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TAXPAK

Newsletter by

Tola Associates

April 2024

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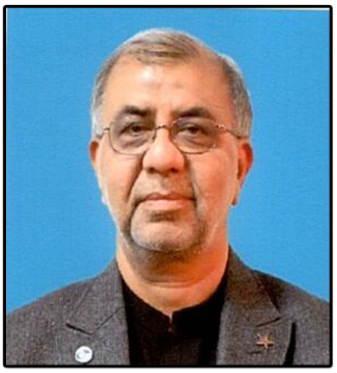

Asalam-o-alaikum everyone! Hope this monthly issue of TaxPak finds you in good spirits and immaculate health! We welcome you to another edition of TaxPak, our monthly publication the purpose of which is to provide a monthly update on the ongoing tax related developments in Pakistan. Alhamdulilah, so 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. Moreover, Notifications from the corporate regulatory body i.e., SECP are also 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 consists a discussion of two judgments. The first one has been passed by the Hon'ble Appellate Tribunal Inland Revenue Islamabad regarding the recovery procedure as enshrined in the the Income Tax Ordinance 2001 ("ITO"), whilst the other judgement was passed by the Indian Income Tax Appellate Tribunal Delhi Bench regarding the constitution of a service permanent establishment where there is no physical presence in India in terms of the Agreement to avoid double taxation between India and Singapore.

Towards the end of the newsletter, we have discussed our Topic of the month titled "Taxation of Online Market Place". The said topic provides an insight on the taxability under the Income Tax Ordinance 2001, Sales Tax Act, 1990 and respective provincial taxes on online market places.

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 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,
Ashfaq Yousuf Tola - FCA,
Chairman
Tola Associates.

FBR Notifications:

Income Tax Notifications

1. PAKISTAN HONOUR CARD SCHEME FOR THE TAX YEAR 2023

The FBR, vide SRO No. 469(I)/2024 dated 3rd April 2024, launched a scheme titled "Pakistan Honour Card Scheme" which shall be applicable for the Tax Year 2023. Through this scheme, a specified number of top taxpayers were entitled to receive a Pakistan Honour Card. Taxpayers holding this card are entitled to a number of privileges, including the facilities and privileges provided at the CIP/VP lounges of airports, fast track clearance at immigration counters, issuance of an official passport, and invitation for an annual dinner by the Prime Minister. The validity of the privileges shall be for 1 year from the date of issuance of the card.
For further reading: FBR

2. ITGO FOR DISABLING MOBILE PHONE SIMS FOR PERSONS WHOSE NAME DID NOT APPEAR IN THE ATL DESPITE BEING REQUIRED TO FILE THEIR TAX RETURN FOR THE TAX YEAR 2023

The FBR, vide Income Tax General Order No. 01 of 2024 dated 29th April 2024, issued an Income Tax General Order whereby, a list consisting of the names of 506,671 persons was published who were not appearing on the ATL list, but were required to file their Income Tax Returns for the Tax Year 2023. The Persons whose name appeared on the list would have their mobile phone SIMs disabled. Furthermore, the sim of the persons mentioned therein would remain blocked until their names have been restored by the FBR or Commissioner-IR having jurisdiction. Furthermore, Pakistan Telecommunication Authority (PTA) and all Telecom operators were directed to submit a compliance report with the FBR on 15th May 2024.
For further reading: FBR

Sales Tax Notifications

1. AMENDMENTS TO THE SALES TAX RULES, 2006

The FBR, vide SRO No. 582(I)/2024 dated 18th April 2024, made further amendments in Sales Tax Rules, 2006 whereby, individuals, AOPs or single member companies (other than manufacturers) were no longer required to indicate in the balance sheet, the amounts attributable to partners with percentage and the time limit for providing the same within 30 days has now been omitted.
For further reading: FBR

2. AMENDMENTS TO THE RATE OF SALES TAX FROM CNG STATIONS BY THE GAS TRANSMISSION AND DISTRIBUTION COMPANIES

The FBR, vide SRO No. 581(I)/2024 dated 18th April 2024, supersession the earlier issued SRO No. 587(I)/2022 dated 10th May 2022 following which, the value of supply to CNG consumers for charging sales tax from CNG stations by the gas transmission and distribution companies will be subject to charge of Rs. 200/- per KG for both Regions I and II.

Furthermore, the notification also specified that Region-I included Khyber Pakhtunkhwa, Balochistan, and Potohar Region, while Region-II included Sindh and Punjab, excluding the Potohar Region.
For further reading: FBR

SALES TAX ON SERVICES NOTIFICATIONS

1. KPRA- LEVY OF INFRASTRUCTURE DEVELOPMENT CESS

The KPRA, vide Notification No. BO (Rev-II)/FD/3-4/2024 dated 3rd April 2024, issued a notification whereby 2% Infrastructure Development Cess would be charged on the value of goods imported into the Khyber Pakthunkhwa province.
For further reading: KPRA

CORPORATE NOTIFICATIONS

1. Amendments to the Auditors (Reporting Obligations) Regulations, 2018

The SECP, vide SRO No. 505(I)/2024 dated 1st April 2024, issued amendments to the Auditors (Reporting Obligations) Regulations, 2018, which had been previously published vide SRO 70(i)/2024 dated 17th January 2024, whereby, a format of the report to be issued by the auditor of a securities/ futures broker was issued. Furthermore, in case of revision of the audit report, a format specifying the reason for revision was also annexed.
For further reading: SECP

2. Amendments to the General Takaful Accounting Regulations, 2019

The SECP, vide SRO No. 569(I)/2024 dated 8th April 2024, issued amendments to the General Takaful Accounting Regulations, 2019 whereby certain alternative disclosure requirements were mentioned for insurers whose window takaful operations formed 25% or more of their overall gross contribution.
For further reading: SECP

3. Amendments to the Securities Brokers (Licensing and Operations) Regulations, 2016

The SECP, vide SRO No. 570(I)/2024 dated 8th April 2024, issued amendments to the Securities Brokers (Licensing and Operations) Regulations, 2016 whereby, the Commission was empowered to grant the establishment of a wholly owned subsidiary to provide Shariah-compliant brokerage services subject to certain terms and conditions, for instance, terms that the subsidiary company should appoint a dedicated compliance officer, or that the subsidiary should be either a Trading-only broker or a Online Only broker etc.
For further reading: SECP

CASE LAW: REFUND OF TAX ORDERED BY THE ATIR THAT WAS ILLEGALLY RECOVERED BY THE DEPARTMENT UNDER SECTION 138 OF THE INCOME TAX ORDINANCE 2001

Introduction:

The Appellate Tribunal Inland Revenue, Islamabad ("ATIR") was moved by M/s Oracle Systems Pakistan Private Limited ("Appellant") for the tax year 2012 & 2014 against the Orders passed by the Commissioner Inland Revenue, LTO, Islamabad ("Respondent"). The Appellant challenged the act of recovery of the disputed amount by the revenue authorities without adhering to and observing the due process of law as enshrined under section 140 of the Income Tax Ordinance, 2001 ("ITO").

Brief Facts of the Case:

The Appellant was aggrieved of the Orders passed by the assessing officer. Consequently, the Appellant preferred to appeal the impugned Orders before the Learned Respondent which upheld the decision of the assessing officer. The learned Respondent passed the Orders on 23-11-2022. The Order with respect to tax year 2012, was served by hand to the Appellant at 02:45 PM, while the Order with respect to tax year 2014 was uploaded on IRIS at 02:13 PM on the same day of passing the Orders.

The department on the same day and in a hasty manner issued notices under section 140 of ITO to different banks between 2:47PM to 2:49PM through email and the accounts of the Appellant were attached, and the disputed amount was recovered by the revenue authorities on the same day without giving ample time to the Appellant to discharge the demand or to exercise its right to prefer an Appeal.

Thereafter, the Appellant being aggrieved and prejudiced, preferred an appeal and stay application against the Order of CIR(A) before the Hon'ble ATIR.

Arguments by the Learned Counsel of Appellant:

The Counsel of the Appellant argued that the Learned Respondent upheld the assessing officer's decision, and the department failed to adhere to the law and procedure for recovery. He claimed that the department issued notices to banks without providing a reasonable time to discharge the demand or to prefer an appeal which violated the law and overlooked settled legal principles, which were binding on all organs of the state in terms of Articles 189 and 201 of the Constitution of

LNG Limited Vs Federation of Pakistan and others, wherein it was held that recovery could not be made until it had been decided by at least one independent forum. Further, it was also contended that the Learned Appellant shall suffer from an irreparable loss and undue hardship if the reliefs prayed were not granted.

In view thereof, it was vehemently contended that the ATIR had the authority to direct the revenue department to refund the amount illegally recovered from the Appellant's banks. The Appellant's counsel also agitated that the taxpayer has a strong prima facie case and the collection of the disputed amount was unjust and unreasonable and requested the ATIR to use its extraordinary power to direct the authorities to refund the tax recovered illegally.

Arguments by the Learned Counsel of Respondent:

The Learned Counsel of the Respondents argued that the application is neither maintainable nor proceedable under section 131(5) of the Ordinance. He also argued that the main appeal was still sub-judice, and that the Learned Appellant may apply for a refund under section 170 if the appeal succeeds. He further contended that the ATIR could not grant refund of tax even if it was recovered illegally while exercising powers for grant of stay. Furthermore, it was further agitated that the amount had been legally recovered.

Decision of the Hon'ble ATIR:

The Hon'ble ATIR while allowing the stay applications, directed the revenue authorities to refund the amount of Rs. 1,088,303,543/- recovered from the banks of the Appellant within 7 days from the service of the Order, and referred the matter to Federal Tax Ombudsman, who was directed to investigate and provide their findings and recommendations within three months with respect to the maladministration on part of the revenue division. Furthermore, the Chairman FBR was instructed to include this judgment in the personal files of the Revenue Authorities involved. The findings of the Hon'ble ATIR were bifurcated and decided in three parameters and are as follows:

(i) Whether the coercive action by the revenue authorities to recovery the amount under Section 140 of the ITO while disobeying the settled principle of law by the Courts, provisions of the ITO and the rules made thereunder was unwarranted and bad in law?

With respect to this question, the Hon'ble ATIR found that the following procedures should have been followed as prescribed in the ITO:

1. An assessing officer was supposed to serve a demand notice under section 137 of ITO to the taxpayer when a liability was determined as "payable". If the decision of the assessing officer is accepted by the taxpayer, then the demand becomes absolute and the officer can recover such amount. However, if the taxpayer is not satisfied, he can prefer an appeal within 30 and the Commissioner is empowered to extend the time for tax payment or allow installments upon written request by the taxpayer.

2. If the taxpayer is in default, the Commissioner can issue a notice to affect the recovery of the tax demand under section 138 of the ITO and the Commissioner (Appeals) is empowered to grant a stay of recovery until the decision on main appeal finalizes.

3. Subsequently, where an Appeal before the ATIR is filed, the ATIR is empowered to grant a stay against the recovery of a tax demand. However, this power can only be exercised when an appeal is filed within 60 days of the order passed by the assessing officer and is against the first appellate authority, i.e., CIR(A). Furthermore, to maintain public confidence in justice and rule of law, if an in-time application for a grant of stay or extension of stay has been filed by the taxpayer, the Recovery Officer shall be barred from using coercive means until the Appellate Authority decides the application at the ad-interim stage.

In the instant matter, the Order for tax year 2012 was served to the applicant by hand, while the Order for tax year 2014 was uploaded on IRIS. Meanwhile, the Recovery Officer ("RO") issued notices to banks via email within 34 minutes of uploading the 2014 Order. The action of the RO left no doubt that the notices were issued without prior approval of the Chief Commissioner, which was a pre-requisite before recovering the disputed demand.

It was also found that that the RO not only prejudiced the right of Appellant to file an appeal, but also usurped an opportunity of the taxpayer for filing his objections, hence the ATIR held that the revenue department and RO acted unlawfully and hastily to extort the tax demand, causing financial instability to the taxpayer, despite being aware of the recovery proceedings procedure laid under section 140 of the ITO.

The ATIR also highlighted that the Article 10A of Pakistan's Constitution, guaranteed fair trial and due process for citizens, which in this case, the action of the revenue authorities to recover the demand from the taxpayer's bank was without lawful authority, as no notice was served to the taxpayer regarding the recovery. Moreover, the power to issue Notice under section 140 rested with the Commissioner, and in the instant matter it was issued by the Deputy Commissioner. The Deputy Commissioner also failed to establish before the Hon'ble ATIR on the question of

jurisdiction, therefore the ATIR held that the action taken by him was rendered illegal, resultantly, the amount so recovered was declared unlawful and violated the law and established malafide on part of the revenue authorities.

(ii) Whether the ATIR in its statutory powers of granting a stay of recovery has also the ancillary and incidental power in appropriate cases to direct the refund of tax recovered unlawfully and without following the due process of law?

The Hon'ble ATIR observed that the ATIR, being an independent forum with broad appellate powers, had similar powers as applicable to appellate courts under the Civil Procedure Code. In the instant matter, the Revenue authorities acted in disregard of settled law and due process by issuing notices to banks without prior approval by the Chief Commissioner, depicting undue haste in recovering amounts on part of revenue authorities.

The ATIR also held that it is a misconception on part of the Learned Respondents that the Appellant should file for refund, as the recovery itself was illegal. Furthermore, the fact that the Notice under section 140 of the ITO was issued to the banks without seeking clear and express approval from the Chief Commissioner was a pure evidence of disregard of the settled law and due process. The act and conduct of revenue officials in this case were against the judicial conscience and violated canons of law, justice, and ethics. In this scenario, it was held that the ATIR could not act as a silent spectator of arbitrary and illegal activities on part of the department and RO, causing frustration in the legal process and therefore had all the powers relating to the subject matter of appeal including the power of granting a stay of recovery and refund of tax recovered by the revenue authorities.

The ATIR also held that exercising such powers was to curb a trend and maintain confidence of the public in the administration of justice and rule of law, while it also held that this power could only be exercised in exceptional circumstances as the appeal was pending in the ATIR.

(iii) Whether, on the facts and in the circumstances of this case, the ATIR can pass the appropriate strictures and necessary instructions for disciplinary proceedings against the revenue authorities?

The Hon'ble ATIR held that the exercise of statutory discretion is guided by public policy and law, as emphasized in De Smith's Judicial Review and Travels v. Commissioner Enforcement judgment. The ATIR in Shahid Impex v. Director General, Karachi (2014 PTD Trib. 674) ruled that when an officer

passed any order without paying any heed to whether he is vested with the jurisdiction or not, reflects their conduct and competency. If an officer abuses power, stringent stricture should be passed. In Golden Plastics v. Secretary Revenue, Islamabad, the Federal Tax Ombudsman ruled that non-compliance with an appellate order was considered an indiscipline, insubordination, and maladministration, making the officer liable for disciplinary action.

Furthermore, The Government Servant (Efficiency and Discipline) Rules, 1973 outlined disciplinary matters, including inefficiency and misconduct. The FBR Act, 2007, allows the Chairman to represent against acts of maladministration, corruption, and misbehavior by board officers or employees. As such, Section 9 of the Federal Tax Ombudsman Ordinance, 2000, empowers the Ombudsman to investigate allegations of maladministration of the Revenue Division or Tax Employee. In conclusion, the Hon'ble ATIR referred the matter to the Federal Tax Ombudsman, who is expected to investigate and provide his findings and recommendations within three months.

CASE LAW: PHYSICAL PRESENCE OF MORE THAN 90 DAYS REQUIRED IN INDIA TO CONSTITUTE A SERVICE PE IN INDIA UNDER THE INDIA – SINGAPORE DTAA

INTRODUCTION:

The Hon'ble Appellate Tribunal Delhi Bench "D": New Delhi ("Appellate Tribunal") was moved by the Clifford Chance PTE Ltd. ("Appellant") versus ACIT Civic Centre, New Delhi ("Respondent") against the final assessment Orders passed under Section 143(3) read with Section 144C(13) of the Income Tax Act 1961 ("1961 Act"), pursuant to the directions of the Learned Dispute Resolution Panel ("DRP"). It was decided vide the Final Assessment Orders that the Appellant constituted a service PE due to physical presence of its employees in India, and also a virtual service PE on the basis that in terms of para 6 of Article 5 of the India-Singapore DTAA what is important is the aggregate duration of provision of services by the non-resident within India and Singapore and duration of physical presence of the employees in India is not material.

BRIEF FACTS OF THE CASE:

The Appellant was a tax resident of Singapore and had opted to be governed by the provisions of India-Singapore Double Taxation Avoidance Agreement ("India-Singapore DTAA"). The Appellant was engaged in the business of providing legal advisory services to several international clients including in India. The Appellant filed its return of income for the Assessment Years ("AY") 2021 & 2022 by declaring nil income and claimed credit of taxes deducted at source ("TDS"). The cases were selected for scrutiny under CASS by the learned assessing officer. Statutory notice(s) under

section 143(2) and 142(1) of the Income Tax Act, 1961 ("Act") were issued and served upon the Appellant in response to which the Appellant duly furnished the information called from time to time. The Appellant provided advisory services which were rendered remotely outside India and while there were situations where employees of the Appellant travelled to India for rendering services also. It was observed by the learned assessing officer while assessment proceedings, the Appellant had a gross total receipt of Rs. 15,55,45,693/- for the AY 2021 and Rs. 7,76,53,507/- for the AY 2022 from rendering services to Indian clients but the same had been claimed as exempt in its Income Tax Return by the Appellant. The Appellant was then asked to show cause as to why the said receipts should not be taxed on account of constitution of service **Permanent Establishment** ("PE") of the Appellant in India.

In response to said notice, the Appellant filed detailed submissions before the learned assessing officer which were not found to be tenable. Thereafter, the draft assessment orders for AY 2021 and 2022 passed under section 143(3) read with section 144(C) of the Act, by adding back the gross receipts to the total income of the Appellant on account of constitution of service PE of the Appellant in India. Being aggrieved, the Appellant filed objections before the Learned DRP against the draft assessment orders, following which, the Learned DRP directed to the learned assessing officer to reconsider the facts/information and material placed on record by the Appellant during the assessment proceedings, before passing the final assessment order. Pursuant to said directions, the learned assessing officer passed a final assessment order under section 143(3) read with section 144(C) (13) of the Act. Thereby, being aggrieved of the decisions passed by the earlier authorities, the Appellant approached the Appellate Tribunal for adjudication the matter in question.

ARGUMENTS BY THE LEARNED APPELLANT:

The learned Appellant argued that to constitute a service PE in India there should be furnishing of service within the source state meaning thereby actual performance of service in the source state i.e. India. As per Article 5(6) of the India Singapore DTAA the Appellant should actually furnish services in India by way of physical presence of its employees in India for the purpose of computing the threshold of 90 days. The number of days spent by a foreign enterprise in India should be measured on the number of days spent by the foreign enterprise in India through employees or other personnel and not based on the man days by aggregating common days spent by more than one individual. The Appellant did not have any premises at its disposal in India through which it carried on business.

Moreover, the learned counsel for the Appellant candidly assisted the Honourable Appellate Tribunal with regards to the number of days spent by the employees of the Appellant for work and

for vacation with documentary evidences and declaration of those employees. He submitted that the days that the employees were present in India for vacation must not be counted in the number of days spent in India for constitution of a service PE of the Appellant. Further, the Appellant raised concerned that directions issued by the learned DRP in absence of Document Identification Number ('DIN'), though intimated separately, is non-est and invalid and thus liable to be quashed. Moreover, the Appellant contended that the impugned order passed by the assessing officer is barred by limitation under section 153 of the Act.

Further, it was also contended by learned counsel for the Appellant that the services provided by the Appellant did not make available any technical knowledge, experience, skill, know-how which may enable the Indian client to be able to apply the same independently and hence these are not in the nature of FTS under the provisions of India-Singapore DTAA.

It was also contented by learned counsel for the Appellant that the days spent by the employees of the Appellant for business development (non-revenue generating) activities must be excluded from the time spent by the said employees whilst calculating the time in order to decipher whether the threshold to constitute a service PE in India has been met.

Furthermore, the Appellant argued that levy of interest under section 234B of the Act was only levied in cases where the Appellant does not furnish its return of income or furnishes it after the due date prescribed under section 139 of the Act. However, the Appellant filed income tax return within the extended due date for filing the return. The Appellant further added in his submission that the addition on account of total income merely on the basis that amount is appearing in Form 26AS ignoring the fact that the Appellant had neither raised any invoice nor received any payment from ICICI Bank Limited and without appreciating such the corresponding TDS credit had not been claimed while filing return of income. The Appellant further argued that the department had determined interest on income tax refund and tax had been withheld by the department on the interest amount without appreciating the facts of the case, as such, neither the income tax refund amount nor interest amount was received during the tax year. The Appellant further submitted that if at all the interest income should be taxed, then it should be @ 15% as provided under Article 11 of India-Singapore DTAA instead of 40% as applied by the learned Respondent.

ARGUMENTS BY THE LEARNED RESPONDENTS:

The learned Respondent argued that the Appellant had a gross total receipts from rendering services to Indian clients but the same have been claimed as exempt in its Income Tax Returns. Further, the Respondent submitted that the services were provided by the employees of the Appellant to the clients in India for a period of more than 90 days, physical presence of employees is not relevant and accordingly constituted virtual service PE in India on account of the nexus rule

provided in Article 5(6) of India-Singapore DTAA. The Respondent moreover contended that there is no mandate in the tax treaty that the employees providing services within India must be stationed in India and services provided from outside India are to be considered for constitution of service PE in India.

FINDINGS OF THE HON'BLE APPELLATE TRIBUNAL VIDE ORDER / JUDGMENT DATED 14th March 2024:

Constitution of Service PE / Virtual Service PE in India:

The Hon'ble Appellate Tribunal held that as Article 7 of India-Singapore DTAA, the profits of a foreign enterprise can be taxed in India only if business is carried on through a PE situated in India. The provisions of Article 5(6) (a) of India-Singapore DTAA to constitute a service PE actual performance of service in India is essential and accordingly only when the services are rendered by the employees within India with their physical presence during the financial year relevant to the tax year under consideration shall be taken into account for computing threshold limit for creation of a service PE of the Appellant in India.

For computation of threshold limit to constitute service PE, the business development days, as well as common days should be excluded while computing the threshold of service PE as no services were provided to customers in India on the days spent on business development activities and the computation of threshold should not be based on man days but by aggregating common days spent by more than one individual.

Furthermore, the Hon'ble Appellate Tribunal found that the services by the Appellant were performed for only for 44 days in India excluding vacation period, business development days and common days in the tax year 2021 and none in 2022, hence, the Appellant did not constitute a service PE in India as per the India-Singapore DTAA for both the tax years under question.

Moreover, the learned Respondent had strongly relied on the decision of the Bangalore Tribunal in the case of ABB FZ LLC 83 taxmann.com 86 and also placed reliance on the concept of virtual service PE mentioned in OECD Interim report (2018) under the OECD/G20 BEPS Project titled "Tax challenging arising from Digitalization" which the Hon'ble Appellate Tribunal held that the reliance on these were misplaced as the facts involved in case at hand differs.

Further, the Hon'ble Appellate Tribunal held that the Appellant does not constitute a virtual service PE in India as no provision regarding establishment of virtual service PE are mentioned under

India- Singapore DTAA and hence the present service PE provision under the India-Singapore DTAA which requires physical rendition of service in India should only be applied. This view is supported by the OECD Interim Report 2018 itself wherein it is clearly mentioned that in the absence of any amendments to the tax treaty provisions themselves, these measures can be challenged by the tax payers before the courts.

Attribution to alleged service PE:

The Hon'ble Appellate Tribunal held that the attribution of business profits i.e. impugned receipts of the Appellant to the alleged service PE/virtual service PE of the Appellant in India were not taxable in India in the absence of the PE of the Appellant in India in terms of Article 7 read with Article 5(6)(a) of the India-Singapore DTAA.

Validity of assessment proceedings/order:

The Hon'ble Appellate Tribunal held since the grounds regarding the validity of the impugned assessment order on account of absence of Document Identification Number (DIN) on the directions/order of the learned DRP and the assessment order being barred by limitation under section 153 of the Act were not argued, therefore, it was not adjudicated upon.

Others (Interest under section 234A):

The Hon'ble Appellate Tribunal held that it would be deemed fit and proper to restore this issue to the file of the learned Respondent for verification as to the filing of date of return viz-a-viz the due date of filing of return and decide it afresh in accordance with law.

Others (Interest under section 234B):

The Hon'ble Appellate Tribunal held that the income was received by the Appellant after deduction of tax at source and therefore the proviso to section 209(1)(d) of the Act is not applicable. The section 209(1)(d) of the Act read with proviso thereto, where in case of a non-resident company, tax deductible at source has been paid, it would not be permissible for the Revenue to charge any interest under section 234B for alleged failure to pay advance tax by such Appellant, and placed reliance on the decision passed by Coordinate Bench of the Tribunal in the case of Amadeus IT Group SA vs. ACIT (ITA No. 1742/Del/2023). Therefore, the demand raised had been deleted.

Penalty under Section 270A of the 1961 Act:

The Hon'ble Appellate Tribunal held that initiation of penalty proceedings under section 270A of the Act was pre-mature and hence not adjudicated.

Alleged addition of income received from ICICI Bank:

The Hon'ble Appellate Tribunal held the Appellant had neither raised any invoice nor received any payment from ICICI Bank Limited during the relevant Tax Year. The Appellant while filing the return of income had neither reported the impugned receipt nor claimed corresponding TDS credit thereon. However, no contrary material/evidence was brought on record by the learned Respondent to prove that the Appellant had received any payment from ICICI Bank Limited. In light of these submissions, the Hon'ble Appellate Tribunal held that it would be deem fit to direct the learned Respondent to verify the claim of the Appellant and if found to be correct by him, grant corresponding credit of TDS to the Appellant in accordance with law. Further, the Hon'ble Appellate Tribunal held that the impugned additions of income from ICICI Bank Ltd. and interest income on income tax refund solely on the basis of the fact that such amounts are appearing in Form 26AS is not sustainable in law and hence liable to be deleted. In support reliance was placed on the decision of the Jabalpur Tribunal in the case of Ravinder Pratap Thareja vs. ITO 60 taxmann.com 304 wherein it is held that merely because a payment is reflected in Form 26 and is shown to have been made to the Appellant, it cannot be brought to tax in his hands when the said money is not received by the Appellant.

TOPIC OF THE MONTH: TAXATION OF ONLINE MARKET PLACE:

An online market place ("OMP"), as the name specifies itself, is a website/platform where buyers and sellers interact, conduct transactions and resultantly the buyer purchases the product/services while the seller gets consideration in exchange. There are many examples of an OMP such as Daraz, Ali express, Amazon, Foodpanda etc. to name a few. This month's edition brings a brief insight on the special provisions applicable on an OMP under the Sales Tax Act, 1990 ("STA"), Income Tax Ordinance, 2001 ("ITO) and applicability of provincial taxes.

Sales Tax Act, 1990 ("STA"):

Section 2(18A) of the STA, provides an inclusive definition of an OMP. It defines that OMP includes an electronic interface such as a market place, e-commerce platform, portal or similar

electronic interface which facilitates the sales of goods including 3rd party sale by either: (a) controlling the terms and conditions of the sale, or (b) authorizing the charge to the customers for the payment of the supply or (c) by ordering/delivering the goods.

Moreover, where 3rd party goods are involved, then the operator of the OMP shall be liable to withhold 1% on the gross value of such taxable supplies from suppliers other than active taxpayers. It is pertinent to mention that the applicability of this withholding commenced from 1st September 2021.

Income Tax Ordinance, 2001 ("ITO):

Under the ITO, an OMP shall be subject to provisions of minimum tax under section 113 read with the Division IX of Part I of the First Schedule of the ITO, and shall be liable for turnover tax at the rate of 0.25% on the turnover from such transaction. Moreover, as per Clause 28C of the Second Schedule of the ITO, in case of brokerage or commission, the withholding tax rate shall be 5%. For instance, if Mr. A has an agreement with Mr. B that Mr. A would get 10% commission on the sales made through XYZ website, then in this case, Mr. B will be liable to withhold 5% tax on payment of such commission.

Provincial:

Apart from Sindh and Balochistan, no other provinces have issued any specific rules with respect to OMP.

Sindh:

As per the Sindh Sales Tax Special Procedure (Online Integration of Business) Rules, 2022, issued vide Notification No. SRB-3-4/03/2022 dated 21st February 2022, POS integration is mandatory for an OMP acting as a facilitator at all their points of sale, including the ones providing services through the internet. At present all POS generated invoices are accompanied with a fee of Re. 1 per invoice, but the OMPs are exempt from such fee if they are solely and exclusively a facilitator to such service. Furthermore, services provided by restaurants through an OMP platform are subject to 13% Sindh services sales tax.

Keeping the aforementioned in mind, for instance, if a meal is sold through an order created through an app, it would attract 13% Sindh sales tax on services and the owner of the restaurant would be responsible to pay the tax so collected, while the owner of the app, being a commission agent would have his income taxable as under the ITO i.e. 5% deducted on the amount of commission.

Balochistan:

Balochistan also issued a similar rule titled "The Balochistan Sales Tax Special Procedure (Online Integration of Business) Rules, 2022" vide Notification No. BRA/Rules/026/2022 dated 12th September 2022, wherein it made POS integration mandatory for an OMP acting as a facilitator at all their points of sale, including the ones providing services through the internet. Furthermore, as similar with Sindh, the POS invoices will not be subject to the fee of Re. 1/-. At present, only services provided by restaurants through an OMP platform are subject to 15% Balochistan sales tax on services.

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