Tax Review/Taxation
Daily Alert Service

Huzaima & Ikram
January 09, 2017

This special email service from Monday to Friday, part of subscription package, is aimed at keeping you informed about tax and fiscal matters. It contains news, legislative changes, case-law, in-depth articles and analyses covering all areas of taxes at domestic and international level. On every Saturday evening, we email weekly compilation of the entire material. Every month, ***Taxation*** in printed form, is sent through post and digital version of ***Tax Review International*** is made available for download at www.huzaimaikram.com.

For subscription, please visit our website or contact offices mentioned below.

This service is now available *only* for paid subscribers. Please send your email address at sales@aacp.com.pk along with your name, company name, phone number and billing address.

This issue contains:

Kind Regards,

Huzaima Bukhari
Editor

AA Consultants & Publishers
Suite # 14, 2nd Floor, Sadiq Plaza, Regal Chowk, Mall Road,
Lahore, Pakistan
Phone. 042-36365582 & 042-36280015 Fax 042-35310721
Email: sales@aacp.com.pk website: http://aacp.com.pk

Tax policies that may work best for Pakistan

by
Michael Best

When politicians don't pay taxes, it evokes much anger. But the problem is not just politicians: it's all those who should pay taxes but don't. Pakistan's tax-to-GDP ratio is only 11 per cent, one of the lowest in the world. Countries with similar levels of development have ratios around 15 per cent. While many people estimate that Pakistan's tax base should consist of three to four million people, only a million Pakistanis file their tax returns or appear on employer tax statements.

The main problem is that Pakistan's current tax policy assumes that the government has both good information on the tax base and the capacity to collect taxes at little cost. But Pakistan faces major challenges on both counts, leading to widespread evasion and inadequate collection of taxes. This makes it harder for the government to pay for vital infrastructure and social development projects to raise incomes, reduce poverty and address inequality.

Reforming the tax administration is one way forward, but it is difficult and will take time. A growing body of evidence suggests there is another way: Focus on innovative methods that suit Pakistan's ground realities and that the current administration can use to collect more revenue now.

To understand this approach, consider three tax collection scenarios.

In the "first best" scenario, governments have perfect information on taxpayers and can collect taxes effectively at no cost. What is important here is that they know how much potential income citizens have. With that information, governments can spread the burden of collecting taxes in an equitable and efficient way. While this is ideal, no country in the world has a "first best" setting because it is impossible to know what taxpayers' potential income is.

In the "second best" scenario, governments have the capacity to collect taxes, but information is weaker. Governments only know how much people earn — their actual income — but not their potential income. So they tax according to how much people really make: Higher earners are taxed more and lower earners are taxed less. This yields less revenue than a tax based on potential earnings because higher earners can lower their incomes to pay less taxes. But it is the best countries with relatively effective tax administrations can do.

In the "third best" scenario, the government neither has the capacity to know even actual incomes nor to collect taxes. Taxpayers may not truthfully report their incomes and tax administrations cannot collect taxes without great effort and cost. This scenario is closer to reality, especially of lower income countries like Pakistan.

Pakistan's current tax policy operates as if it were in a "second best" world, but it better fits into the "third best" category. This has real consequences for how much tax revenue can be collected.

Take the example of corporations. Right now, Pakistan taxes corporate profits. This would be an effective way to tax in a "first" or "second best" setting because the government would know how much actual profit the corporations make and would tax them. But with the current weak system of publicly available company accounts and the inability to verify the accuracy of corporate profits, corporations have a strong incentive to under-report profits and pay fewer taxes.

If Pakistan took a "third best" approach, what would it do instead? One solution is a minimum tax on corporate revenue. Pakistan already does this for corporations whose profit is too small to tax.

With the help of collaborators, I conducted a study of the minimum tax and found that it prevented 60 to 70 per cent of the profits of the corporations in the study from going misreported. This evidence implies that a "third best" tax policy — in which the minimum tax is implemented more widely — would leverage the revenue-raising power of the minimum tax while minimising its distortionary costs to the economy. Implementing this would not entail a strenuous restructuring of the entire tax administration. This is a policy change that could be done easily with existing tax capability.

Once the government recognises that it cannot observe people's income and trust them to report directly, it opens up more areas to apply a "third best" approach. For example, using consumption behaviour and salaries as alternative sources of information to widen the tax net would make greater sense.

The withholding tax — which is levied in Pakistan through a tax deducted at source from a payment of income — demonstrates that, to a certain extent, this is already acknowledged. It has been somewhat successful in Pakistan because the government only has to monitor employers who act as the government's withholding agents, and employee salaries are less likely to be misreported to them.

Reforms to improve the capacity of tax administration to collect information and levy taxes will undoubtedly be important in the long term. But to support Pakistan's development agenda now, the smartest approach could in fact be the "third best".

Import stage: FBR concerned over massive misuse of exemption certificates

The Federal Board of Revenue (FBR) has expressed serious concern over massive misuse of exemption certificates at import stage and negligible impact of taxation measures taken in last budget (2016-17). Sources told that the critical tax-related issues came under discussion during the day-long Chief Commissioners conference held at the FBR House here on Saturday.

Tax authorities noted with concern that misuse of withholding exemption certificates has considerably increased at import stage during 2016-17. Tax authorities also expressed concern that how field formations have issued inadmissible tax exemption certificates at import stage without following due process of law. It has been decided to immediately take measures to cancel inadmissible certificates through verification exercise and ensure preventive measures to avoid such issuance of certificates in future.

The FBR has also directed the Chief Commissioner to explain reason behind low impact of budgetary measures taken in 2016-17. Despite taxation measures taken in last budget, the FBR has suffered revenue shortfall of over Rs 140 billion in first half of 2016-17. Each Chief Commissioner tried to justify their shortfall in collection. The FBR also finalised the strategy to increase collection in the remaining period of 2016-17, sources added. – *Courtesy Business Recorder*

Services of ICG at Gerry's shed inaugurated

Collector of Customs Zulfiqar Younas has inaugurated the services of Immediate Clearance Group (ICG) at the Gerry's shed on Friday. The facility would decrease the customs clearance time at the airport freight unit (AFU), Lahore and facilitate trade at the cargo complex. The aim of the ICG is to expedite clearance of perishable goods.

Speaking on the occasion, the Collector of Customs emphasised the importance of close collaboration between Customs, clearing agents, importers, exporters and ground handling agents. He also appreciated the efforts of all stakeholders for their positive role in enhancing trade at the airport freight unit, Lahore.

He said the Customs staff has been appointed at the ICG to provide clearance 24/7. "It will hugely benefit the clearance of

perishable goods and live animals, both of which are an important source of revenue for the Collectorate of Customs (Preventive), Lahore. Other high-ups of the Collectorate besides representatives from Gerry Dnata, Turkish airline, Jordan airline and DHL were also present on the occasion. – *Courtesy Business Recorder*

Outgoing Chairman FBR's services lauded

Chief Collector Customs Central Samaira Nazir Siddiqui and officers of Pakistan Customs Service Central Region arranged a luncheon to bid farewell to Chairman FBR Nisar Mohammad Khan at Custom House Lahore on Saturday. She paid rich tribute to Nisar Muhammad Khan for his valuable services rendered to the department. She also praised the leadership and professional excellence displayed by him during his tenure as the Chairman FBR.

Collector MCC Preventive Lahore Zulfiqar Younas also appreciated the services of the Chairman FBR and said that the dedication, competence and principles on which he led his career were indeed a role model for the senior and young officers alike. The Chairman FBR shared his experiences during his 32 years long career in the civil service. He stressed upon the young officers to infuse in them the qualities of hard work, dedication and service to the country. – *Courtesy Business Recorder*

PIAF criticises FBR raids

Pakistan Industrial and Traders Associations Front (PIAF) Chairman Irfan Iqbal Sheikh has criticized the Federal Board of Revenue (FBR) for issuing undue notices to business community, creating unrest among them. "The PIAF had received a number of complaints of FBR officials using arm-twisting tactics against businessmen under the grab of Sales Tax Act Section 38b and 40b, which give them special powers to raid the business premises," he said.

He said that even after paying the duties and other taxes, the FBR officials stop the vehicles loaded with raw materials which are supplied to the big industries and ask for import documents from the drivers and then take the speed money when they don't find their required documents.

Irfan Iqbal sheikh said the raids on industrial units and shops would hamper the economic activities. The Federal Finance

Minister Ishaq Dar should take notice of the whole situation and restrain the FBR officials from entering the business premises. If there is an urgent need to take action against any particular industrial unit, the FBR officials should be directed to take concerned association on board, he added. As such the Section 38b and 40b are being misused by the FBR officials that need to be checked; he said and stressed the need for promoting economic vitality by strengthening private sector as internal dynamism has faded away due to energy shortage. – *Courtesy Business Recorder*

Mandviwalla terms FBR's audit policy disaster for tax system

The Federal Board of Revenue (FBR) has failed to squeeze the neck of 0.7 million high net wealth individuals, despite having their complete records, said Senator Saleem Mandviwalla here on Saturday. While lambasting the audit policy of the FBR, he said that it was unfortunate that out of 0.9 million taxpayers, only 0.1 million would be on FBR's radar through its audit exercise.

Furthermore, he said the FBR's audit policy was a disaster for tax system of the country; adding that this audit policy would prove a tool to harass the honest taxpayers of the country, which would encourage more taxpayers to go out from the tax net. He alleged the FBR was busy in threatening and harassing the taxpayers as they were raiding on the offices of the taxpayers and issuing notices to them on every day.

He said that FBR had completely failed to increase the tax net of the country and by committing said action, they were restraining unregistered persons to get enrolled in tax net; adding that FBR had done nothing on the data of 0.7 million high net wealth individuals attained from Nadra in the tenure of PPP-led government rather it had put the said classified information in the dustbin.

Resultantly, these people are enjoying every facility in the country, they are living in luxury villas, travelling abroad every month, their children are studying abroad and they have a bank balance of billions, he maintained. He further urged the FBR to revisit its audit policy in order to provide maximum relief to the registered persons, who were being neglected since long. – *Courtesy Business Recorder*

FED collection through cigarettes declines sharply

Federal Excise Duty (FED) collection on cigarettes sharply declined by over 45 percent or Rs 4 billion during the first quarter (July-Sep) of this fiscal year 2016-17 mainly due to change in duty structure. According to State Bank of Pakistan (SBP), the tobacco industry in the formal sector is facing immense competitive pressure due to massive increase in FED and the illicit market of cigarettes in Pakistan has reached about 40 percent of the total demand.

Cigarette industry witnessed a substantial increase in FED in the fiscal budget, which not only adversely affected production, but also encouraged demand for smuggled and counterfeits in the market. The presence of a large, informal sector undermines the viability of the legitimate players in the industry and that remains one of the major factors in discouraging both domestic and foreign investment.

While highlighting the "challenge for legitimate cigarettes industry in Pakistan" the SBP in its report pointed out that the tobacco industry in the formal sector is facing immense competitive pressure due to exponential growth of duty-evaded segment. Specifically, the price increase due to higher FED in the Federal Budget FY-2016-17 and those cigarettes, which have successfully evaded excise levy, are far cheaper and thus more in demand compared to the tax-paid brands.

Under S.R.O. 473(I)/2016, the government has enhanced the FED on cigarettes in two stages. During the first stage up to November 30, 2016, the excise duty was fixed at Rs 4,000 per thousand cigarettes. This rate increased further to Rs 4,400 in the second phase starting from December 1, 2016.

As a result, not only the sale volumes of the legitimate and tax-paying segment of the industry are facing a decline, the government is also losing its revenues. FED collection on cigarettes fell to Rs 5.5 billion in first quarters of current financial year from Rs 10.1 billion in first quarters of last fiscal year, posting a decline of 45 percent or Rs 4.6 billion, the SBP reported.

According to the SBP, the tax evasion on cigarettes generally takes mainly in three forms. Firstly, on import for the commercial use (also known as International Transient Brands) on which applicable taxes include duties, excise and sales tax. – *Courtesy Business Recorder*

FTO initiates probe against RTO Islamabad

Federal Tax Ombudsman (FTO) has initiated investigation against the mal-administration of tax functionaries of Regional Tax Office (RTO) Islamabad, for not de-attaching the bank accounts of a taxpayer despite vacation of demand by competent court.

It is reliably learnt that the FTO has taken up a complaint of an I.T professional, whose bank account was attached without serving any statutory notice and thereafter continuation of bank attachment orders despite having vacation of tax demand order issued by competent authority.

According to the details, the instance complaint reflects a clear case of harassment and mal-administration. The FTO has started investigation on the complaint filed before the FTO through Lahore based lawyer Waheed Shahzad Butt and notices have been issued to the Secretary Revenue Division, Chief Commissioner, RTO, Islamabad, Saad Khan, Tax Employee, Zone West, Islamabad, Commissioner Zone-III, Islamabad and Chief Commissioner.

Due to alleged harassment of the tax employees of the RTO Islamabad, the businessman not only left the country, but also stopped his entire business, complainant accused.

The complainant stated that the Secretary Revenue is the head of the agency (FBR) while SA to PM, being representative of the Prime Minister, designated/notified as Special Assistant to Prime Minister on Revenue, is the supervisory authority over tax employees working under the command and control of the Secretary.

Saad Khan is a subordinate tax employee of CIR and Chief Commissioner, RTO, Islamabad while CIR is responsible for work done by the Public Office holder (Saad Khan).

The complainant was earlier employed in Islamabad and after resigning started his own business, however, due to certain unavoidable circumstances remained failed to continue its own business successfully, therefore, again started employment.

In the month of July 2016 a cheque issued by the Complainant from his personal bank account was returned dishonoured by the Bank with the strange remarks that “Bank Account has been attached by the order of the IRS official of Zone III, RTO, Islamabad”. After visiting the concerned RTO, a request was moved to tax employee with the categorical remarks that no

order/demand note etc was ever issued/served and attachment of bank accounts is not only highly unjust but unconstitutional. On 05.08.2016 certified copy of order dated 28.06.2014 has been issued / served, wherein it has been revealed that a huge demand of income tax has been raised by the then tax employee, however, during the period June 2014 to June 2016 (long 24 months) there was complete silence from IRS functionaries representing Zone III, Regional Tax Office, Islamabad.

Being aggrieved appeal was preferred before the Commissioner (Appeals). On the basis of specific written request patently illegal demand was stayed by vide Order No 108/2016 dated 11.11.2016 in the light of provisions of Section 128(1A). Despite receiving the order, bank accounts of the Complainant were never de-attached by the tax employees working under the CIR and CCIR Islamabad. Thereafter, pending appeal was heard and decided in favour of complainant and demand was vacated for de-novo proceedings. After having order passed by the competent authority, bank accounts were not de-attached by the tax department.

It has been alleged that after lapse of 41 days finally on 28.12.2016 a letter has been received from Saad Khan wherein certain alien issues have been communicated. Instant Complaint has been moved with the hope that forum of FTO would grant an effective judicious remedy in this case in which for the first time since the promulgation of FTO Ordinance, 2000, a crucial issue has been forwarded for judicious consideration by FTO, complainant added.

The FTO is required by the terms of the statute that governs the working of the office of the FTO to unmask maladministration and recommend action to prevent its recurrence and this is exactly what the FTO has done since 2000, lawyer added. – *Courtesy Business Recorder*

2016 TRI 32 (H.C. Cal.)

HIGH COURT OF CALCUTTA

Debangsu Basak, J.

Utanka Roy
v.
Director of Income Tax, International Taxation Transfer Pricing, Kolkata & Ors.

FACTS/HELD

S. 5/ 9: Salary received by a non-resident for services rendered abroad accrues outside India and is not chargeable to tax in India. The source of the receipt is not relevant. The CIT has wide powers u/s 264 and has to exercise them in favour of the assessee in terms of CBDT Circular No. 14 (XL-35) dated 11.04.1955

1. The petitioner was working as a marine engineer and had rendered services as such to a foreign shipping company during the assessment year 2011-2012. The petitioner had filed income tax return for such assessment year under the residential status as non-residential Indian. He disclosed a receipt of a remuneration of Rs. 5,63,850/- in US Dollars. The petitioner was issued an assessment order cum intimation under Section 143(1). The petitioner did not file any appeal. The petitioner had applied under Section 264 of the Income Tax Act, 1961 claiming that the income had accrued outside India and was not taxable in India. The CIT rejected the assessee's claim. On a Writ Petition by the assessee HELD allowing the claim:

   (i) Scope of total income is laid down in Section 5 of the Income Tax Act, 1961. Sub-Section (1) deals with income to a person who is resident in India while Sub-Section (2) deals with income of a person who is a non-resident. The petitioner is a non-resident Indian. He is guided by Section 5(2) of the Act of 1961. Section 5(2) of the Act of 1961 is as follows:–

   "*(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a nonresident includes all income from whatever source derived which-*

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.- Income accruing or arising outside India shall not be deemed to be received I India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.- For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

Explanation 1 to Sub-Section 2 states that, income accruing or arising outside India shall not be deemed to be received in India within the meaning of such section by reason only of the fact that it is taken into account in a balance sheet prepared in India. Explanation 2 clarifies that income will not be treated to be received in India solely on the basis that such income was received or deemed to be received in India.

(ii) Therefore, it has to be found out where the income to the person concerned had accrued. For the purpose of finding out the place of accrual of the income, the place where the services have been rendered becomes material. In fact, the place where the income gave rise is required to be considered to arrive at a finding whether the income was in India or outside India.

(iii) In Prahlad Vijendra Rao 2011 (198) Taxman 551 an income derived by a person working outside India for 225 days has been held not to have accrued in India.

(iv) In Avtar Singh Wadhwan 2001 (247) ITR 260 it has been held that, the relevant test to be applied to decide whether the income accrued to a non-resident in India or outside is concerned, is to find the place where the services were rendered, in order to consider where the income accrued. The source of the income was not relevant for the purposes of ascertaining whether the income had accrued in India or outside

India. The question whether the petitioner has rendered services in India or not is a question of fact.

(v) It is not disputed that the petitioner as a marine engineer had rendered services outside India for the period of 286 days. He has received his remuneration for such work from a foreign company. Consequently, the income received by the petitioner for services rendered outside India has to be considered as income received out of India and treated as such.

(vi) The powers conferred on the Commissioner under Section 264 are very wide. The Commissioner has the discretion to grant or refuse reliefs. There is nothing in Section 264 which places any restriction on the Commissioner's revisional power to grant relief to the assessee in a case where the assessee detects mistake on account of which he was over assessed after the assessment was completed.

(vii) Circular Bearing No. 14 (XL-35) dated April 11, 1955 prescribes as follows:–

"(3) Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly, in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should –

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them as to their rights and abilities and as to the procedure to be adopted for claiming refunds and reliefs."

(viii) In Mahalaxmi Sugar Mills Ltd 1986 (160) ITR 920 the Hon'ble Supreme Court has held that, there is a duty cast upon the Income Tax Officer to apply the relevant provisions of the Income Tax Act for the purpose of determining the true figure of the assessee's taxable income and the consequential tax

liability. In the event, the assessee fails to claim benefits or a set of, it cannot relieve the income tax officer of his duty to apply the benefits of an appropriate case.

(ix) The power under Section 264 is wide enough to grant appropriate relief to an assessee. In the impugned order, the Commissioner notes that, the income received by the petitioner is in respect of services rendered for 286 days outside India. The Commissioner exercising powers under Section 264 of the Act of 1961 could have proceeded to grant appropriate relief to the petitioner by setting aside the intimation under Section 143(1) of the Act of 1961 and holding that, such income of the petitioner is not taxable in respect of the relevant assessment year. The Commissioner, however, did not do so. It has remanded the matter to the assessing officer to do the needful.

Writ petition disposed of.

W.P. No. 369 of 2014.

Heard on: 1st December, 2016.

Decided on: 15th December, 2015.

Present at hearing: R.K. Biswas, Advocate, for Petitioner. Md. Nizamuddin, Advocate, for Respondents.

JUDGMENT

Debangsu Basak, J.–

The petitioner has assailed an order under Section 264 of the Income Tax Act, 1961.

Learned Advocate for the petitioner has submitted that, the petitioner was working as a marine engineer and had rendered services as such to a foreign shipping company during the assessment year 2011-2012. The petitioner had filed income tax return for such assessment year under the residential status as nonresidential Indian. He had disclosed a receipt of a remuneration of Rs. 5,63,850/- in US Dollars. The petitioner was issued an assessment order cum intimation under Section 143(1). The petitioner did not file any appeal. The petitioner had applied under Section 264 of the Income Tax Act, 1961.

Learned Advocate for the petitioner has submitted, referring to 2011 (198) Taxman 551 (*Director of Income Tax v. Prahlad Vijendra Rao*) that, the income received by the petitioner is exempt from income tax as the petitioner had received his salary for work done outside India for a period of 286 days during the assessment year. Relying upon 2001 (247) ITR 260 (Commissioner of Income Tax v. Avtar Singh Wadhwan) the learned Advocate for the petitioner has submitted that, the interpretation of

Section 5 given by the impugned order is wrong. In support of the proposition that, income of a non-resident Indian is exempt from income tax and that such income has to be assessed in view of the guidelines laid down by different authorities, learned Advocate for the petitioner has relied upon 2005 (276) ITR 216 (*Smt. Phool Lata Somani v. Commissioner of Income Tax & Ors.*), 2008 (297) ITR 17 (*Commissioner of Income Tax v. Williamson Financial Services & Ors.*), 1986 (160) ITR 920 (*Commissioner of Income Tax, Delhi v. Mahalaxmi Sugar Mills Co. Ltd.*).

Learned Advocate for the petitioner has referred to an administrative instruction for guidance of income tax officers on matters pertaining to assessment and has submitted that, the income tax officer ought to have guided the assessee with regard to the income tax payable.

Learned Advocate for the department has submitted that, the order under Section 143(1) of the Income Tax Act is appealable under Section 246A. He has referred to Section 264(7) and Explanation 1 thereto and has submitted that, the impugned order does not contain any irregularity warranting interference by the writ Court. The petitioner having an alternative of remedy of appeal had chosen not to avail of the same. Therefore, the petitioner not ought to be allowed to contend the grounds as sought to be canvassed herein. He has submitted that, the decision relied on by the petitioner relates regular appeals and that, they have no manner of application to the facts of the present case.

I have considered the rival contentions of the parties and the materials made available on records.

The petitioner is an Indian citizen. He is an income tax assessee. He has filed a return for the assessment year 2011-2012 with the Income Tax authorities. The petitioner claims to be an engineer and to be engaged as such by a foreign company. The petitioner claims that, he has worked as an engineer with the foreign company for 286 days during the assessment year. He has filed income tax return for the assessment year disclosing an income of Rs. 5,63,850/-. He has thereafter received an assessment cum intimation notice under Section 143(1) of the Income Tax Act, 1961. He has applied under Section 264 of the Income Tax Act, 1961 against such intimation under Section 143(1). In course of hearing of the proceedings under Section 264, the petitioner has claimed that, he has received Rs. 27,92,417/- from his employer during the assessment year in question instead of the sum of Rs. 5,63,850/-.

The proceedings under Section 264 of the Income Tax Act, 1961 was disposed of by the impugned order dated September 25, 2013. There are two parts to the impugned order. The first part finds the petitioner's income to be assessable under the Income Tax Act, 1961. It, however, does compute the tax liability. The Second portion relates to the exemption receivable by the petitioner and notes that, such exemptions

have not been claimed by the petitioner. It ultimately allows the assessing officer to take necessary action.

The contention on behalf of the petitioner that, in the present facts, the petitioner is exempt from payment of income tax requires consideration.

Scope of total income is laid down in Section 5 of the Income Tax Act, 1961. Sub-Section (1) deals with income to a person who is resident in India while Sub-Section (2) deals with income of a person who is a non-resident. The petitioner is a non-resident Indian. He is guided by Section 5(2) of the Act of 1961. Section 5(2) of the Act of 1961 is as follows:–

> *"(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a nonresident includes all income from whatever source derived which-*
>
> *(a) is received or is deemed to be received in India in such year by or on behalf of such person; or*
>
> *(b) accrues or arises or is deemed to accrue or arise to him in India during such year.*
>
> *Explanation 1.- Income accruing or arising outside India shall not be deemed to be received I India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India. Explanation 2.- For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."*

Explanation 1 to Sub-Section 2 states that, income accruing or arising outside India shall not be deemed to be received in India within the meaning of such section by reason only of the fact that it is taken into account in a balance sheet prepared in India. Explanation 2 clarifies that income will not be treated to be received in India solely on the basis that such income was received or deemed to be received in India. Therefore, it has to be found out where the income to the person concerned had accrued. For the purpose of finding out the place of accrual of the income, the place where the services have been rendered becomes material. In fact, the place where the income gave rise is required to be considered to arrive at a finding whether the income was in India or outside India.

In Prahlad Vijendra Rao (Supra) an income derived by a person working outside India for 225 days has been held not to have accrued in India.

In Avtar Singh Wadhwan (Supra) it has been held that, the relevant test to be applied to decide whether the income accrued to a non-resident

in India or outside is concerned, is to find the place where the services were rendered, in order to consider where the income accrued. The source of the income was not relevant for the purposes of ascertaining whether the income had accrued in India or outside India.

The question whether the petitioner has rendered services in India or not is a question of fact. It is not disputed that the petitioner as a marine engineer had rendered services outside India for the period of 286 days. He has received his remuneration for such work from a foreign company. Consequently, the income received by the petitioner for services rendered outside India has to be considered as income received out of India and treated as such.

There is anomaly in the quantum of income received by the petitioner during the period. In his income tax return he has initially stated that his income to be Rs.5,63,850/- while in the proceedings under Section 264, he claims to have received a sum of Rs. 27,92,417/-.

In view of the finding that, the petitioner has received the remuneration from a foreign company for services rendered outside India, the quantum that he claims to have received, namely, Rs. 27,92,417/- has to be considered as such.

Smt. Phool Lata Somani (supra) has been relied upon on behalf of the petitioner. It has held that, the powers conferred on the Commissioner under Section 264 are very wide. The Commissioner has the discretion to grant or refuse reliefs. There is nothing in Section 264 which places any restriction on the Commissioner's revisional power to grant relief to the assessee in a case where the assessee detects mistake on account of which he was over assessed after the assessment was completed.

Circular Bearing No. 14 (XL-35) dated April 11, 1995 prescribes as follows:–

> *"(3) Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly, in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should –*

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them as to their rights and abilities and as to the procedure to be adopted for claiming refunds and reliefs."

In Mahalaxmi Sugar Mills Ltd. (supra) the Hon'ble Supreme Court has held that, there is a duty cast upon the Income Tax Officer to apply the relevant provisions of the Income Tax Act for the purpose of determining the true figure of the assessee's taxable income and the consequential tax liability. In the event, the assessee fails to claim benefits or a set of, it cannot relieve the income tax officer of his duty to apply the benefits of an appropriate case.

Tapan Kumar Mitra (supra) has held that, a writ petition challenging an order passed under Section 264 of the Act of 1961 on the ground of non-recording of reasons was not maintainable in view of the facts of such case.

Ashok Mondal (supra) is a case where the assessee has assailed the order of assessment under Section 264 without preferring an appeal. In the facts of the case, it has held that, the writ petition was not maintainable inasmuch as the writ petitioner was seeking to challenge the order of assessment through such a process. The re-opening of the order of assessment through such mechanism was not permitted by the Hon'ble Division Bench.

The impugned order is one under Section 264 of the Act of 1961. The power under Section 264 is wide enough to grant appropriate relief to an assessee. In the impugned order, the Commissioner notes that, the income received by the petitioner is in respect of services rendered for 286 days outside India. The Commissioner exercising powers under Section 264 of the Act of 1961 could have proceeded to grant appropriate relief to the petitioner by setting aside the intimation under Section 143(1) of the Act of 1961 and holding that, such income of the petitioner is not taxable in respect of the relevant assessment year. The Commissioner, however, did not do so. It has remanded the matter to the assessing officer to do the needful.

In view of the discussions above, therefore, the intimation under Section 143(1) of the Act of 1961 dated December 7, 2012 as well as the order under Section 264 dated September 25, 2013 are set aside.

W.P. No. 369 of 2014 is disposed of. No order as to costs.

———————