



COLLECTION OF INFORMATION BY THIRD PARTY AND RECOVERY PROCEEDINGS UNDER THE INCOME TAX LAW

A REVIEW OF THE INCOME TAX ORDINANCE, INCOME TAX RULES AND THE PROPOSED
AMENDMENTS IN THE RECOVERY RULES

BY MR. AMMAR ATHER SAEED

PARTNER SAIDUDDIN & CO.

SAIDUDDIN & CO

COLLECTION OF INFORMATION FROM THIRD PARTY

SAIDUDDIN & CO

S. 176 - NOTICE TO OBTAIN INFORMATION OR EVIDENCE

- S. 176 of the Ordinance gives Commissioner the authority to require any person who may or may not be liable for tax to:
 - Furnish any information relating to any tax leviable under the Ordinance;
 - Fulfil any obligation under any agreement with foreign government or governments; and
 - Attend a hearing for the purposes of being examined concerning tax affairs of that person or any other person

DOCUMENTS THAT MAY BE REQUIRED UNDER S. 176

- Accounts/ Financial Statements;
- Documents/ Books of Accounts;
- Bank Accounts;
- Property Documents;
- Business Transaction details from Service Providers/ Vendors etc; and
- Any other information that the Commissioner deems fit.

The Commissioner has the power to impound and retain information for as long as he may deem necessary

MODES OF FURNISHING INFORMATION

- Information may be served electronically to the Commissioner, on computer using the specified software, as specified by FBR from time to time; or
- Information can be served in the form of a hard copy to the Commissioner by post/ courier service or by hand to the officer having jurisdiction.
- If the same is not provided to the Commissioner, the Commissioner has the power to request production of computer on which the information is stored.

POWERS TO ENFORCE FURNISHING OF INFORMATION/ APPERANCE

- S. 176 (4) gives the Commissioner the same powers as prescribed in the Code of Civil Procedure, 1908 with respect to the following:
 - Enforcing attendance of any person and examining the person on oath or affirmation;
 - Compelling the production of any accounts, records, computer stored information, or computer;
 - Receiving evidence of affidavit; or
 - Issuing commissions for the examination of witnesses

POWER TO ENTER PREMISES

- S. 176 gives the Commissioner the power to approve and permit a Chartered Accountant Firm/ Special Audit Panel to do the following:
 - Enter the business premises of a tax payer;
 - Obtain any information; and
 - Require production of any record.

BLANKET POWERS UNDER S. 176(5) OF THE ITO

- Section 176 (5) gives the Commissioner a blanket, overriding power to request for production of accounts, documents, computer stored information or the giving of information irrespective of any bar provided under the applicable laws relating to privilege or public interest

LEGITIMACY OF NOTICE

- All notices for the purposes of obtaining information or evidence shall be served in the following manner:
 - In writing detailing the information required; and
 - Strictly issued under S. 176.
- If a notice has been issued without the mention of S. 176, the same will have no legal value (2011 PTD 321)

CHECKS AND BALANCES BY THE COURTS

- In order to ensure that the blanket power under S. 176 is not misused, the Courts have created checks and balances to increase accountability. These are:
 - Any document that is required to be inspected by a tax officer shall first be specifically approved by the Commissioner for inspection; and
 - All documents required to be inspected into need to be specifically identified and approved by the Commissioner. If no such approval is sought then the inspected document or any revelation as a result thereof will have no legal sanctity or legal effect (2013 PTD (Trib.) 87)

PENALTY

- S. 182 of the ITO prescribes penalties for the following:
- S. 182 (9) - Failure by any person to furnish information required or to comply with any other term of the notice served under S. 176.
 - Penalty – Rs. 25,000/- for the first default and Rs. 50,000/- for each subsequent default.
- S. 182 (10) – Any person who makes a false or misleading statement either orally or in writing to the Inland Revenue Authority with respect to documents made, prepared, given, filed or furnished under the Ordinance.
 - Penalty – Such person shall pay a penalty of Rs. 25,000/- or 100% of the amount of tax shortfall, which ever is higher.

RECOVERY PROCEEDINGS UNDER THE INCOME TAX LAW

SAIDUDDIN & CO

WHAT IS THE PURPOSE OF RECOVERY PROCEEDINGS? (S.137 OF ITO)

- Recovery proceedings are initiated where payment of tax is due from the tax payer.
- This may arise in one of three circumstances:
 - Amendment Assessment Order; or
 - Any other Order including but not limited to u/s 121, 122, 143, 144, 162, 170, 182, or 205.
- Where such an eventuality arises, the tax payer is required to make payment within 30 days of receipt of notice for payment of the tax liability.

HOW MANY WAYS CAN RECOVERY OF UNPAID TAX LIABILITY BE DONE? (S.138 OF ITO)

- If the notice u/s 137 has not been complied with by the defaulter, the Commissioner may proceed for recovery of tax from property, which term includes moveable and immovable property, it is required to provide the taxpayer with a notice under Sub-Section 138(1) of the Tax Ordinance, requiring the person to make payment within the time stipulated by the notice.
- Only if the tax amount is not paid within the time frame provided by the notice or such further time as is provided by the Commissioner, is the Commissioner empowered to invoke powers of:
 - attachment and sale;
 - appointment of receiver for management of the property (moveable and immoveable); and
 - arrest and detention for a period not exceeding six months.

ARE THERE ANY LEGAL PRE REQUISITES THAT NEED TO BE FULFILLED FOR IMPLEMENTATION U/S 138?

- A reading of Section 138 outlines that there needs to be a tax liability before such a notice can be issued by the Commissioner.
- However, the Honourable Lahore High Court in the case cited as 2013 PTD 1114 has held that before any order under exercise of Section 138 can be passed the Commissioner shall abide by Article 10A of Constitution, and shall:
 - Give the defaulting tax payer an opportunity of being heard; and
 - Allow him the opportunity to produce evidence (if any) as he deems fit

WHAT HAPPENS IF THE RECOVERY IS TO BE MADE FROM COMPANY OR AOP? (S.139 OF ITO)

- In cases of Company, if the tax payable can't be recovered from the Company, then the same can be recovered from the:
 - Directors of the Company; and
 - Shareholders provided that they do not have less than 10% shareholding.
- In cases of an AOP, if the tax payable can't be recovered from the AOP, the same can then be recovered from member of the AOP.
- Provided that no director, shareholder or AOP member shall be liable for recovery of tax that become payable after they had ceased to hold their post or is a minor (2012 CLD 1966)

CAN THE DEFAULT BE RECOVERED FROM A THIRD PARTY?

- As per Section 140 of the ITO the Commissioner may by an order in writing require payment of the default amount of the tax payer from a third party, however the same can only be exercised when notice has been issued by the Commissioner u/s 138 of the ITO.
- Provided that the third party needs to fall in either of the below categories:
 - owing or who may owe money to the taxpayer;
 - holding or who may hold money for, or on account of the taxpayer;
 - holding or who may hold money on account of some other person for payment to the taxpayer; or
 - having authority of some other person to pay money to the taxpayer.
- No recovery through the above section can be made if the order has been challenged vide appeal before the Commissioner (Appeals) and 10% of the liability has been deposited.

ARE THERE ANY PRE REQUISITES TO ACTION UNDER SECTION 140 OF ITO?

- The Courts of Pakistan have in various cases dwelled on the requirements that need to be fulfilled for action u/s 140 of the ITO to be legal.
- In the case cited as 2016 PTD 1799 before Honourable Islamabad High Court, it was held that before recovery can be made u/s 140, notice u/s 138(1) needs to be issued.
- As to the contents of the said notice, the Honourable Lahore High Court in the case cited as 2015 PTD 458 have held that notice for recovery needs to be state:
 - How the tax became due
 - How does the third party become liable to pay the said tax

PREREQUISITES FOR ATTACHMENT OF MOVEABLE PROPERTY

- The Commissioner or any other officer as authorized under Rule 136(1) of the ITR, may issue a warrant of attachment and provide a copy of the same to the defaulter pursuant to Rule 137 and thereafter attach any moveable property of a defaulter under Rule 138 of ITR.

WHAT ARE THE TYPES OF MOVEABLE PROPERTIES THAT CAN BE ATTACHED FOR RECOVERY?

- Rule 140 of the Rules, 2002 lays out three scenarios in which attachment of moveable property shall be made by a written order of the Commissioner.
 - One is the circumstance in which a debt is not secured by a negotiable instrument;
 - The second is a share in a corporation; or
 - Last deals with other moveable property not in the possession of the defaulter.

POWER OF THE DEPARTMENT WITH RESPECT TO RECOVERY FROM MOVEABLE PROPERTY

- Where a moveable property is attached u/r 139, the same shall be attached by way of actual seizure and the same shall be kept in custody by the officer or by his subordinates.
- If the moveable property seized has risk of decay or where cost of its storage is more than its actual value, then the officer may sell the same.
- The officer may, if he has reason to believe that the moveable property is hidden in a place, after giving a notice of his intention, break into the place to seize the property. (Rule 148 of ITR)

CAN BANKS OF THE DEFAULTER BE ATTACHED AND RECOVERY MADE FROM THEM?

- Rule 140 of ITR read with Section 2(15) of the ITO which defines “debt” allows the authorized officer to attach the bank account of the defaulter since relation between the Bank and the defaulter is one of creditor and bank.

For example, Bank A procures deposits from customers and depending on the form of the account maintained, current account, profit and loss, savings account or other types, which have varying conditions for withdrawal, Bank A becomes a debtor for the amount deposited and the Clients are creditors for the amount owing.

- A bare reading of Section 140(b) also provides that the Bank falls within the definition of the third party liable to have tax recovered from them since it holds the money on behalf of and on account of the defaulter.

PROCEDURE OF ATTACHMENT RECOVERY U/S 140 OF ITO?

- The mechanism of attachment that has been prescribed by Rule 140(i).
- It provides that in the case of a debt, the creditor will be restrained from recovering the debt and the debtor from making the payment until further order of the Commissioner.

As in the case of an unencumbered bank account, this essentially provides a scenario of a debit lock whereby the defaulter who is the debtor, is restrained from recovering any money and the bank, which is the creditor, is restrained from making payment or allowing withdrawal.

- Sub-Rule 140(3) expands on this power by prescribing that the debtor who was prohibited in Sub-Rule 140(i) shall on receipt of a notice from the Commissioner, pay the amount of debt to the officer and such payment shall discharge the debtor as if payment had been made to the entitled party.

PROCEDURE FOR ATTACHMENT OF NEGOTIABLE INSTRUMENTS AND SHARES

- Section 140 of the ITO talks about recovery of money from third parties.
- Such money is often times held in the form of negotiable instruments such as cheques, pay orders, drafts and other payment instruments.
- Where a negotiable instrument has been made in the name of a third party, the officer may seize the actual negotiable instrument if it is still in the possession of Bank as per Rule 142 of ITR.

PROCEDURE FOR ATTACHMENT OF SHARES IN COMPANY OR AOP

- Where the share is to be attached, a notice shall be given to the defaulter prohibiting him from transferring his share or interest as per Rule 141 of the ITR.
- The Commissioner may then execute the necessary documents with the effect that the same have been executed by the defaulter with the relevant authorities for the transfer of shares.
- In case of share in AOP, as per Rule 144 of the ITR the Commissioner may appoint a receiver to the share of such partner in the profits, whether already declared or accruing, and of any other money which may become due to in respect of the partnership.

PROCEDURE FOR SALE OF MOVEABLE PROPERTY ATTACHED?

- The Commissioner has the power under Rule 149 of the ITR to sell the moveable property attached where it is not in the form of money.
- Before such sale is made, a proclamation will need to be issued by the Commissioner outlining, time, place and confirmation status of the sale (Rule 150).
- Sale should be made after 15 days of the issuance of the proclamation (Rule 152).
- Sale can be made by way of tender or public auction (Rule 153).
- The defaulter may stop such sale by depositing the full or part liability due subject to the satisfaction of the Commissioner under whose order such sale is being done (Rule 157).

ARE THERE ANY EXCEPTIONS TO ATTACHMENT OF MOVEABLE PROPERTY?

- As per Rule 138 of the ITR the following cannot moveable property cannot be attached:
 - The standing crops of the agricultural produce lying in the field or stored in or near the dwelling house of the defaulter or land owned or cultivated by the defaulter, which represents the agricultural produce of the land
 - the necessary wearing apparel, cooking vessels, beds and bedding of the defaulter, his wife and children, and such personal ornaments, as, in accordance with religious usage, cannot be parted with by any women;
 - tools of artisans, and such cattle and seed grain as may, in the opinion of the Commissioner, be necessary to enable him to earn his livelihood
 - houses and other buildings belonging to an agriculturist and occupied by him;
 - books of account;
 - And others as provided for in Rule 128 of the ITR

CAN IMMOVEABLE PROPERTY BE ATTACHED AND WHAT IS THE PROCEDURE FOR ITS ATTACHMENT?

- The Commissioner has the power under Rule 158 of the ITR to prohibit the defaulter from transferring or subjecting the property to a charge of any kind and enjoying the same.
- The Commissioner has to make an order for attachment of the immovable property in the manner prescribed for in the ITR, a copy of which shall be sent to the defaulter.
- A copy of the order of attachment needs to be placed both at the property and at the Commissioner's office where it is visible.

CAN AN IMMOVEABLE PROPERTY BE SOLD?

- The Commissioner is empowered under Rule 161 to sell the said property or part of it to recover the tax liability of the defaulter.
- Before such sale is made a proclamation will need to be issued in the language of the district where the property is located.
- Such proclamation will be pasted on the property and the Commissioner's office.
- It should contain among other things:
 - Location of the property
 - Amount of recovery for which sale is ordered
 - Rent if any assessed on the property or its part

CAN SUCH SALE OF IMMOVEABLE PROPERTY BE STOPPED BY THE DEFAULTER?

- The Defaulter or any person who has interest in the property, may within 30 days apply to the Commissioner for setting aside of the sale under Rule 170 by way of:
 - Payment of amount specified in sale proclamation and 8% interest calculated from the date of proclamation
 - For payment to purchaser of property, a penalty of 10% of the amount.
- Under Rule 171, the Defaulter can also apply to the Commissioner for setting aside of such sale where the notice to pay the default amount has not been given to the defaulter.
- The Commissioner also has the power under Rule 178 to delay the sale, subject to the defaulter satisfying the Commissioner that the default amount will be paid by way of mortgage, lease or sale of property

WHAT IS THE ROLE OF RECIEVERS IN RECOVERY PROCEEDINGS?

- The Commissioner may appoint a Receiver to manage the business of the defaulter once the same has been attached.
- The Commissioner may also, instead of ordering sale of immoveable property, appoint a Receiver to manage the property.
- The profits/rent of the property if any, after deduction of arrears of tax and management expenses shall be paid to the defaulter.
- The Receiver so appointed shall have powers to:
 - bring and defend suits;
 - manage, protect, preserve and improve the property;
 - the collection of the rents and profits thereof;
 - the application and disposal of such rents and profits; and
 - the execution of documents as the owner himself.

CHANGES PROPOSED UNDER DRAFT AMENDMENTS TO THE ITR FOR RECOVERY PROCEDURE? (1 / 2)

- The proposed amendments have been promulgated in the ITR.
- Exercise of Section 140 of the ITO has been made conditional upon Commissioner being satisfied that:
 - No refund is due to the defaulter; or
 - No application for rectification of rectification of the demand is pending.
- Exercise of Section 140 of the ITO has also been conditioned upon approval by the Chief Commissioner in certain instances.

CHANGES PROPOSED UNDER DRAFT AMENDMENTS TO THE ITR FOR RECOVERY PROCEDURE? (2/2)

- Such instances where the Chief Commissioner's approval in writing is required are as under:
 - Where demand is created by an ex parte order
 - Where demand is created by rejection of estimate under Section 147 of the ITO
 - Where an Order which created the demand has been appealed in accordance with Section 127 of the ITO and no payment of 10% liability has been made
- The proposed SRO proposes to introduce a mechanism for appeal, not previously available, in the instance that the Commissioner has determined a dispute which arose out of the operation of the ITR.
- This Appeal shall lie to the Chief Commissioner, RTO or LTU as the case may be or to the Commissioner if the first Order was made by an officer authorized by the Commissioner.

The background is a blue gradient. In the corners, there are white line-art designs resembling circuit boards or neural networks, with lines and small circles connecting them.

THANK YOU

SAIDUDDIN & CO