



ITBAK's News & Views

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A publication of the Income Tax Bar Association, Karachi covering information on recent important judicial pronouncements, circulars, clarifications and articles for members of the Bar.

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Message to the Members

Members are requested to send their contribution for the next issue before 25th April 2004.

IMPORTANT CIRCULARS AND NOTIFICATIONS

CIRCULARS/ NOTIFICATIONS REFERENCE	DATE	ISSUES INVOLVED	ITBAK LIBRARY REF: NO.
INCOME TAX			
SRO 130(I)/2004	27-02-2004	Rule 231A of the Income Tax Rules, 2002 (the Rules) inserted prescribing Procedure for issuance of advance ruling under section 206A of the Income Tax Ordinance, 2001 (the Ordinance) to a non-resident person and Rule 231B of the Rules inserted permitting withdrawal of such Application under Rule 231A at any time before the advance ruling is issued.	01
S.R.O. 862(I)/2003	02-09-2003	Convention between the Government of the Islamic Republic of Pakistan and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the prevention of fiscal evasion with respect to taxes on Income has been made with effect from 9 th March, 1999	02
SALES TAX			
SRO (I)/2004	12-01-2004	Draft of Sales Tax Refund Rules, 2004 issued.	03
SRO 166(I)/2004	18-03-2004	Special Procedure for Manufacturers-cum-Suppliers of Spun Yarn Rules, 2004 issued.	04
C.No.4(8)DTRE/	20-01-2004	Clarification issued in respect of issues raised by the Collector (Exports), Karachi on DTRE-2003 for compliance by all the concerned.	05
C.No.3(19)ST-L&P/	28-02-2004	Comments and Suggestions invited by 31-03-2004 on Sales Tax Refund Rules, 2004.	06
C.No.4(I)DRD/ 2004/DTRE	20-01-2004	Clarified that DTRE Scheme is applicable only in respect of cases relating to areas where all the four Federal Tax Laws i.e. Customs, Central Excise, Sales-tax and Income-tax are applicable simultaneously. However, DTRE facility exclusively for Sales-tax can be granted if exporter is from the area wherein Sales Tax Act, 1990 is applicable.	07
C.No.4(8-A)DTRE\	24-03-2004	Clarification issued in respect of issues raised by the Collector Multan for compliance by all the concerned.	08
*			
CORPORATE LAWS			
Circular No.7	30-01-2004	Under the Companies (General Provisions and Forms) Rules, 1985, only Company's Chief Executive or Secretary can sign the statutory returns but due to practical difficulties faced by the Companies, now the documents/returns filed under the signature of a Director will also be accepted for registration.	09
Circular No.11	18-02-2004	All Non-Banking Finance Companies (including Modaraba) are directed to comply with Section 20 of the National Accountability Ordinance, 1999, in letter and spirit by reporting all suspicious financial transactions to the Chairman, NAB.	10

CIRCULARS/ NOTIFICATIONS REFERENCE	DATE	ISSUES INVOLVED	ITBAK LIBRARY REF: NO.
Circular No.12	24-02-2004	Now even Unlisted Public Companies have been allowed in emergent situations to hold their Board Meetings through video conferencing where it is not possible for the directors to be physically present at the venue of the meeting. However, requirements of requisite quorum and other legal formalities relating to holding such meetings must be strictly observed. Further, Company Secretary is responsible to secure video recording of the proceedings of the meeting and keep it in his custody along with other relevant records.	11
Circular No.13	05-03-2004	Old National Identity Cards (NIC) are not to be accepted as valid document, as the same have been cancelled by the Government. The dealing officers are required to ensure that new computerized NIC are mentioned on all the relevant papers.	12
Circular No.14	08-03-2004	Companies Easy Exit Scheme (CEES) re-launched providing an opportunity to dormant Unlisted Public and Private Companies; Associations Not For Profit; Companies Limited by Guarantee and Foreign Companies, having no assets or liabilities and not carrying business, to take advantage of the exit facility and get their names struck off the Register of Companies, after fulfillment of specified formalities and payment of requisite fees. CEES is operative for a period of 4-months from 01-03-2004 to 30-06-2004.	13

SYNOPSIS OF IMPORTANT CASE LAW

INCOME TAX

CITATION	SECTION	ISSUES INVOLVED
2004 PTD (TRIB) 583	Para(c) of Part II of First Schedule	In this case, the Full Bench was constituted to determine a very important question of law in respect of assessment of partners of registered professional firm. The question for determination arose due to the fact that action under section 66A was taken by the learned IAC, wherein, according to interpretation placed by the learned IAC, the partners of registered professional firm would be entitled for rebate who pay Super tax under Para (c) of Part-II of First Schedule. It was his contention that since the professional registered firms do not pay any super tax, hence, Para (c) of Part-II does not apply to it, therefore, its partners are not entitled for any tax rebate under Clause (f) of Para-I of Part-I of First Schedule. The learned Full Bench, after hearing the parties has not accepted the interpretation made by the departmental officer and agreed with the assessee/partners. After going through various propositions of law in respect of payability/chargeability. (It is suggested that the learned members may read this judgment very carefully, where plethora of judgments have been cited on the principles of interpretation of fiscal statute.)
2004 PTD (TRIB) 456	59A and 65	In this case, the assessments were framed under Section 59A, which were reopened on the basis of anonymous complaint. The learned Tribunal observed that the text of definite information means a material which causes a reasonable belief of said evidence which might lead to a definite belief of escape or under assessment. It was also held in this case that since the reopening was made by an officer having no jurisdiction to the case, reopening was held to be without jurisdiction.
89 TAX 193 (S.C. PAK)	56, 61 and Article 247 of the Constitution of Islamic Republic of Pakistan	In this case, an assessee having its registered office at Dargai Malakand Agencies carries on business of manufacturing, processing and sale of Vanaspati and Cooking Oil. It was issued notice u/s 56 and 61 which was challenged before the Hon'ble Peshawar High Court as action without jurisdiction. The Hon'ble Court held that Income Tax Ordinance, 1979 is not applicable to Malakand Division within the contemplation of Article 247 of the Constitution. The Department filed Appeal before the Hon'ble Supreme Court of Pakistan, which after examining the provisions of Income tax and the Constitution has held that Income tax Ordinance, 1979 has not been extended to tribal areas, the company was not taxable under the Ordinance, 1979.
2004 PTD (TRIB) 689	66A	In this case an application for rectification was filed on the point that Hon'ble Income Tax Appellate Tribunal has no power to set aside an order of an IAC passed under Section 66A. The Hon'ble Income Tax Appellate Tribunal after examining the provisions of Section 134 and 135 held that it has power to set aside the order.
2004 PTD (TRIB) 708	Proviso to section 56	In this case proviso to Section 56 inserted through Finance Ordinance, 2001 has been held to be curative, beneficial and remedial in nature, it is therefore held on the basis of judgment of Hon'ble Supreme Court reported as 1993 SCMR 73 and 1999 PTD Trib 8, the proviso is

retrospective in effect and applicable on all pending proceedings at any stage of appeal.

2004 PTD 735
H.C. KAR

22 and 30

In this case assessee leased its plant and machinery and building and claimed that the income arising out of letting out be assessed under Section 22. The Departmental authorities however assessed it under Section 30. The Hon'ble High Court approved the treatment given by department.

2004 PTD (TRIB)
769

In this case while examining various issues in respect of various jurisdictional aspects the honorable Tribunal has observed as under:

"The Court or Tribunal is always clothed with certain jurisdiction, which is defined as power of Court to hear and determine a case to adjudicate or exercise power in relation to it which includes power to hear and determine issues of law and fact in accordance with settled provision of law. Once the court or Tribunal has jurisdiction, it possess inherent power to decide the question of their own jurisdiction and its adjudication right or wrong is binding upon the parties and the remedy against incorrect or wrong decision is provided by way of appeal, revision and review and in case remedies are not exhausted, the order, even if erroneous, will attain finality, and shall be binding upon the parties. However, if the term jurisdiction refers to be legal authority to administer justice in accordance with the means provided by law subject to the limitation imposed by law and subject to certain terms, such terms must be complied with in its real spirit while recording order and in case mandatory conditions for the rightful exercise of jurisdiction are not fulfilled, the order would not be treated as void but voidable and in such terms must be complied with in its real spirit while recording order and in case mandatory conditions for the rightful exercise of jurisdiction, Under such circumstances, the proceedings cannot be termed as illegal and without jurisdiction. Absence of inherent jurisdiction, is distinguished from exercise of jurisdiction ignoring law of procedure, the former would render judgement a nullity and the latter would be an irregularity and if not objected to in time, would be accepted as a legal order. In our opinion, jurisdiction vests with the panel but panel has improperly exercised its jurisdiction and while making distinction between the existence of jurisdiction and the exercise of jurisdiction in an irregular manner, the law shall not permit to declare the proceedings to be impugned at the behest of the person who invoked it in an irregular manner. Reliance is placed on case-law reported as PLD 1979 SC (AJ&K) 109. In the circumstances supra, we find that once an authority has jurisdiction, an irregularity in the exercise of it will not vitiate the decision. Even otherwise it is a procedural lacuna which is curable by all means

The term void is also distinguishable with voidable. An order which is void is nullity .e. an order made by the Court possessing no jurisdiction whereas a voidable order is n order made by an authority which possessed jurisdiction but passed the order in illegal or irregular manner, such order may be set aside on sufficient cause being shown . Deviation

from the procedure or causing procedural lapse, is mere irregularity in exercise of jurisdiction, hence may be rectified or corrected by affording another opportunity of hearing to the parties."

2004 PTD (TRIB) 16
762

In this case, the Hon'ble Income Tribunal while examining the provisions of section 16 read with Golden Handshake Scheme has already held that the amount not compensation in lieu of surrender of service and deposits to various approved fund require separate treatment. It was further observed that if there are some specific exemptions available, it cannot be denied to the assessee. The scope of the decision of the Hon'ble Lahore High Court reported as 2002 PTD 562 in respect of working of average rate of tax has been reiterated.

2004 PTD (TRIB) 13(1)(d)
848

In this case action under Section 13(1)(d) was taken by treating the value declared by the assessee as too low. It was contended before the Tribunal that property was purchased through registered sale deed which has sanctity attached to it unless proved otherwise. It was also argued that onus has not been discharged to prove that assessee expended more money than mentioned in the sale deed. It was further submitted no parallel case was cited for the estimate made in the value. The Hon'ble Tribunal accepted all the contentions raised by the assessee.

2004 PTD (TRIB) 13(1)(aa)
880

In this case an addition under Section 13(1)(aa) was made on the ground that amount deposited by the directors were unexplainable. The learned Tribunal after examining all the aspects of the case and law held that once the company had submitted the evidence about the source of the deposit no addition could be made. The worthy members are requested to kindly read this interesting decision.

2004 PTD 921
H.C. KAR.

52 and
Explanation to
section 50(4)

The facts of the case are that action u/s 52 was taken by the assessing officer for default of non deduction of tax u/s 50(4) by treating the Explanation added in Section 50(4) as retrospective. The learned tribunal had held that Explanation to Section 50(4) was not retrospective.

The Hon'ble High Court after examining the principles of interpretation concluded that Explanation was not retrospective. While examining the said Explanation various important principles on the interpretation of law and on the effect of Explanation have been laid down, which are briefly reproduced for convenience.

- (a) The ordinary object of an explanation to a statutory provision is to explain the meaning and intendment of the Act.
- (b) Where there is any obscurity, ambiguity or vagueness in the main enactment, the explanation clarifies the same so as to make it consistent with the dominant object which it seems to be subservient. The explanation is a note of caution by the Legislature to rectify the judicial error and to give guideline for future, clarifying the intention of the Legislature.
- (c) Normally, the explanation does not enlarge or limit the provision already enacted.
- (d) Sometimes, the legislature steps in to convey its real, intention if not fully conveyed by the earlier enactment or there has been a misconception about the scope of a provision.

- (e) Sometimes definition or a deeming clause is inserted by an explanation.
- (f) Sometimes on account of ineptness or lack of dexterity on the part of draftsman, substantive provisions are also enacted with the heading explanation.
- (g) If an explanation is merely declaratory or clarificatory in nature or is meant to fill in certain obvious gaps or to convey the real intention of the legislature by explaining the meaning and intendment of the Act or by clarifying an obscurity or vagueness in the main enactment it is always retrospective in effect and is operative since the very inception of the enactment and shall be held to be existing all along.
- (h) However, if a substantive/a new enactment has been made or a new definition is added or a deeming provision is inserted or the scope of a provision particularly a substantive/charging provision is enlarged or extended it shall not have the retrospective effect until and unless specifically specified so by the Legislature.

It was further observed after perusal of various explanations either enacted at the time of promulgation of the Ordinance itself, or inserted subsequently, it is obvious, that all the explanations are not necessarily declaratory and clarificatory or for removal of doubt. Some explanations are definitive in nature, some of them have enacted the deeming provisions, some explanations are on the face of them declaratory, clarificatory and for the removal of doubt. Some of the explanations have been specifically inserted with retrospective effect and the others have no such statement. Some of the explanations have enlarged and extended the scope of already enacted provisions and through some explanations substantive legislation has been resorted to. The result is that no hard and fast rule can be made applicable to all the explanation inserted by subsequent legislation. The explanations squarely falling within the normal purpose and scope of explanations, to wit, being declaratory, clarificatory, meant for removal of doubt, removing of obscurity or an ambiguity or filling in any obvious gap or correcting any pronouncement by the Court taking as judicial error by the Legislature, shall have the retrospective effect. However, the explanation whereby substantive legislation has been made or deeming provisions have been enacted or substantive provisions of law have been enlarged or extended creating new liabilities they shall not have retrospective effect.

ITA NO.1709/KB OF 127(2)
2003 TRIB
(Un-reported)

In this case, the appellant had filed an appeal before the ITAT on the plea that the CIT(A) was not justified in dismissing the appeal for non-payment of mandatory 15% of disputed tax under section 127(2). The learned Bench of the ITAT by following the judgement of Lahore High Court have directed the Commissioner of Income Tax Appeals to adjudicate the appeal on merits without pressing for deposit of 15% of disputed tax liability.

WEALTH TAX

2004 PTD (TRIB) 5
724

In this case assessee claimed exemption of assets for Wealth Tax on the ground that he inherited the property from his father, who created the assets from foreign Remittances. It was held by the Hon'ble Tribunal that

exemption is provided to the person who himself has created the assets from foreign remittances.

89 TAX 234 (TRIB) 2(1)(5)(ii)

In this case, an assessee being a private limited company was taxed under the provisions of Section 2(1)(5)(ii) of the Wealth Tax on the ground that it has leased its plant and machinery. The learned Tribunal after examining the said provisions and facts found that Assessee Company was incorporated with single object of running flour mill and held the assets for that purpose not for leasing out the same. The leasing took place due to unavoidable circumstance, as same was not the purpose of the company. It has been held that company was not chargeable to wealth tax.

(Members are requested to read this decision carefully which contains substantial material on interpretation of law.)

89 TAX 271 (TRIB) 17B and 35

In this case, assessee filed rectification application before the IAC u/s 35, on some mistakes in the order passed by him in the orders passed u/s 17B. Instead of IAC, the Deputy Commissioner rectified the orders. The assessee challenged the order before the CIT (A), who cancelled the orders. The department filed appeals before the learned Tribunal. After examining the facts and provisions of Section 35 of the Wealth Tax Act, 1963, it has been held by the learned Tribunal that rectification can only be made by the authority whose order is sought to be rectified. The order of CIT(A) was confirmed.

2004 PTD (TRIB) 17, 5(1)(i) and
1014 clause (22) of
Part I of
Second
Schedule

In this case, the Hon'ble Income Tax Appellate Tribunal after examining the provisions of section 17 of the Wealth Tax Act, 1963 has held that Section 17A(1)b specifically provides that the time limit for completion of assessment is two years where a return has been filed. The general limitation of four years is not applicable in a case where a return has been filed and is only applicable if the return has not been filed. It was further held that exemption to Stock Exchange was allowable u/s 5(1)(i) and clause (22) of Part I of Second Schedule to the Wealth Tax Act, 1963, as the Exchange's object is of general public utility.

SALES TAX

2004 PTD 624
H.C. LAH. 11, 11A, 45
and 73

In this case through a show cause notice contravention case under section 73 of the Sales Tax Act was made by the Collector on the ground that the returns filed for tax period 7 of 2001 to 12 of 2002 were wrong and input tax claimed/adjusted was inadmissible. The principle amount and additional taxes and penalties were levied. The argument of the assessee was that the Collector sitting on the executive side has no jurisdiction and the action could only be taken by the Collector (Adjudication) in view of provisions of section 179 of the Customs Act. The Hon'ble High Court accepted the above plea and further held that:

"The provisions of sections 11, 11-A and 45 are necessarily different in vital aspects. The assessment and recovery of tax under sections 11 and 11-A respectively is a summary proceedings wherefrom the return/record submitted by a registered person the default in payment of tax or short payment or an inadmissible tax credit or refund is discernible on the fact of such return. In these cases an officer of the department on the executive side can proceed to make an assessment of tax due on the basis Of that return/record subject to the conditions given in sub-clause (4) of section 11

and the proviso thereof. The officer thus acts both as prosecutor as well as a judge. The default being apparent from the documents/record/material submitted by the taxpayer collection of further evidence is not required. The recovery of short paid admitted liability in a return is likewise recoverable in a summary manner.

The power of adjudication contemplated under section 45 of the Act is altogether different. The adjudication proceedings contemplate not only issuance of a show-cause notice but also requiring the taxpayers as well as the Department to produce evidence and material in support of their respective stands. These proceedings are normally initiated on the basis of a contravention report which is akin to the submission of challan in a Court of criminal jurisdiction. Although such proceedings are not criminal in nature yet summary of allegations in the form of contravention report submitted before the Adjudicating Authority partakes a number of characteristics of a challan submitted before a Judge or a Magistrate on the criminal side.

The learned Collector by way of the impugned order having confused these concepts and having proceeded in a matter which was amenable only to an action under section 45 of the Act clearly erred in law. A bare reading of first para of show-cause notice makes it clear that the proceedings initiated in this case were not based upon the return filed by the registered person or the material accompanying the same. Instead it appears that the record/accounts of the petitioner for the period July, 2001 to December, 2001 were scrutinized, and such scrutiny was described as audit in the notice itself. It was on the basis of that examination that the department framed the view that the petitioner had not made the payment on supplies in respect of the purchases made. Even otherwise generally from a Sales Tax return filed for a tax period the violation of provisions of section 73 of the Act (certain transactions not admissible) cannot be made out. It is only on examination of record or on audit of a registered person that such default can come to surface if it was actually committed."

2004 PTD (TRIB) 7 and 8
681

In this case the Hon'ble Customs, Central Excise and Sales Tax Tribunal after examining the provisions of Section 7 of Sales Tax Act, 1990 read with SRO's 578(I) 98- dated 12.6.98, 987(I) of 99 dated 30.8.99, CBR's Circular Letter No.2(77) ST/95/Vol-VII dated 28.2.2002 and judgment of Hon'ble Supreme Court reported as 1999 PTD 1892 has held that Sales Tax paid on identifiable spares, accessories and maintenance material required essentially to keep the production machinery of a registered person operational can be claimed as admissible input tax credit in terms of Section 7(10) as these are not covered by Section 8(1) or listed under any notification. It was further held that it is not material in such a situation whether such spares and accessories are stock in trade or not. It was further held that input tax credit in relation to purchases made of goods including spares accessories and maintenance material like tyres, tubes, batteries, grease, lubricant, etc. shall not be admissible if these are procured for the maintenance, repairs, reconditioning or operation of goods e.g. vehicles, building, office equipment, electrical and gas

apparatus, appliances, furniture & fixtures covered by section 8(1) or notification issued there under.

89 TAX 203
(S.C. PAK)

32A

*not
retrospective*

In this case, the Petitioner challenged the provision of Section 32A of the Sales Tax Act, 1990 challenging the appointment of the auditors who conducted the audit for the period 1996-97 and 1997-98 on the ground that Section 32A cannot operate retrospectively. The Hon'ble Supreme Court accepted the contention and held that it cannot be retrospective.

(Members are requested to read this judgment thoroughly)

2004 PTD 557

2(25) and
3(1a)

In this case, it has been decided after considering the various provisions of law involved, particularly sub-section (1A) of section 3 of the Sales Tax Act, 1990 read with definition of term "registered person" as given in section 2(25) of the Act that further tax envisaged under the said statutory provisions was not leviable in respect of supplies made to persons who were liable to be registered with the Sales tax Department even though they were not in actual so registered. It was further observed after examining the other judgments in the field that while interpreting the provisions of section 3(1A) of the Sales Tax Act that the lower forums presupposed without there being any material on record that all the retailers to whom taxable supplies were made by the wholesaler were un-registered persons. It was also held that provisions of section 2(25) of the Sales Tax Act, 1990 in acted in the year 2002 were not applicable retrospectively to the period in question i.e. 1999 and 2000.

2004 PTD 788
H.C. LAH.

2,3 & 45

In this case, Sales Tax was imposed on the excavated limestone and clay, which was then utilized in the manufacturing of cement. The Hon'ble Lahore High Court on the basis of judgment of case reported as 2002 PTD 609 held that process of excavation of limestone and clay was of manufacture and consequently, a process in furtherance of taxable activity. It was further held that limestone and clay were identifiable/marketable goods on which tax could be levied and as such, even if the goods have been supplied by a person to itself, the same would fall within the definition of taxable supply. (In this judgment, numerous judgments have been referred. Members are requested to go through the relevant judgments for better understanding of the issue).

2004 PTD 767
S.C. PAK.

3

It will be recalled that the Hon'ble Lahore High Court had held in the case of Coal Mines that levy of Sales Tax on supply was valid and the argument that taxation on the mines was a provincial subject was not accepted. The aggrieved party filed Civil Petition before the Hon'ble Supreme Court of Pakistan, wherein, the judgment of Hon'ble Lahore High Court has been up-held.

2004 PTD 868
H.C. KAR

2 & 3

In this case show cause notice was issued on the basis of audit conducted by the sales tax department wherein it observed and alleged that sales has been misdeclared as bank statement of the assessee shows substantial amount which were treated as such. The assessee filed explanation and contended that action is illegal in view of the provisions of sales tax act and that action is without any evidence that all the receipts taken into bank account were on account of taxable supplies and there was no provision in the sales tax act to deem the receipt of the money to be a sale.

The Hon'ble High Court after hearing the party and examining the

provision of law held that there was no provision which deems the cash credited in the accounts as taxable supply or amount received on account of taxable activity in furtherance of any business. It was further held that initial burden of proof in respect of case of any tax fraud lies on the department and once the burden is discharged by the department, the burden is shifted to the assessee to establish that the act done was without any knowledge on his part or without any intention of dishonesty or fraud and was done with any lawful excuse.

2004 SCMR 456

3

In this case, before the Hon'ble Supreme Court question came for consideration that whether the sale tax is payable from the date of receipt in advance of the amount of consideration for taxable supply on the date of delivery of goods to the purchaser. It may be stated that above question emanated from the judgment of Hon'ble High Court of Lahore, wherein it was held that sales tax will be charge when sale transaction is completed and not on advance received. The Hon'ble Supreme Court has reversed the judgment of the High Court.

(Members are requested to read this very important judgment which is of far reaching effect.)

FEDERAL TAX OMBUDSMAN

89 TAX 214 (FTO)

INCOME TAX

In this case, the grievance of the assessee before the Hon'ble Federal Tax Ombudsman was that the Commissioner of Income Tax (Appeal) has decided the appeal against the assessee without assigning any reason. The Hon'ble FTO after examining the case has observed that appellate order should be a speaking order. It was observed that it is a universally acknowledged principle of justice that the Appellate court must state its reasons for the decision. It is not sufficient to say that the order of the assessing officer or the argument of any party represents the correct view of the case. It is necessary that reasons are given in the order for the decision arrived at. It has been observed that the reason so given will enable a party to decide whether to appeal against the order or not? Reasons are to be given even in cases where order is passed affirming the assessment order. Mere reproduction of the order of the assessing officer without giving his own reasons or applying his mind is improper. The object of appeal is that a higher forum may apply independent mind to the controversy and then decide by its own reasoning. In the facts and circumstances of the case, the appellate order was held that it suffers from infirmity and can be termed as arbitrary and Maladministration is established.

OTHER LAWS

2004 SCMR 396

CENTRAL
EXCISE

In this case, the Hon'ble Supreme of Pakistan has held that Clubs were chargeable to Central Excise duty. The plea of the petitioner that clubs were exempt from Central Excise on the basis of certain notification was not accepted.

2004 PTD 801

CUSTOMS

In this case the assessee imported certain goods declaring the same as items of raw material and produced exemption certificates for non-deduction of tax under Section 50(5) before the Customs Authority which was duly allowed and goods were released without deduction of advance

tax under Section 50(5). Subsequently on the basis of information the custom department found that assessee has evaded duties and taxes by misdeclaration of description value and quantity and found that goods imported comprised finished goods. It was further found that income tax exemption certificate was misused and exemption was wrongly availed which fact was duly confirmed from the income tax department. On the basis of the above facts case was re-opened under Section 195 of the Customs Act for realization of evaded income and imposition of penal action. The appeals filed before first and second appellate forum were dismissed.

It was argued before the Hon'ble High Court of Sindh that Customs Authority had no jurisdiction to recover income tax and to impose additional tax under Section 86. It was further argued that penalty imposed under Section 156(1) of the Customs Act was without jurisdiction and that custom department cannot recover income tax. The Hon'ble High Court of Sindh after examining the relevant provision of law observed as follows -

"A perusal of the provisions contained in section 50(5) of the Ordinance and section 202 of the Customs Act, shows that the Collector of Customs has been empowered to collect the advance income-tax under subsection (5) of section 50 of the Ordinance, at the time of import of goods at the rates specified in the First Schedule to the Ordinance, in the same manner and at the same time as the customs duty and tax is to be collected in the same manner as customs duty, the recovery thereof can be made under section 202 of the Customs Act. In the judgments cited above, it already stands decided that merely by providing the manner and time of collection of tax under any tax enactment, the nature of the tax shall not be changed, meaning thereby that if the advance tax under section 50(5) of the Ordinance can be collected as customs duty and can be recovered by the customs officials under section 202 of the Customs Act, it will not change the nature of tax and the income-tax shall not become the customs duty. We fully subscribe to the views held earlier by this Court in the judgments cited above, that the collection of tax and assessment are not one and the same. The power to collect the advance income-tax under section 50(5) of the Ordinance by the Collector of Customs, shall not have the effect of converting the income-tax into customs duty and consequently the customs official shall be empowered by virtue of the provisions contained in the Income Tax Ordinance and the Customs Act, merely to collect the determined amount of tax and shall not have the Authority to resort to the chargeability or assessment of a tax. Likewise when the income-tax shall not be changed into customs duty, the applicability of section 156 of the Customs Act, shall be excluded as a logical conclusion."

2004 SCMR 394

The hon'ble Supreme Court of Pakistan while deciding a case where plea of adverse possession was taken has observed and held that devolution of inheritance is automatic and the co-heirs become co-sharers, the moment inheritance opens. Even the entry of mutation etc is also not necessary.

PLD 2004 SC 261

The Hon'ble Supreme Court of Pakistan has held that word having not been defined in the Act is to be construed in its ordinary sense and not as a term of art.

PLD 2004 SC
(AJ&K) 1

It has been held by Hon'ble Supreme Court of Azad and Jammu Kashmir that if by an order, interest of a person is adversely affected, he should be given a notice of hearing as natural justice so demands. Principles of natural justice shall be presumed to be in every statute, unless same is excluded by relevant statute itself.

2004 PTD 791

CENTRAL
EXCISE

In this case it was held by the Customs, Central Excise and Sales Tax Appellate Tribunal that that cutting of tin plates to size used in the manufacture of metal containers would constitute a manufacturing activity within the definition of section 2(25) of the Central Excise Act, 1944.

The Hon'ble High Court of Sindh, after examining the decision of the Tribunal, and definition contained in Central Excise Act observed that any process incidental or ancillary to the completion of manufactured product is included in the definition of word "manufacture" as contained in section 2(25) of the Central Excise Act, 1944. The decision of learned Tribunal was up-held that the act of cutting tin plates to size amounts to manufacture within the definition of said section.

Tax Avoidance and Tax Evasion

By Irfan Saadat Khan, Advocate

Tax evasion exists in all countries, though in varying degrees. It is a serious problem in developing countries, which are in the process of evolving their tax systems.

What is Tax Evasion and Tax Avoidance?

1. Tax evasion is an illegal attempt to reduce the tax payable by deliberately under-reporting or not reporting taxable incomes or concealing one's true state of affairs from tax authorities. Tax evasion is a criminal offence and if detected is punishable by financial penalties or even by imprisonment or both.
2. Tax avoidance means preventing or reducing one's tax liability through manipulations within the framework of existing tax legislation. Tax avoidance, as against tax evasion, is legally permissible and hence a legitimate aim of taxpayers.
3. Tax avoidance is resorted to through such devices as formation of holding companies to claim artificial deductions, constitution of trusts and family partnerships, transfer of income earning assets to one's wife and children for fractioning income for tax purposes, investing in provident funds and life insurance policies, and manipulation of capital gains.

2. Methods of Evading Taxes

- 2.1 The following devices are generally employed to evade income tax: 1. Non-reporting/under-reporting of taxable income. 2. Maintaining multiple set of account books, fraudulent changes in account books, and keeping transactions out of account books. 3. Opening and operating bank accounts under assumed names. 4. Doing business in the name of dummies. 5. Over-reporting expenses. 6. Fragmenting income to reduce tax liability. 7. Transfer pricing manipulations (by companies).
- 2.2 Although evasion of tax is a common tendency among people belonging to different groups, opportunities for it vary according to the nature of income earned by taxpayers. In the case of income from salaries and interest from deposits, evasion is less likely because of proper recording and auditing of transactions, and deduction of tax at source. However, opportunities for tax evasion are very large in the case of self-employed in business and professions. They can insist on their customers to pay them in cash or accept invoices, which underestimate the payment.

3. Why Tax is evaded

- 3.1 Among the host of causes of tax evasion, the level of tax rates is probably the most crucial. It is widely believed that higher the rate of tax, the greater is the tendency to evade taxes. High tax rates make tax evasion more tempting. Tax evaders readily take greater risks if they know that in the event of success the reward is high.
- 3.2 Tax evasion is more in countries where there is general apathy on the part of people towards the government and its laws. People will have less respect for tax laws if they perceive the tax system to be unfair in terms of level of taxation (tax-GDP ratio) and/or distribution of tax burden among various classes. Similarly, there can be a feeling among taxpayers that government is indulging in wasteful expenditure, e.g. digging the roads too often or spending excessively on government functionaries. There is a widespread feeling among the common men that there is considerable waste in government expenditure, that there is excess staff and that the tail is too large.

ratio is unduly high. And with it all, it is generally felt that the public, which pays the taxes, gets poor service and members of the public are treated often not as masters who pay but as supplicants. Moreover, salaried persons envy tax evasion opportunities available to self-employed professionals and retail traders, and are tempted to conceal their incomes from non-salary sources.

- 3.3 Lenient penal action in case violation of law is detected also encourages tax evasion. Tax evasion by politicians and bureaucrats sends wrong signals to the general public that non-compliance is acceptable. A regime of controls, licenses, and shortages also breeds tax evasion and black money.
- 3.4 The problem of tax evasion in underdeveloped countries is associated with the peculiar characteristics of their economies, which, in most cases, are agriculture-based in the sense that a substantial part of national income originates from and the majority of the work force is engaged in agriculture. Moreover, there is widespread illiteracy, lack of accounting practices, limited monetisation and shortage of administrative resources.

4. Effects of Tax Evasion

- 4.1 The effects of tax evasion on an economy are indeed disastrous. Tax evasion cuts at the very root of the revenue potential of a tax system and therefore hinders the resource mobilization efforts of a government. Lack of funds may distort implementation of development plans and force a government to resort to deficit financing in case public expenditure is inelastic.
- 4.2 Tax evasion may interfere with the declared economic policies of a government by distorting saving/investment patterns and availability of resources to various sectors of the economy. For instance, government may impose credit restrictions to discourage certain activities (e.g. speculation) but money saved through tax evasion may finance and encourage the same activities.
- 4.3 Evasion of tax seriously undermines the equity attribute of a tax system. Honest taxpayers, who are obliged to bear disproportionate tax burden, feel demoralized and tempted to join the tax evaders' camp.
- 4.4 Tax evasion leads to the creation of black money, which in turn is a menace to the economy in its own way. Tax evasion and black money encourage concentration of economic power in the hands of undesirable groups in the country.
- 4.5 Tax evasion eats into the time and energy of tax administration, which is obliged to unravel the intricate manipulations of tax dodgers.
- 4.6 Tax evasion leads to degradation of social and moral standards. Social abuses like bribery, intimidation, blackmailing, tampering with official records, submitting fake documents etc. all go with tax evasion.

5. How to control Tax Evasion

The following methods may be considered to check tax evasion.

- 5.1 High tax rates increase premium on tax evasion, which in turn generates black money. Contrarily, it can be expected that lowering of tax rates improves tax compliance and broadens the tax base.
- 5.2 This is a system of collecting income tax whereby money is periodically deducted by the employers, financial institutions, and others from wages of employees, returns on securities, and other payments. Thus, intermediaries (or third parties) do the job on behalf of the government as regards assessment of the taxable base and the collection of tax thereon. Generally, a fixed percentage is withheld from the payment made which is deposited in government's account. At the time of filing the return of income, the taxpayer encloses withholding tax receipts and in case of overpayment he can claim refund of tax.

- 5.3 In every country, there are some soft-to-tax and hard-to-tax sources of income. Wages and salaries are properly recorded and therefore it is easy to assess and collect taxes on them through the Pay-As-You-Earn system. Similarly, income from securities paid through banks can easily be subjected to deduction at source.
- 5.4 Presumptive tax scheme is an easy way to collect and assess the tax. By this method both taxpayer and the assessing authority are somewhat absolved from their responsibility. Presumptive taxation suits a developing country like Pakistan where there is a large unorganized business sector consisting of small retail establishments, and self-employed professionals. It is easy to administer this tax, which can become an effective source of revenue. It also promotes horizontal equity.
- 5.4 A tax amnesty is an opportunity offered by a government to tax evaders to declare their past concealment of income, wealth etc., without fear of being prosecuted. Tax amnesty (or impunity) is granted only for the past in order to secure better compliance and thus higher tax yield in the present and future. A tax amnesty brings the concealed money in the open. Broadens the base of investment, and hence accelerates economic development. However, tax amnesties set bad precedents and encourage tax evaders in the hope that they will be let off leniently for their past sins any time in the future. Practically, the same group of tax evaders takes advantage of tax amnesties announced by the government. The honest taxpayers are demoralized and the tax enforcement machinery also loses respect in the eyes of the common man.
- 5.5 The use of computer facilitates storage and cross checking of economic information will definitely to some extent curb the tendency of avoiding the tax.

CONCLUSION

Widespread tax evasion is a bane of the Pakistan tax system. The history of taxation law amendments in Pakistan is essentially a history of plugging loopholes, as and when discovered, to prevent leakages of revenue.

CORRIGENDUM

a) Members are hereby informed that due to an inadvertent omission in the annual issue – 2003 of News Letter, the names of the following Hon'ble Members of the Bar who have also been inducted as members of the Advisory Committee setup by the Federal Tax Ombudsman were not mentioned in the felicitation column –

- Mr. Rehan Hasan Naqvi, Advocate Supreme Court of Pakistan
- Mr. S.M. Shabbar Zaidi, FCA
- Mr. Khaliqur Rehman, FCA

b) The name of Mr. Shahab Ahmed was not published in the list of members elected for the year 2004, due to inadvertent printing omission.

The News & Views Committee sincerely regret the inadvertent omission.

FUTURE CPE ACTIVITIES

DATE	SEMINAR/ WORKSHOP	CHIEF GUEST/ SPEAKERS	VENUE
April , 2004	Discussion for finalisation of Budget Proposal	To be announced shortly	Conference Room New Income Tax Building, Karachi

Disclaimer -

The News & Views committee claims no responsibility to the correctness of the contents published. The information provided is non-exhaustive and members are advised to refer to the respective documents/case law cited for understanding the issue involved.

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