax as being excluded from the very definition of goods under section 2(12) of the Act therefore, is not bound to obtain sales tax registration under the Act, as a consequence thereof, it is under no obligation to pay "Further Tax" in terms of section 3(1A) of the Act.

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