TOLA ASSOCIATES
TAX & CORPORATE ADVISORS

TAX PAK
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INAUGURAL NOTE

Tola Associates have been founded in March, 2017. We have started Tax Pak - a newsletter to communicate update to our valuable clients, members and students of ICAP & ICMAP, Businessmen, and general public.

We have planned to circulate this newsletter electronically free of cost on monthly basis regularly covering major developments introduced during the month in Income Tax, Sales Tax (Federal and Provincial) and Federal Excise laws.

Readers are advised to look at disclaimer at end and consult their tax advisors for further clarification of any issue in the newsletter. Readers' feedback is welcomed.

Ashfaq Tola - FCA
Editor in Chief

EDITORIAL NOTE

I would like to take this opportunity to offer a sincere gratitude to **Mr. Ashfaq Yousuf Tola** for inaugurating such activity for the interest of the readers to apprise them with the tax amendments on a monthly basis.

The aim behind unveiling the instant Newsletter i.e. Tax Pak is just to refresh the readers by updating them with the recent developments being carried out in Tax Laws by the Authorities.

Author:
Naresh Kumar Aruwani - Adv

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1. TAXABILITY ON BEHBOOD SAVING CERTIFICATE SCHEME

An amendment has been introduced in Second Schedule to the Income Tax Ordinance, 2001 ("ITO") vide Notification No. SRO 1217(I)/2017 by adding a new clause (103) after clause (102) in the aforesaid Schedule, Part IV. The new clause (103) reads as follows:

"The provisions of section 7B shall not apply to yield or profit on investment in Behbood Savings Certificate or Pensioner's Benefit Account, provided that tax or said yield or profit on debt is paid at the rates specified in Division I or Part I of the First Schedule subject to clause (6) of Part III."

For ready reference Section 7B of the ITO is reproduced hereunder:

"Tax on profit on debt.—(1) Subject to this Ordinance, a tax shall be imposed, at the rate specified in Division IIIA of Part I of the First Schedule, on every person, other than a company, who receives a profit on debt from any person mentioned in clauses (a) to (d) of sub-section (1)of section 151.

(2) The tax imposed under sub-section (1) on a person, other than a company, who receives a profit on debt shall be computed by applying the relevant rate of tax to the gross amount of the profit on debt.

(3) This section shall not apply to a profit on debt that is exempt from tax under this Ordinance."

EXPALANATION

If tax on profit from Behbood Savings Certificate or Pensioner's Benefit Account is paid

in accordance with normal slab rates as given in Division I of Part I of the First Schedule then rates specified in S. 7B Division IIIA of Part I of the First Schedule i.e. 10%, 12.5% and 15% will not apply. However, advance tax under section 151 of ITO shall continue to apply i.e. 10% for filers and 17.5% for non-filers.

"The introduced amendment will subsequently benefit citizens whose bread and butter are contingent on their pensions or on benefits being driven from Behbood Saving Certificate schemes."

Note: Behbood Saving Certificate (BSC) is meant to facilitate widows and senior citizens (aged 60 or above) who can profit from its purchase on monthly basis from the date of its issue. BSC is exempted from Zakat and is un-transferrable.

2. TAXABILITY ON SHUHADA'S FAMILY WELFARE ACCOUNTS

An amendment has been introduced on December 22, 2017 vide **S.R.O 1280(I)/2017** in Part III, Clause (6) of Second Schedule to Income Tax Ordinance, 2001 (ITO) by Federal Board of Revenue.

Clause (6) of Part III of Second Schedule to (ITO) is reproduced hereunder for ready reference;

"(6) the tax payable under clause (c) of sub-section (1) of section 39, in respect of any amount paid as yield or profit on investment in Behbood Savings Certificate or Pensioners Benefit Account shall not exceed 10% of such profit."

The Federal Board of Revenue, as being the competent forum to grant reduction in tax rates and exemption, is pleased to grant reduction in tax liability vide the aforementioned SRO to the Citizens on their profit or yield on investment in Shuhadas' Family Welfare Account which was earlier granted only to Citizens on their profit from Behbood Saving Certificates or Pensioners Benefit Accounts.

Furthermore, a similar amendment has also been introduced in Clause 36A of Part IV of the Second Schedule vide the Same SRO by the Federal Board of Revenue which has exempted profit on debt on Shuhadas' Family welfare Accounts from deduction of advance tax. It is pertinent to mention here that prior to this amendment, Clause 36A of Part IV exempted profit on debt on only Behbood Saving Certificate and Pensioners' Benefit Account from withholding tax, but now it has extended the scope of benefit for Shuhadas Family Welfare Accounts as well.

Note: The 'Shuhadas' Family Welfare Account' scheme was announced by the Finance Minister in his budget speech 2017-18 in recognition of the sacrifices rendered by the Martyrs and their family members. This Scheme was launched through Central Directorate of National Savings (CDNS) and the motive behind such scheme was to guarantee profit to the families of Shuhadas'.

3. SALES TAX ON EXPORTS OF STEEL

With respect to recent amendment made vide ***SRO 1244(I)/2017*** dated 13 December 2017 the repayment rate of sales tax on exports of steel @ Rs 6,306 per ton is applied retrospectively from 23 October 2008 till 1st June 2012 instead of 31 March, 2012.

4. LEVY OF SALES TAX ON SERVICES OF INTER-CITY TRANSPORTATION

The Sindh Government, vide its Circular No. 07/2017 dated November 01, 2017, has restrained the Sindh Revenue Board (SRB) to collect sales tax from inter-city transportation or carriage by road or through conduit or pipeline till December 31, 2017.

It is pertinent to note that after the 18th amendment in the Constitution, the Provincial Governments have started collection of sales tax on service through their respective statutes and as to date all the four Provinces have enacted their respective statutes. Sindh was the pioneer to enact Sindh Sales Tax on Services Act, 2011 followed by Punjab Sales Tax on Services Act, 2012, KPK Finance Act, 2013, Baluchistan Sales Tax on Services Act, 2014 in the Provinces of Punjab, Khyber Pakhtunkhwa and Baluc-

histan respectively. Through Finance Act, 2015, the Federal Government had also substantially enhanced the list of taxable service by amending Islamabad Capital Territory (Tax on Services) Ordinance, 2001.

The Sindh Government in the year 2014 imposed sales tax on services of inter-city transportation which, prima facie, have a direct negative effect on the people of Pakistan living below poverty line in addition to manifold practical limitations. Both the transportation service providers specially Oil Tanker Contractor Association of Pakistan and the local community strongly rejected imposition of sales tax on transportation services and recorded many protest and strikes against this new sales tax Surprisingly, the Government of Punjab and Government of Baluchistan copied the Government of Sindh and introduced this new tax in Punjab and Baluchistan. However, to date none of the Provincial Governments have been able to collect sales tax on transportation services due to its complex nature and incapacity of the service provider to understand and pay this new tax.

EXPECTED CONSEQUENCES

- The largest mode of distribution of petroleum products in the country through road transportation. Sales tax on inter-city transportation services would increase the cost of distribution which would create immense pressure on Oil and Gas Regulatory Authority to increase the price of petroleum products which is the main factor for controlling inflation in the country. Hence,

sales tax on inter-city transportation services is against the policy of the Government to curb inflation.

- Pakistan is an agriculture orientated country with most of its population engaged in deriving income from agriculture. Sales tax on inter-city transportation in Punjab, Sindh and Baluchistan would substantially increase the cost of agriculture produce in the hands of farmers. For example the cost of fertilizer, urea and pesticides will likely increase with this new levy which would demolish the Federal Government efforts to provide subsidized fertilizer and other agricultural products.

- It's is practically impossible to make a formula for collection of sales tax and demarcation of transportation service cannot be made. For example a truck driver takes goods and starts its journey from Karachi, drops some goods in Multan and load other goods in available vacant space, then reach to Quetta for next journey to Faisalabad, Islamabad and Kashmir. No mechanism could be devised for collection of sales tax in aforesaid scenario which would open an era of dispute between the Provincial Governments and the Federal

Government.

- Almost all the transporters, transport companies or truck drivers are illiterate people and do not have the capacity to compute the sales tax and to abide by the law.

- Another bottleneck is the criteria of taxability of these servises as Sindh and Punjab are divided in the issue whether the sales tax is to be charged on the basis of origination or destination of the journey.

5. E-VERIFICATION OF NOTICES AND ORDERS

The practice of digging into the pocket of taxpayers continued over the past many years by the tricksters impersonating themselves to be tax officers on the fake and fabricated notices and exercise of deceiver exhibiting counterfeited exemption certificates and orders before the Tax Authorities for their unlawful gains has nearly come to an end after this very impressive launch of facility for online verification of notices, orders and exemption certificates by the Information Technology Wing of Federal Board of Revenue (FBR) on December 5, 2017 vide Circular No. 1(130)SS(BDT)/2017-BTD/146830-R.

It has been learned that the subject facility has been aimed to prevent mishaps as witnessed by the relevant authorities over the past many years. Vide this particular e-verification, available on FBR website at the link: **https://e.fbr.gov.pk/esbn/**., any withholding agent would be able to easily verify the authenticity of the system generated exemption certificate which earlier took around two weeks for verification of the same.The new facility benefits the general public as well as withholding agents to instantly verify the authenticity of notices, orders and exemption certificates on the basis of the bar code printed on the certificates, notices and orders.

Upon entering the special numbers in the given spaces and to affirm the genuineness of exemption certificates as well as all the correspondence with the Board, the screen will display the information including registration number, name, tax year, section and date of issuance.

This new facility will likely solve longstanding problems as experienced by withholding agents as well as general public and will possibly stop the revenue leakages by eliminating the unlawful practices as carried out prior to this launching facility of e-verification.

6. TOPIC OF THE MONTH

AUTOMATIC STAY AGAINST RECOVERY OF DEMAND - A PURCHASED RELIEF

A lot has been written for and against the questionable relief as illustrated in Income Tax Ordinance (ITO), Sales Tax Act (STA) and Federal Excise Duty (FED). This relief was firstly introduced in Section 140 of the ITO in the year 2015-16 which reads as follows:

"140. Recovery of tax from persons holding money on behalf of a taxpayer— (1) For the purpose of recovering any tax due by a taxpayer, the Commissioner may, by notice, in writing, require any person –

….2[—Provided that the Commissioner

shall not issue notice under this sub-section for recovery of any tax due from a taxpayer if the said taxpayer has filed an appeal under section 127 in respect of the order under which the tax sought to be recovered has become payable and the appeal has not been decided by the Commissioner (Appeals), subject to the condition that twenty-five per cent of the said amount of tax due has been paid by the taxpayer.]…"

It seems that this mouthwatering amendment in the ITO was suitable to collectors or exchequers who were able to meet their revenue targets by easily amending the deemed assessment and minting outstanding demands thereof against the taxpayers and consequently making it for inevitable taxpayers to purchase such relief in consideration of depositing 25% of the disputed amount with the tax authorities. This practice has legalized the rulers and slaves of FBR to catch the taxpayers into their trap by exaggerating the tax demands under the pretext of tax defaults by the taxpayers.

Things moved on and this flimsy provision of law was also introduced in STA and FED in order to make ITO, STA and FED run in a parallel way. Taxpayers started receiving high tax demands notices from the Revenue Authorities relating to the Sales Tax matters as well under the guise of "so called" tax defaults by the tax payers.

Prior to this very amendment in the ITO, STA and FED Interim relief was recognized to be a discretionary relief, however, it may be assumed that such discretionary relief has now been transformed into a vested right for those individuals who chooses to avail/purchase such relief subject to their deposit of some percentage of disputed amount. It becomes a right when the party seeking the relief opts to deposit 25% of the disputed amount, as stipulated in ITO, 2001 and STA, 1990, and FED, 2005 with the Tax Authorities and in a similar manner such relief is of discretionary nature when the Court considers the question of grant of interim relief, while endorsing the co-existence of prima facie case, balance of convenience and irreparable loss and injury in favour of the party seeking the relief as enshrined in Order 39 Rule 1 and 2 of Civil Procedure Code, 1908.

We personally have witnessed many taxpayers showing their dissatisfaction with relation to such amendments made in ITO, STA and FED which pose a question as to what made the legislature persuasive to make such amendments which ultimately digs into the pockets of the taxpayers, hence, amounting to unjust enrichment at the expense of the taxpayer which is against the principle of economic justice embodied in the Constitution. It is the duty of the Government to make policies which benefits the public as a whole. Introduction of such rationale into the provisions of ITO, STA and FED tantamount to burying the discretionary power of the Quasi-Judicial Authority. It is a settled principle of law that an assessee should not be forced to pay a demand created by a revenue authority unless the order creating such demand has undergone the scrutiny of at least one independent forum. (see Honorable Lahore High Court Judgment reported as **2003 PTD 1746.**)

It is worth mentioning that one shall not be

be punished for the sin one has not proved to be done as it is a settled principle of law that an accused is innocent until proven guilty. Similarly, incorporation of such rigid amendment in the provisions of law i.e. a conditional stay is, more or less, equivalent to the punishment for the wrong one has not proved be done.

Beside the query i.e. "conditional stay is a purchased relief", the relevant section for the purpose of this said query is section 131 of ITO which reads as follows:

"Notwithstanding that an appeal has been filed under this section, tax, shall unless recovery thereof has been stayed by the Appellant Tribunal, be payable in accordance with the assessment made in the case.

Provided that if on filing of application in a particular case, the Appellant Tribunal is of the opinion that the recovery of tax levied under this Ordinance and upheld by the Commissioner (Appeals), shall cause undue hardship to the taxpayer, the Tribunal after affording opportunity of being heard to the Commissioner, may stay the recovery of such tax for a period not exceeding one hundred and eighty days in aggregate.

Provided further that in computing the aforesaid period of one hundred and eighty days, the period, if any, for which the recovery of tax was stayed by a High Court, shall be excluded."

According to section 131 (5) the tax has to be paid in accordance with the assessment made unless its recovery has been restrained vide the order of the Appellate Tribunal. Bare reading of section 131 (5)

gives the impression that stay against the recovery of tax is not a matter of right but of discretion. The Appellate Tribunal grants stay once it is satisfied that recovery of tax will cause undue hardship to the taxpayer.

The same condition exists in section 128 of the ITO. The Appellate Tribunal or the Commissioner (Appeals) at its discretion can stop the recovery of tax if it finds that it is a case of **"undue hardship"** for the taxpayer. The same inference has also been drawn in a case reported as **2015 PTD 1855.**

Though, the term 'hardship' has not been defined anywhere in the Statute. Reference is made to Black's Law Dictionary by Bryan A. Garner, Tenth Edition, which defines the term 'hardship' as privation; suffering or adversity. Whereas, Taxman's English Dictionary defines the term 'hardship' as a situation that is difficult and unpleasant because you don't have enough money, food, clothes, etc. and defines the term 'undue' as more than you think is reasonable or necessary syn, excessive.

The Ordinance does not require the taxpayer to prove hardship but requires it to be a case of undue hardship. The meaning of

the term has been drawn in a case titled **Prestige Lights Ltd. V. Customs, Excise and Service Tax Appellate Tribunal (Uttaranchal) (D.B) (2004 (2) U.D.265).**

The taxpayer must show its absolute inability to pay the tax. The same inference was also drawn by Honorable Lahore High Court in a case titled Shagufta Abdullah Versus Commissioner Inland Revenue and 3 others **("Shagufta Case")** and reported as **2015 PTD 1855** which, besides other key issues, pleased to decide that the taxpayer must establish that under existing financial circumstances, his income and expenses does not allow him to pay the required tax. The relevant extract of the judgment is reproduced hereunder:

"It is not the inability to pay the tax or inconvenience to pay the tax. Not it is about commercial viability or profit making. It is a financial disability to pay the tax making it virtually impossible for the taxpayer to pay the tax. The taxpayer must specifically plead undue hardship based in its income and expenses so that it can be evaluated. The appellate forum must assess evaluate and whether it is a case of undue hardship. This evaluation is in the form of a concession available to the taxpayer under the Ordinance. The appellate forum in order to form an opinion as to whether the recovery of a tax would amount to undue hardship must consider the financial position of the taxpayer through its documents and ascertain whether on the basis available assets and income, a taxpayer is prevented from meeting the required demand. Undue hardship can also include situations where the taxpayer is able to show a strong prima facie case. It was held in ***M/s. L.G. Electronic India Pvt. Ltd. v. Commissioner of Central Excise Nodia (Allahabad) (2009 (6) ADJ 246)…"***

We have observed many Authorized Representatives of the taxpayers agitating the point before the Appellate Forum and requesting for the interim relief on the sole ground of having them filed an Appeal against the demand order. It is pertinent to note that filing of an Appeal does not absolve the recovery officer from recovering the demand in question unless recovery thereof has been stayed by the Appellate Forum and mere refusal of the Appellate Authority to grant stay would not mean that the authority has upheld the impugned demand against which an Appeal has been filed by the Appellant. Order of stay takes effect immediately on being passed, even if it was not brought / served to the tax department/officers below.

Matter of grant of stay, no doubt is one of discretionary nature, but such power has to be exercised judicially. The Authority primarily considers, before granting the stay, whether recovery of tax would cause undue hardship to the taxpayer. It can also be argued that such discretionary relief can be transformed into a right when the taxpayer choose to deposit some percentage of the disputed amount with the tax authorities and as a result subject demand is stayed till the final disposal of the Appeal. But how long will it take the Judicial or quasi judicial authority to resolve such matter is a mystery. However, in this connection Shagufta case also goes on to decide that whenever a stay is granted in an Appeal under the Ordinance, there is a corresponding duty on the appellate forum to decide the appeal within the stipulated time particularly where the payment of tax has been stayed.

AUTHOR'S OPINION

Expeditious trial and quick disposals of cases, without losing the sight of provisions of relevant laws, are always appreciable. In the light of discussion rendered above amendments like grant of stay subject to deposit of some percentage of disputed amounts with the treasury will not attract to the taxpayers who proves to likely suffer undue hardship if tax so demanded is recovered from them. However, whether the precondition to stop the recovery subject to deposit of 25% of disputed amount till the final disposal is a concession or a punishment is rather a matter of interpretation. Further, whether taxpayers opting to avail conditional stay by complying with its precondition will likely be refunded the amount he deposited as a surety for the grant of stay along with compensation once the case is decided in its favour needs to be cleared by the legislatures.

7. SUPER TAX - CONSTITUTIONAL OR UNCONSTITUTIONAL

Mr. Justice Shahid Karim in his judgment passed on December 29, 2017 decided the issue regarding the constitutionality of Section 4B(super tax) of Income Tax Ordinance, 2001 arose through Writ Petition No. 38612 of 2015 and other connected petitions **('the Petition')** filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 before the Honorable Lahore High Court, Lahore.

In essence, the petition lays a challenge to the insertion of Section 4B in the Income Tax Ordinance, 2001 by the Finance Act, 2015

Section 4B is an imposition in the nature of 'super tax' for rehabilitation of temporarily displaced persons which was by way of Finance Act, 2017 extended to 2017.

This super tax is being imposed on banking companies and affluent and rich individuals, association of persons and companies within a certain income bracket (above Rs. 500 million) and was deemed to be mere allocation in the Federal Consolidated Fund for a specific project, that is, rehabilitation of temporarily displaced persons. The rehabilitation of temporarily displaced person was validly construed as a project and a specific sector for which an additional amount of revenue was generated by the imposition of super tax.

Honorable Court held that if an impost has been levied as a tax by clear language of the statute, the courts cannot hold the said imposition as ultra vires on the touchstone of double taxation. However, if the intent is not very clear, the courts will not put a construction on the charging section which will amount to double taxation.

The power to impose tax has been derived by the legislature from Article 77 of the Constitution. Therefore, a tax which is a heavy burden and is a compulsory exaction can only be levied by or under the authority of Act of Parliament.

In a taxing statute, legislature enjoys much greater latitude for selection of subjects of taxation as also for classification and the legislative will is based on diverse, economic, social and policy considerations. The economic wisdom of a tax is within the

exclusive province of the legislature and questioning the legislative policy is beyond the domain of the courts. The Super Tax was held to be valid by the Honorable High Court.

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