TOLA ASSOCIATES
TAX & CORPORTE ADVISORS

TAX PAK
Newsletter by
Tola Associates
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Editorial Note

Asalam-o-alaikum everyone! Hope this monthly issue of TAXPAK finds you in good spirits and immaculate health! We welcome you to another edition of TAXPAK, our monthly publication the purpose of which is to provide a monthly update on the ongoing tax related developments in Pakistan. Alhamdulilah, so far, we have been successful in our mission to educate about, and keep the public-at-large updated of, these developments on a monthly basis.

Moreover, we would like to apprise the readers of what information you can expect in this document. This newsletter contains an elaboration of important notifications and circulars issued by the Federal Board of Revenue ("FBR") and its provincial counterparts. For the month of May, only two Notifications were issued by the FBR which have been discussed in this newsletter. Whereas, no notifications were issued by the provincial revenue authorities for the month of May. Moreover, Notifications from the corporate regulatory body i.e., SECP are discussed. As our main aim is to keep the masses updated regarding the developments in the Pakistani tax law, we usually discuss a (relatively) recent judgement passed by the courts of law. This edition of TaxPak discusses two recent judgements passed by the Appellate Tribunal Inland Revenue ("ATIR") and Supreme Court of Pakistan ("SC"), respectively. The judgment passed by the ATIR relates to adjustment of tax withheld under Section 236K of the Income Tax Ordinance 2001 against a property disclosed as a Benami. Whereas, the judgment issued by the SC discusses whether delegation of the Commissioner's powers to an Additional Commissioner Inland Revenue is permissible or not.

Towards the end of the newsletter, we have discussed our Topic of the month titled "Advanced Ruling". The said topic provides an insight on the procedure and practical applicability of the Advanced Ruling under section 206A of the Income Tax Ordinance, 2001 read with Sections 231A and 231B of the Income Tax Rules, 2002.

All our readers are requested to visit our website **www.tolaassociates.com**, or download our mobile application in order to access previous published editions of this TAXPAK along with other publications, and to stay updated of future notifications. Lastly, we request our readers to circulate this e-copy within their circle, as our primary aim is to benefit the masses. Feedback is always welcomed.

Warm Regards,

Tola Associates.

FBR Notifications

A. Income Tax

1. DRAFT AMENDMENTS TO THE INCOME TAX RULES, 2002

The FBR, vide SRO 640(I)/2023, dated 31st May, 2023 issued draft amendments for objections or suggestions from all persons likely to be affected and for reporting of their objections or suggestions within seven days of publication. The draft amendments proposes to align the rules with the amendments introduced in section 37 and section 37A of ITO vide Finance (Supplementary) Act, 2023. Our Comments on the same may be accessed through this Link.

Moreover, a clarification has also been proposed to be introduced in the rules which clarifies that the term "share of a listed company" does not include units of a Mutual Fund, collective investment scheme, a REIT Scheme or derivative products or units through NCCPL and section 37A shall remain applicable on disposal of such units, schemes or products.

For further reading, please click on the following link: FBR

B. Sales Tax

1.SALES TAX GENERAL ORDER NO. 11 OF 2023 – TIER I RETAILERS - INTEGRATION WITH FBR'S POS SYSTEM

The FBR, issued a Sales Tax General Order No. 11 of 2023, dated 25th May 2023, wherein the identified Tier-1 Retailers have been directed to get themselves integrated with the FBR by the 31st May 2023. It has also been provided that failure to comply would result in disallowance of input tax claim and shall create tax demand of the same amount. For further reading: FBR

SECP Notifications May 2023

1. AMENDMENTS TO THE COMPANIES (GENERAL PROVISIONS AND FORMS) REGULATIONS, 2018

The SECP, vide SRO 531(I)/2023, dated 3rd May 2023, issued a notification wherein it made amendments to the Companies (General Provisions and Forms) Regulations, 2018 which had earlier been published for public suggestions through SRO 471(I)/2023 dated April 10, 2023, wherein a new proviso was inserted that translated documents shall be accepted if the document is apostilled by the designated competent authority of origin, and that such state is also recognized by the Government of Pakistan for receiving apostilled documents. Source: SECP.

2. AMENDMENTS TO THE COMPANIES (INCORPORATION) REGULATIONS, 2017

The SECP, through SRO 530(I)/2023, dated 3rd May 2023, issued a notification wherein amendments were made to the Companies (Incorporation) Regulations, 2017, which had been earlier published for public suggestions vide SRO 468(I)/2023, dated 10th April 2023. The said amendment issued regulations related to foreign company / foreign body corporate, wherein additional documents for submission to the registrar were listed. Source: SECP

3. AMENDMENTS TO THE FOREIGN COMPANIES REGULATIONS, 2018

The SECP, vide SRO 532(I)/2023, dated 3rd May 2023, issued a notification wherein it made amendments to the Foreign Companies Regulations, 2018 which had earlier been published for public suggestions through SRO 472(I)/2023 dated April 10, 2023. Through the said notification, various documents were listed to meet compliance for registering a foreign company/ body corporate. Source: SECP

4. AMENDMNTS TO THE COMPANIES (GENERAL PROVISIONS AND FORMS) REGULATIONS, 2018

The SECP, vide SRO 627(I)/2023, dated 22nd May 2023, issued a notification which had earlier been published vide SRO 449(I)/2021 dated 06th April 2021, wherein the threshold for obtaining approval from the board to incur capital expenditure and/or dispose of assets was made. For further reading. Source: SECP

5. GUIDELINES FOR MERGERS AND AMALGAMATIONS

The SECP issued guidelines for Mergers and Amalgamations contained in section 510 of the Companies Act, 2017. The guidelines explained in brief about the scheme of arrangements, procedure related to filing the petition to the courts/ requirement after sanction of petition, details about filing application to the Commission such as powers of the commission, checklist of necessary documentations needed, procedures and measures after submitting the application and requirement of filing the same to the registrar and /or commission if necessary. For further reading: SECP

6. REQUIREMENTS RELATED TO GRIEVANCE HANDLING MECHANISM FOR INSURERS

The SECP, through Circular No. 07 of 2023, dated 24th May 2023, issued a circular wherein it provided a brief insight for every insurer that it was mandatory to establish a "Grievance Handling Policy and Grievance Function", adding that it will be applicable on all life and non-life insurers inclusive of family and general takaful operators. The Circular also explained how the grievance should be handled; procedures which were needed to ensure that all complaints were being recorded and processed through the system, how they were being monitored and requirements of reporting and record keeping obligations. For further reading, kindly click on the following link: SECP

7. AMENDMENTS TO THE NON-BANKING FINANCE COMPANIES AND NOTIFIED ENTITIES REGULATIONS, 2008

The SECP, vide SRO 5952(I)/2023, dated 17th May 2023, issued a notification which had earlier been published for public suggestions through SRP 423(I)/2023 dated 31st March 2023. Through the said notification, the SECP inserted the definitions of Closed End Fund, Digital Fund Management NBFC, Digital lending, and substituted many provisions such as timeframe of filing change in officers with the registrar, remuneration payable to the asset management company etc. and provided various specimen forms.

Case Law- 1:

SECTION 111 CAN NOT BE INVOKED WHERE SOURCE OF INVESTMENT IS JUSTIFIED | ADJUSTMENT OF TAX DEDUCTED u/S 236K AS A BENAMIDAR ALLOWED | ATIR, LAHORE

The Honourable Appellate Tribunal Inland Revenue- Lahore ("ATIR") was moved in the case of Muhammad Talat (**"Appellant"**) versus The Commissioner Inland Revenue, RTO, Lahore (**"Respondents"**)

Introduction

The Appellant had filed a nil return of income and had claimed withholding tax deducted under Section 236K of the Income Tax Ordinance, 2001 ("ITO") against a property which he himself had declared at zero as a "Benamidar" which had been purchased and declared in his brother's wealth statement. Following which an order u/s 122(1)/122(5) of the ITO was passed resulting in a tax demand of Rs 23,102,180/- and by invoking the addition u/s 111(1)(b) of the ITO, the tax liability rose to Rs 70,277,166/-. Being aggrieved, the Appellant preferred an appeal before the CIR(A-VII) Lahore, who dismissed the appeal seconding the impugned Order. Thereafter, the Appellant filed an appeal before the Honourable ATIR.

Arguments by the Learned counsel for the Respondents

The counsel for the Respondents endorsed the orders passed by Commissioner and the CIR(A-VIII).

Arguments by the Learned counsel for the Appellant

The counsel for the Appellant argued that the authorities below had issued arbitrary orders as the taxpayer had declared the property as a Benami of his real brother who had paid the consideration though known sources and had adequately disclosed it in his wealth statement. Therefore, the assessing officer unjustifiably made addition u/s 111(1)(b) of the ITO against the property which the Appellant had already declared at Zero value. The counsel argued that since the tax was deposited against the Appellant's CNIC, therefore, claiming withholding u/s 236 was justified. The counsel for the Appellant also argued that the assessing officer did not apply his judicial and independent mind while passing the order. Concluding the argument, the counsel for the learned appellant argued that action under section 122(1) of the ITO was unsustainable under the law as the properties were duly declared with the source of investment in the taxpayer's wealth statement.

Findings of the ATIR

The ATIR after examining the arguments and records the ATIR found that the Appellant had in fact disclosed the property as benami and both had declared the property in their respective wealth statements. Therefore, the ATIR held that since the tax was deposited against the CNIC of the Appellant, claiming the withheld amount under section 236K was justified and thereby ordered vacation of the orders passed by the authorities below.

Case Law-2:

CIR is allowed to delegate powers in cases under section 122(5A) I Supreme Court

Introduction

The Supreme Court of Pakistan (**"SC"**) was moved in the case of Allied Bank Limited (**"Learned Petitioner"**) versus the Commissioner of Income Tax, Lahore (**"Learned Respondent"**) to decide whether the powers of the Commissioner under section 122(5A) of the Income Tax Ordinance, 2001 (**"ITO"**) can be delegated to the Additional Commissioner-IR under section 210 of the ITO.

Brief facts of the case

A show cause notice was issued to the learned petitioner by the Additional Commissioner-IR under section 122(5A) of the ITO along with notice under section 122(9) of the ITO following which, an Order was passed. The learned petitioner filed an appeal before the Commissioner Inland Revenue (Appeal-I), Lahore (**"CIRA"**) which was partly allowed and the question beforehand was thereby dismissed. The petitioner and the department then filed cross appeals before the Appellate Tribunal Inland Revenue, Lahore (**"ATIR"**) who disposed the case on merits and once again the question regarding delegation of power was dismissed. The petitioner then filed an Income Tax Reference (**"ITR"**) under section 133 of the ITO and questioned on the following matter:

1. Whether the ATIR was correct in law in endorsing assumption of jurisdiction by the Additional Commissioner u/s 122(5A) of the ITO? and
2. Whether the legal obligation of "consideration" imposed by the legislature on the Commissioner in section 122(5A) of the ITO can be delegated to any other authority below the rank of the Commissioner?

The ITR decided against the petitioner vide the impugned judgement therefore, the learned petitioner being aggrieved filed a petition for leave to appeal before the SC.

Arguments by the Learned Petitioner

Learned counsel for the petitioner argued that the deemed assessment was made under Section 120 of the ITO by the Commissioner and that the amendment under Section 122(5A) of the ITO is based on the said assessment, and if it is considered erroneous and prejudicial to the interest of revenue, it can only be amended by the Commissioner and cannot be delegated to the Additional Commissioner; therefore in this case the counsel argued that the discretion of the Commissioner to "consider" the assessment order is erroneous in so far as it prejudicial to the interest of revenue cannot be delegated.

Arguments by the Learned Respondent

The learned counsel for the respondent submitted that the Commissioner is empowered through Section 122(5A) to delegate powers as it is expressly explained under Section 210(1A) and 211 of the ITO that powers and functions of the Commissioner delegated u/s 210 of the ITO shall be treated as having been exercised and performed by the Commissioner. The learned respondents also argued that according to the definition of the Commissioner, the Commissioner is empowered to delegate to any other authority vested with all or any powers of the Commissioner, and it shall be treated as being exercised and performed by the Commissioner himself.

Findings of the SC

The SC examined and elaborated its findings against the sections 2(13), 122(5A), 210 and 211 of the ITO to evaluate whether delegation may or may not be permitted. The SC found the following:

Sno	Section	Evaluation
1.	122(5A) 122(9)	Requires that the taxpayer must be provided with an opportunity to be heard, the Commissioner may amend, or further amend an assessment order if he considers the assessment order as erroneous is so far as it is prejudicial to the interest of revenue.
2.	210(1)	Specifically empowers the Commissioner to delegate all or any powers/ functions conferred upon or assigned to the Commissioner to any officer of Inland Revenue subordinate to the Commissioner, except the power of delegation.
3.	210(1A)	Commissioner shall not delegate powers of the amendment of assessment contained in Section 122(5A) to an officer of Inland Revenue below the rank of Additional Commissioner Inland Revenue.
4.	211(1)	By virtue of an Order u/s 210 of the ITO, an officer of the Inland Revenue exercises a power/ performs a function, delegated to him, of the Commissioner, such power/function shall be treated as it was exercised/ performed by the Commissioner.
5.	2(13)	As per the definition of Commissioner, - a person appointed u/s 208 and includes any other authority vested with all or any of the powers and functions of the Commissioner.

Therefore, in view of the above, the SC found that the learned petitioner interpreted the above provisions in isolation which the SC was not in view of as section 210(1A) clearly dismissed the ambiguity of jurisdiction and the same was supported by the definition of the Commissioner, therefore the leave was refused, and the petition was dismissed. The SC also found that the argument of the learned petitioner regarding delegation was devoid of force as the ITO clearly allows the Commissioner to delegate his function and powers which includes power to "consider" and decide u/s 122(5A) to the Additional Commissioner.

Topic of the month
Advance Rulings

In this month's issue, we have decided to apprise our kind readers about Advance Rulings. Advance ruling is a concept in tax laws that allows taxpayers to seek guidance from tax authorities on the interpretation and application of tax laws to their specific transactions or situations. It provides clarity and certainty to taxpayers by helping them understand the tax implications of their proposed actions before they undertake them. Most of the tax jurisdictions in the world have their own Advance Ruling laws and mechanism(s) in place. Taxpayers who are planning to engage in complex transactions or planning to reorganize their corporate structure, for example, can request a written statement with respect to tax treatment of the proposed transactions in a specific jurisdiction.

The concept of Advance ruling is also present in Pakistan in the form of Section 206A of the Income Tax Ordinance, 2001, ("ITO") introduced through the Finance Act, 2003 and Rules 231A and 231B of the Income Tax Rules, 2002 ("ITR"). Rules 231A and 231B were inserted vide SRO 130(I)/2004 dated February 27, 2004.

Procedure:

A non-resident taxpayer shall intimate the Board through an application in writing who shall then issue an advance ruling setting out the Commissioner's position to a transaction proposed or entered into by the taxpayer. The ruling shall be binding on the Commissioner with respect to the application to the transaction of the law as it stood at the time the ruling was issued provided that the taxpayer had provided a full and true disclosure of the nature of all aspects of the transaction relevant to the ruling.

The ITO also states that in case of any inconsistency between a circular and an advance ruling, priority shall be given to the latter.

The format of the application has been provided in the ITR under Rule 231B, and it has also been explicitly mentioned that if the applicant intends to withdraw the application, the applicant may withdraw it any time before the advance ruling is issued. It is pertinent to mention that the application shall be disposed of within 90 days of its receipt.

The advance ruling shall be binding on the Commissioner only in respect of the specific transaction in which the advance ruling was issued, and shall continue to remain in force unless:

-There is a change in facts or law on the basis of which the advance ruling was pronounced;
-It is subsequently found to have been obtained by fraud / misrepresentation of facts about the nature of transaction on which advance ruling was issued.

Constitution of the Committee:

The application for the advance ruling shall be considered by a Committee. The committee shall consist of the following members:

-Chairman, Federal Board of Revenue;
- Member (Inland Revenue), FBR; and
- Nominee of the Law and Justice Division not below the rank of BPS-21.

Furthermore, if the committee considers necessary, the Committee may obtain comments of the Commissioner /advice of a legal expert on the application and decide the issue in a joint sitting or through circulation amongst its members.

Practical examples of Advance Rulings:

1. Deutsche Bank AG: (Circular No. (7)IT-Jud./04)

Brief Facts of the case:

Deutsche Bank AG- Germany ("DBAG") had to maintain deposits under Section 13(3) of the Banking Companies Ordinance, 1961 which were previously Rs 5 million and thereafter raised to Rs 1 billion. The amount was converted into Pakistani rupees and had to be reflected in the account as Pakistani rupees ("PKR"). However, in case of foreign banks, deposits could be kept in either PKR or foreign currency. If the foreign bank opted to maintain deposits in foreign exchange, then the foreign bank had to deposit foreign exchange equivalent to the required amount of PKR at the then current rate of exchange, which DBAG had done so. However, due to exchange fluctuation, it resulted in a surplus. The surplus gain was intended to be utilized to offset accumulated losses of the Bank, following which DBAG proposed SBP's approval to undertake the following:

1. Convert approx. Euro 5.5 million of the Regulatory Capital into local currency; and
2. Offset the capital account against the accumulated net losses; and
3. Transfer PKR 373 million from capital account to current account maintained with the SBP.

Following which DBAG filed an application for Advance ruling u/s 206A of the ITO to confirm that the surplus amount due to exchange gain utilized for recouping of losses would not be constituted as an income and would not be subjected to tax.

Findings of the Committee:

The Committee found that the currency being stock in trade of the Bank upon any sale / conversion thereof, with the view to recoup losses is income and that such encashment and ploughing back is a revenue earning exercise to which the DBAG distinguished that it had not been locally incorporated neither was there any establishment of a parent-subsidiary relationship, as it was entirely non-resident company operating its branch in Pakistan and that the bank had not purchased currencies in the local market, in fact it had remitted entire capital requirement from outside Pakistan. It also highlighted that if the company remitted surplus to Germany and brought it back through remittance to Pakistan Branch, it would not be liable to tax therefore, if the encashed amount would be retained in the Pakistani Branch, it would not change its character of being adjustment in the capital account and would not translate into revenue income. It was finally concluded that two options were available with the applicant for setting off the excess amount available as security against losses:

(a) First being remitting the excess amount to the Head Office (Germany) and then bringing it back through remittances to the branch for setting it off against assessed losses; or
(b) Converting excess euros into Pak rupees and then setting it off against the assessed losses.

Therefore, the ruling was passed that the amount received from SBP by DBAG upon conversion of capital account (maintained in Euros) to Pakistani rupees for offsetting accumulated losses is not chargeable to tax.

2. Geofizyka Krakow SPZ o o (Circular No. 9(6)-IT-Jud/04)

Brief facts of the case:

Geofizyka Krakow SP Z o o ("GKSZ") being a non-resident company, filed an application under Section 206A of the ITO against an amount received from M/s. Orient Petroleum Inc ("OPI") against execution of a contract for seismic data processing/re-processing services for Bakhtawar, Ratana and Bhangali oilfields outside Pakistan.The applicant was of the opinion that the activities fall under the purview of "fee for technical services" and that both treaties namely (1) Treaty for Avoidance of Double Taxation read with section 107 of the ITO and (2) Treaty with the Polish Republic, did not contain any specific provisions for the axation of fee for technical services; therefore, Article 21 of the treaty shall be invoked, which declared that items of income of the resident company of a contracting state which are not expressly mentioned in the Treaty shall be taxable in that State, thus the GKSZ opined that it was a settled proposition that the provisions of the Treaty had an overriding effect on local tax laws, therefore, the GKSZ should not be charged to tax in Pakistan and WHT provisions under section 152 of the ITO shall not be applicable.

Findings of the Committee:

Upon analysis of the documents submitted by the GKSZ and various correspondences in relation thereto, it was found that the GKSZ had remained engaged in services like seismic data acquisition, data interpretation and well logging etc., in the previous years also and had also been regularly assessed by the Companies Zone, Islamabad. It was also found that the present Contract/ Service Order was awarded through its PE directly without any advertisement in print media because of the fact that the GKSZ was having its business activity in Pakistan and the contract awarding company awarded the service order due to its reputation. Thus, the Committee concluded that the amount received amount from M/s Orient Petroleum Inc is liable to tax in Pakistan and shall fall under the head of "business income".

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