

# Tax Review/Taxation

## Daily Alert Service

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#### This issue contains:

- **ARTICLE**
  - Prime Minister's package
- **TAX NEWS**
  - Australia, S. Korea Conclude Trade Talks
  - Morocco Hosts ITD Conference on Tax Decentralization
  - EU Advances Trade Relationships with Georgia & Moldova
  - Anti-graft institutions protecting corrupt: TI
  - Jetty/IOCB:
    - PSM all set to allow its commercial use
    - FBR fails to implement FTO's suggestions
  - Plugging leakage:
    - major changes to income tax laws proposed
- **STATUTES**
  - No.6(96)S(BIC)/2013-14,  
dated December 05, 2013
- **CASE LAW**
  - FOREIGN
    - Commissioner of Income Tax, Chennai -IV  
v.  
M/s. Gem Granites

Kind Regards,

**Huzaima Bukhari**  
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## Prime Minister's package

by  
*Anjum Ibrahim*

The Prime Minister's incentive package was announced on 22<sup>nd</sup> November in front of representatives of the business community from all over the country after a two-day delay to ensure the presence of an ailing Finance Minister Ishaq Dar leaving no one in any doubt that the architect of the package was Dar and that he continues to enjoy the full support of the Prime Minister notwithstanding the increasing rumblings against his flawed policies by the general public.

The package was seen as a revival package - reviving output and therefore growth and reviving the job market. The package can be categorised in three broad groups: (i) another amnesty as no questions will be asked as to the source of funds for all investments barring a few sectors, extending the deadline for filing of returns from 30th November to 15th December (and those who filed on time would be able to revise the returns), any individual paying 25 percent more tax than last year would be exempt from audit, national tax number holders would be exempt from penalties, default surcharge and audit if they have filed income tax returns for the past five years or paid a minimum of 20,000 rupees per annum, and those non-NTN holders who filed returns voluntarily will enjoy immunity from audit and penalties for five years. The package also ceded to popular demand and withdrew Federal Board of Revenue's (FBR) access to bank accounts; (ii) 400 taxpayers would be issued tax payer recognition cards with entitlement to VIP lounges, fast track immigration, increase baggage allowance and an annual dinner with the Prime Minister; and (iii) setting up Prime Minister's Business Advisory Council and Prime Minister's Agriculture Advisory Council with meetings once every three months. None of these measures envisage a reduction in revenue collection as it is mainly about extending perks and privileges enjoyed by the wealthy and influential elites and getting the black money earners not paying tax in any case to whiten their money domestically rather than send it out of the country only to remit it tax-free into the country.

Any amnesty scheme enabling those operating within the illegal economy to whiten their money, (including drug lords dealing in heroin, kidnapping/extortion money/terrorism, outright corruption where expenditure does not match known income sources) cannot be a long-term scheme; and therefore there is a consensus amongst economists and the business community that it is a short-term package designed to fuel stagnating growth. Those who may argue that the government was unaware of low growth potential this year and therefore was compelled to support yet another amnesty scheme would do well to refer to the 19th August 2013 Letter of Intent (LoI) signed by Dar and Yasin Anwar, Governor State Bank of Pakistan, a prerequisite for the approval of the

Extended Fund Facility (EFF) from the International Monetary Fund (IMF) which acknowledged that: “an upfront adjustment of near 2 percent of GDP aims at restoring policy credibility (prior action)” - the adjustment referred to is fiscal adjustment or a rise in taxes, inclusive of measures to enhance documentation, with a decrease in expenditure that would reduce the budget deficit and therefore the growth rate. These measures have been withdrawn and unless new revenue generating resources are identified and implemented and/or expenditure curtailed the pressure on inflation would continue to escalate. The LoI also acknowledges that “inflation reduction will not be a primary focus of the first year of the programme so as to mitigate the impact of the envisaged fiscal contraction.” The two claims made in the LoI are the main causes of rising inflation. The LoI also maintained that “an initiative to incorporate three hundred thousand new taxpayers into the income tax net was launched in July.

The 2013 Finance Bill granted the FBR access to bank information enhancing scope and quality of information in its database... these efforts will be further assisted by increasing the number of risk-based tax audits to 4.2 percent of declarations (from 2.2 percent).” The package of measures announced in the 2013-14 budget in an effort to meet the commitments made in the LoI were eroded by subsequent decisions by the Finance Minister and the remaining pro-documentation measures were reversed by the Prime Minister in his incentive 22nd November package that would effectively end the drive towards greater documentation. The major flaw in Dar’s plan to deal with the economy has been the lack of an indigenous growth policy which explains why he is now willing to grant amnesty to those operating in the illegal economy if they invest in the legal sector.

Time will tell if the illegal economy would through the PM incentive package opt to invest in the legal economy, however, it is pertinent to highlight another commitment made by Dar in the LoI: “the negative impact on economic activity will be ameliorated by structural reforms to boost growth and a somewhat more accommodative monetary policy stance early in the programme than would normally be required given the inflation outlook.” In stark terms this means his growth strategy was to (i) implement energy sector reforms including dealing with arrears that have in recent months resurfaced with the inter-circular debt rising to 180 billion rupees, and massive privatisation that may be a challenge given the fact that many regard speedy sale as a non-transparent sale; and (ii) extend credit to the private sector at lower interest rates, an inflationary measure to essentially support the productive sector at the cost of the general public. More disturbing is the fact that immunity from audit under this package is a violation of the Universal Self Assessment Scheme and would hinder audit through ballot next year with negative implications on revenue collection by the FBR as well as a failure to deliver on commitments made in the LoI for a second year notwithstanding the claims by Dar. The non-substantive perks namely to

have dinner with the Prime Minister once a year, to be fast tracked through immigration, access to VIP lounges may be attractive for some but not all engaged in legitimate or illegitimate business activity.

The Prime Minister's package included the establishment of a Prime Minister's Business Advisory Council and Prime Minister's Agriculture Advisory Council designed, one would assume, to meet the concerns of the two critical sectors of our economy. Many would argue that this is a tacit acknowledgement by the Prime Minister that his Finance Minister does not have the confidence of a major PML-N support group and his intent to meet with them every three months is designed to ensure that these two groups do not come out on the streets in protest against Dar's policies particularly with respect to tax proposals; or worse abandons the party in favour of another more in touch with its needs. That is indeed politically astute, however, the Prime Minister must be wary of the fact that it is the general public whose votes are required to win elections and the general public wants low inflation and high employment opportunities - objectives that Dar states is not his primary focus in the first year of the programme. In the event that he fails to achieve his revenue and expenditure targets, and all indications are that he will fail given policy reversals, then it is doubtful if inflation reduction and job promotion would be his primary focus even next year; or the year after.

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## **Australia – South Korea**

### **Australia, S. Korea Conclude Trade Talks**

Australia has concluded negotiations toward a Free Trade Agreement with South Korea, its fourth-largest trading partner.

The Australian Trade Minister Andrew Robb and his Korean counterpart, Yoon Sang-jick, completed the talks last week.

Under the deal, Korean tariffs will be eliminated on key Australian agricultural exports, resources, energy, and manufactured goods. New market opportunities will also be opened for Australian financial, accounting, legal, educational, and telecommunications services.

Bilateral trade reached AUD32bn (USD29.1bn) in 2012.

Independent modelling suggests that the treaty could be worth as much as AUD5bn over the period between 2015 and 2030. After this, it could boost the Australian economy by around AUD650m a year. Overall exports to South Korea could rise by 25 percent, resulting in the creation of more than 1,700 new Australian jobs. –

*Courtesy tax-news.com*

## **Morocco**

### **Morocco Hosts ITD Conference on Tax Decentralization**

During his opening address at the Fifth International Tax Dialogue (ITD) Conference in Marrakech, Moroccan Finance Minister Mohamed Boussaid underlined the importance of fiscal decentralization.

Emphasizing that tax revenues constitute the main pillar for financing development, and underscoring the importance of good governance in tax matters, Finance Minister Boussaid stressed that there must be a good distribution of fiscal powers between the central and local tax administrations. A tax “partnership” between central and local authorities, and distribution of fiscal powers, will guarantee “harmonious and balanced” development at regional and national level, he insisted.

Alluding to the various reforms of the Moroccan tax system that have been implemented, Finance Minister Boussaid made clear that Morocco had opted for decentralization as a means of ensuring democratic governance. Here, the Finance Minister explained that local authorities in Morocco currently receive 30 percent of income from value-added tax (VAT), 1 percent of revenue derived from

individual income tax, and a further 1 percent of income yielded from corporation tax, to provide them with the necessary financial resources.

Furthermore, Boussaid pointed out that the country's general tax administration has undergone significant restructuring over the last few years, noting that during this process fiscal powers have been bestowed on the regions, and services decentralized. Consequently, the central administration is now only responsible for planning, cooperation, and monitoring, he stated.

Commenting, OECD Assistant Secretary General Rintaro Tamaki underlined the importance of decentralizing fiscal competencies, to improve territorial development. Almost one-third of public spending is carried out at local level, and expenditure is therefore decentralized while tax collection is not, resulting in weak budgetary performance, Tamaki warned.

The International Tax Dialogue was initiated in April 2002 by the International Monetary Fund, the OECD, and the World Bank. The joint initiative is intended to encourage and facilitate discussion of tax matters among national tax officials, regional tax organizations, and international organizations. – *Courtesy tax-news.com*

## **European Union**

### **EU Advances Trade Relationships with Georgia & Moldova**

Deals initialled last week by the European Union (EU) with Georgia and Moldova will establish Deep and Comprehensive Free Trade Areas (DCFTAs).

Negotiations toward the two Association Agreements began in 2010, and were completed earlier this year. The EU's aim in concluding treaties of this kind is to accelerate its political and economic relationships with partner countries. They foresee cooperation in over 25 different sectors, including the environment, agriculture, tourism, education, small- and medium-sized enterprises, and transport.

The DCFTAs set up under the Agreements will liberalize trade to the fullest extent possible, by reducing tariffs, facilitating improved customs procedures, and introducing rules of origin and trade defence instruments. Also included in the Agreements are stipulations on competition and transparency, the protection of

intellectual property rights, and the adaptation of domestic public procurement laws within the EU.

Precautions have been made to ensure that only eligible goods can qualify for preferential treatment. Existing customs tariffs and regulatory barriers will be phased out, to increase the variety and quality of the products and services available. It is hoped that this will in turn encourage specialization, lower costs, and prompt further innovation.

It is estimated that Georgian exports to the EU will rise by 12 percent, and its EU imports by 7.5 percent. The country's gross domestic product (GDP) could increase by 4.3 percent in the long term, provided that the DCFTA is implemented and its effects sustained. Moldova's anticipated change in national income stands at 5.4 percent, while its EU-related exports and imports could go up by 16 percent and 8 percent, respectively.

The Agreements will be signed next year. All parties have confirmed their intentions to implement the provisions as soon as possible. – *Courtesy tax-news.com*

**Anti-graft institutions protecting corrupt: TI**

The Transparency International observed here on Sunday there was an annual corruption of Rs2,000b in the Federal Board of Revenue, while during the past ten years a sum of Rs1,000 billion was embezzled in the independent power projects.

Talking to The Nation in connection with World Anti Corruption Day, TI country head, Adil Gillani, said poverty and inflation could be ended in Pakistan by bringing back this embezzled money.

He also observed that anti-graft institutions were protecting corruption and the corrupt. Performance of National Accountability Bureau, Federal Investigation Agency and Anti Corruption Establishment was zero, he added.

The TI official further said there was no accountability of power and petroleum projects in the past ten years.

About new government's performance, Gillani said the ruling Pakistan Muslim League-Nawaz had not initiated any major project so far, so there was not any noticeable corruption on part of the incumbent government.

He said tenders were awarded against single bid in the LNG project in violation of the PPRA rules and that was pointed out to the Supreme Court.

About the Punjab government, the TI official said, "We examined the record of metro bus project; out of a total of 27 tenders 25 were issued in accordance with the PPRA rules so no corruption was found."

The project was worth Rs30 billion and it was completed within nine months, as decided. – *Courtesy The Nation*

**Jetty/IOCB: PSM all set to allow its commercial use**

Pakistan Steel Mills (PSM) is all set to allow commercial utilisation of its jetty/ Iron Ore and Coal Berth (IOCB) after getting formal approvals from the Ministry of Ports and Shipping and Federal Board of Revenue (FBR), sources close to acting CEO PSM told on Sunday. The source said the commercial utilisation of Pakistan Steel's IOCB had been under consideration of the Ministry of Industries and Production for quite some time.

The Ministry directed the PSM management to constitute a committee to examine the possibility of commercial utilisation of surplus unloading capacity of IOCB as well as to develop tender

documents for competitive bidding in this regard. The committee's report was submitted to the Ministry on 2 October 2013. Subsequently, the issue was placed before the PSM board in its last meeting which also gave clearance to the proposal.

Giving details, sources said that Pakistan Steel's jetty had been obtained from Port Qasim Authority (PQA) for exclusive use to unload imported basic raw materials from ships ie iron ore and coals etc required for its operational needs.

The unloaded raw materials from ships are transported through a dedicated 4.5-km-long conveyor system and stacked at discharging end in operational yards situated within the main plant area of Pakistan Steel. Therefore, having no other alternate arrangement, the availability of the jetty (IOCB) is vital for exclusive use of Pakistan Steel as its operations totally depend on the smooth and uninterrupted unloading of required basic raw materials.

As the ownership of the jetty rests with the PQA, fixed charges of Rs. 277 million per annum are paid by the Pakistan Steel to the PQA, irrespective of tonnage of raw material unloaded. Besides, around Rs 150 million per annum is incurred on the salary/wages of the employees working at the jetty. About Rs 50 million is spent annually on maintenance of equipment and protection of steel structure from corrosion etc.

Keeping in view the above mentioned existing status of the jetty (IOCB) and considering the case under the Risks Mitigation Strategy, the window of opportunity for the commercial outsourcing of surplus capacity of the jetty exists till such time Pakistan Steel operates on less than 90 % capacity utilisation. At present, this period can be taken as one year. The prospect of further commercial outsourcing of surplus capacity of the jetty (IOCB) may be considered from the perspective of Pakistan Steel's enhanced capacity operation and its expected further expansion from 1.1 mtpy to 1.5 mtpy in Phase-I and up to 3.0 mtpy in Phase-II.

Based on possible surplus capacity against 1.1 mtpy capacity of PSM, a financial feasibility has been prepared for one year. The Request For Proposal (RFP) document mentioning necessary terms and conditions for tendering purpose to invite proposals from potential bidders/firms has also been prepared.

The following prerequisites are also mentioned for consideration prior to finalisation of the contract with any successful bidder.

The present bulk material handling capacity at the jetty may only cater for Pakistan Steel's raw material needs for its operation at around 80-90% capacity. Reasons are as under:

Both ship unloaders are in operation for the last 32 years and each of them has completed more than 140,000 hours operational life against designed operational life of 60,000 hours. As per past record of 32 years, the average achieved unloading rate remained 510 tons per hour.

The intercepting conveyor network after Junction No.1 and unloading/stacking machines in primary stock yard (PSY) of Raw Material Handling Department (RMHD) and coal handling yard of Coke Oven & By Product Plant (COBP) have also completed more than 32 years of service life.

In case of increased work load, the wear/tear of the jetty and its installations, conveyor networks and stacking machines will increase, leading to increased frequency of breakdowns, and interruptions in supply of raw material to Pakistan Steel.

It is assessed that with effective maintenance on regular basis the existing unloaders and allied conveyor network and machines will be capable of unloading about 50 ships annually, each having capacity of 50,000 tons+ 10%. Some ships of smaller size carrying 10,000 to 20,000 tons of cargo are also unloaded which increase the operational time and lower the unloading rate. The existing maximum draught of the jetty (IOCB) is 11.5 meters at which ships carrying more than 55,000 tons of cargo cannot be handled.

The sources said, since ownership of the jetty and the responsibility for provision of night navigation facility, increase of draught for berthing of larger size vessels, besides civil maintenance and strengthening of the jetty (IOCB) rests with the PQA, the commercial utilisation of the jetty has to be fully agreed to and supported by the PQA. Moreover, being a government organisation, Pakistan Steel is paying subsidised charges to the PQA. Rates for commercial utilisation of jetty (IOCB) may have to be negotiated with the PQA.

The PSM is yet to resolve the following issues; (i) fate of Service Agreement signed by Pakistan Steel with M/s. Tuwairqi Steel Mill;(ii) NOC from PQA; and (iii) liaison with custom authorities to declare the private ware house for storage of commercial cargo as custom bonded warehouse. – *Courtesy Business Recorder*

**FBR fails to implement FTO's suggestions**

Federal Tax Ombudsman (FTO) recommendations to submit details of sales tax refund cases pending for more than one year across Pakistan and monitor the conduct of IRS officers remained unimplemented by FBR without filing any review/representation before FTO/President.

When contacted a Lahore based tax lawyer Waheed Shahzad Butt told that the office of the FTO has proved to be of great help in redressal of genuine grievances and hardship caused to the aggrieved taxpayers of Pakistan as a result of maladministration on the part of the Revenue Division. The Recommendation of the FTO is legally binding to the FBR and the law must take its course. The FTO's recommendation must be implemented after the expiry of the 30 days period from the FTO's recommendation otherwise it would be treated as defiance, which may be punishable with contempt under section 16 of the FTO Ordinance, 2000 read with Federal Ombudsmen Institutional Reforms Act, 2013.

Earlier, the FTO recommended the FBR to submit details of sales tax refund cases pending for more than one year across Pakistan and monitor the conduct of IRS officers. It is the first of its kind a landmark judgement where the FTO ordered the FBR to submit sales tax refund cases across Pakistan pending for more than one year and also ordered to keep the conduct of the ACIR and LDC under watch. These are the recommendations of the FTO in a complaint filed by a senior citizen named Muhammad Ramzan.

It is observed by the FTO that in any case the statute requires no proof of physical transfer of goods from supplier to buyer as a pre-condition for making an input tax refund claim and blacklisting cannot be made effective retrospectively especially when blacklisting is due to irregularities detected in the suppliers dealings with buyers other than the complainant. It is a well settled principle of law that a past and closed transaction cannot be reopened especially when a beneficiary has no role in the irregularity committed by the other party.

According to the findings of the FTO, there was a protracted delay in the disposal of the refund claims of the complainant. The complainant contends that all the required supporting documentation was filed well in time which was evident from the fact that after receipt of the supporting documents the department started verification of tax payments from the suppliers concerned in the year of 2001. Verification letters issued by the then

Assistant Collector, Sales Tax Refund (Commercial Exporter), Lahore, to Assistant Collector, Sales Tax Verification Cell, Lahore, in the year of 2001, specifically letter Nos. 2340 dated 19.03.2001 and 2818 dated 13.07.2001 are self-explanatory.

The complainant says that due to serious personal medical problems including heart problems and major surgeries during the period 2001 to 2010 he was not able to pursue the refund claims filed by him and the department did nothing to process and dispose of these pending claims within the time allowed under the statute. The complainant was not served with a single notice intimating deficiencies in the documentation filed nor was his explanation sought on any aspect pertinent to the claims. In 2010, the Complainant enquired from the dept the status of his pending claims. The dept vide letter No 2(44)Ex/2011 dated 17.10.2011 informed the complainant that because of significant lapse of time and absence of supporting documents the refund claims had become time-barred.

The complainant filed a Writ Petition No 9532/2012 in the Lahore High Court challenging the departmental rejection of the refund claims. The High Court vide order dated 16.04.2012 directed the Secretary (Exemption) FBR to pass a speaking order after observing that the rejection letter was not a speaking order and was in violation of Section 24A of the General Clauses Act 1897 and Article 10A of the Constitution.

The complainant contends that departmental functionaries started approaching him for payment of illegal gratification to dispose of the refund claims.

The protracted delay in issuance of refund tantamount to maladministration and the delay also create the right to receive compensation under Section 67 of the Act. The FTO recommended the FBR to ensure that refund/compensation due is promptly issued, as per law, submit details of sales tax refund cases pending for more than one year across Pakistan and keep the conduct of ACIR Langrial and LDC Altaf under watch, the FTO order added.  
– *Courtesy Business Recorder*

### **Plugging leakage: major changes to income tax laws proposed**

Chief Collector of Customs Appraisement (South), Karachi has proposed major changes in the income tax laws for plugging in

revenue leakage, taking place in collection of withholding tax on the import of goods under section 148 of the Income Tax Ordinance, 2001.

Sources told here on Sunday that Nasir Masroor Ahmed, Chief Collector of Customs Appraisalment (South) Karachi, has made recommendations to the FBR for introducing changes in tax laws to improve monitoring and compliance at the import stage. In this regard, Chief Collector has analysed the entire withholding regime and made practical recommendations for improving withholding tax collection at the import stage.

According to Chief Collector of Customs Appraisalment (South) Karachi, section 148 of the Income Tax Ordinance, 2001 empowers Collector of Customs to deduct advance tax (Withholding Tax or WHT), on imports in the same manner and at the same time as the customs duty payable in respect of imported goods. The scope of this levy as outlined in Section 148 of the said Ordinance is at the following rates (specified in Part II of the first Schedule): Five percent of the value of goods in the case of industrial undertakings/companies; 5 percent in all other cases of companies; and 5.5% in case of all taxpayers other than those covered in the above said categories of industrial undertakings/ companies.

Sources said that the levy of WHT under Section 148 of the Ordinance 2001, on the basis of the taxpayer-type creates operational issues viz identifying the taxpayer as either an industrial-undertaking ie manufacturer or otherwise. Normally, the assessing officer determines the taxpayer-type from the Sales Tax Registration data as available on the FBR website, which in most of the cases shows a diverse mix of multiple business activities eg importer/exporter/manufacturer/service provider etc (this categorisation suffers from inherent infirmities). Further complexity is added on account of SRO 212(I)/2013 dated 14.03.2013, which prescribes reduced WHT rates of 1% & 3% for imports by manufacturers/commercial importers respectively (under SRO 1125(I)/2011, dated 31.12.2011). Therefore, if the STRN indicates status as “manufacturer” (taken to be an “industrial undertaking”) the advance tax rate applied is 5% (or 1%) and if otherwise, the applicable rate would be 5.5% ad val (or 3%).

Another contributory factor is the definitional difference in the Sales Tax Act, 1990 vis-à-vis Income Tax Ordinance 2001 in characterising the word “manufacturer” ie whereas ITO 2001

refers to such taxpayers as an “industrial undertaking”, the Sales Tax Act, 1990 uses the word “manufacturer”. While the difference between both terms is obvious (industrial undertaking is recognised as having a certain number of personnel engaged in specified activities), it is felt that there is need to harmonise both terms. Synchronising both statutory provisions would aid in determining the appropriate status of a taxpayer, especially at import stage, Chief Collector said.

As observed customs duties are generally collected on the basis of the category of goods and not on the type of importer, in terms of Customs SRO.565(I)/2006 dated 05.06.2006 clearance of goods at concessionary rates, in respect of a manufacturer/ importer is linked to availability of in-house manufacturing capacity which in turn is coupled with determination of the annual requirement of input goods of the manufacturer. Such mechanism is not available under Income Tax regime which opens up avenues for misuse and manipulation. To rationalise WHT collection with regard to the charging provisions of the Customs Act, 1969 the following options are proposed:

Income Tax law may suitably be amended to incorporate legal provisions for determining the annual requirement of imported inputs of an industrial undertaking through a survey report (similar to SRO 565(I)/2006 dated 05.06.2006). The annual requirement would be fed into the WeBOC System by the respective RTOs so that when the industrial undertaking files GD, the system will automatically apply the appropriate rate ie 5% ad val (or 1% ad val in case of imports under SRO 1125(I)/2011). Conversely when any other type of importer files a GD and the system does not detect the permissible annual quota, it would charge WHT @ 5.5% ad val (or 3% ad val in case of imports under SRO 1125(I)/2011). It would also remove any chance of incorrect assessment considering that once WHT is quota-bound, system and/or assessor will automatically apply the rate for industrial undertaking once claim for the respective SRO is detected, Chief Collector proposed.

Alternately if the aforesaid proposal is found to be unviable (in view of the fact that a company may not fall within the definition of an “industrial undertaking”), the NTN of Industrial undertakings / Companies could be tagged appropriately, so that upon filing of GD in WeBOC, the system would automatically recognise the tagged NTN and apply the correct rate ie 5%. Again, un-tagged NTNs would attract the higher rate of WHT.

The aforesaid proposals are made with a view to plug any leakages in the system due to in-correct application of the taxpayer type, introduce horizontal equity across different statutory levies (at import stage) and ensure that no avenue is left open to potential tax evaders, Nasir Masroor Ahmed, Chief Collector of Customs Appraisalment (South) Karachi added. – *Courtesy Business Recorder*

**NOTIFICATION**

In exercise of powers conferred by Section 8 of the Federal Board of Revenue Act, 2007 read with Rule 3(1) of FBR Rules, 2007, the Board-in-Council in its meeting held on 08-11-2013 has been pleased to delegate the powers and functions of the Board under various fiscal statutes administered by the FBR to the Members of the Board and to prescribe their job descriptions as under:

**DELEGATION OF POWERS TO MEMBERS, FBR****Member (Customs)****1. Exercise powers and perform functions of the Board under the following provisions of Customs Act, 1969;**

Sections 2(ai), 4 with approval of Chairman, 5, 6, 8, 9, 10, 11, 18E, 20, 21, 21A(1), 21A(2), 22A, 25C, 25(12), 26(3), 26A, 27A, 32B, 35(2), 37, 38, 43, 45, 45(2), 50, 53, 54, 65, 67, 68(5), 71, 76(1)(a), 79(3), 82 (after approval of FG), 85, 86(I)(b), 90(2), 90(3), 98(1), 98(2), 99(2), 100(2), 107(1), 110, 121(2) & (3), 125, 129(A), 131(a), 131(2), 131(2) proviso, 147, 155(G), 174 [2<sup>nd</sup> Proviso], 177(1), 179(2), 179(4), 181 [1<sup>st</sup> Proviso], 181 [2<sup>nd</sup> Proviso], 182, 185F, 193(2), 194A, 195, 195C(2), 195C(3A), 195C(4), 195C(7), 201(1) (1A), 202(5), 202B(2) with approval of chairman, 203(A), 211(2), 217, 219 and 224.

**1. Exercise powers and perform functions of the board under the following provisions of Customs Notification;**

S.R.O. 71(I)/95, S.R.O. 554(I)/98, S.R.O.678(I)/2004, S.R.O. 575(I)/2006, S.R.O. 41(I)/2009, S.R.O. 809(I)/2009, S.R.O. 565(I)/2006, S.R.O. 576(I)/2006, S.R.O. 655(I)/2006, S.R.O. 656(I)/2006, S.R.O. 450(I)/2001, S.R.O. 75(I)/2006, S.R.O. 327(I)/2008, S.R.O. 559(I)/2008, S.R.O. 492(I)/2009 and S.R.O. 413(I)/2012.

**Member (Inland Revenue-Policy)****1. Exercise powers and perform functions of the Board under the following provisions of Sales Tax Act, 1990;**

Sections 2(46)(g), 3(1B), 3(6), 4(d), 8B Proviso, 9, 10(1) Provisos, 14, 22(1)(f), 22(2), 23(1), 23(3), 23(4), 26(1) 1<sup>st</sup> & 2<sup>nd</sup> provisos, 26(5), 50(1), 61, 61A, 63, 72C with approval of chairman and Clause 48 of 6<sup>th</sup> Schedule.

**2. Exercise powers and perform functions of the Board under the following provisions of Income Tax Ordinance, 2001;**

Sections 2(29C)(b), 27(c), 28(3) to the extent of formulating criteria of approval of leasing companies etc., 32(3), 46(d), 59AA(6), 61(5), 67(2), 74(2A), 76(11), 77(6), 100B(2)(e), 111(5), 114(2A) in consultation with Member(IT), 148(2), 155(3)(vii), 159(3) to the extent of exempting persons, class of persons, goods or class of goods from withholding tax, 181(3), 181(3) Proviso, 183, 206, 206A, 227A with approval of Chairman, 237(1), Clause 12 of Part I of 2<sup>nd</sup> Schedule, Clause 13(iii) of Part I of 2<sup>nd</sup> Schedule, Clause 53A of Part I of 2<sup>nd</sup> Schedule and Clause 57 of Part I of 2<sup>nd</sup> Schedule.

**3. Exercise powers and perform functions of the Board under the following provisions of Federal Excise Act, 2005;**

Sections 3(3), 4(2) proviso, 4(5), 4(8), 5(2), 5(3), 6(3), 7(1), 12(5), 17(1)(g), 18(3), 18(4), 18(5), 40(1), and 42C with approval of Chairman.

**4. Exercise powers and perform functions of the Board under the following provisions of Income Tax Rules, 2002;**

Rules 19A, 19B, 19C, 19D, 19E, 19F, and 231A.

**5. Exercise powers and perform functions of the Board under the following provisions of Federal Excise Rules, 2005;**

Rules 31(2), 32(2), 33(1), 33(2), 33(3), 40(7), 41A(15), 43(6) and 79.

**6. Exercise powers and perform functions of the Board under the following provisions of Sales Tax Rules, 2006;**

Rules 18 and 150.

**Member (Inland Revenue-Operations)**

**1. Exercise powers and perform functions of the Board under the following provisions of Sales Tax Act, 1990;**

Sections 2[5AA(f)], 2(9), 6(2), 8A, 10(3), 13(2)(b), 21(1), 21(4), 22(1A), 26(1), 27(a), 31, 32(1)(a) & (b), 37A, 37B(13), 37I, 38(1), 38B(3), 40B, 40C, 45A, 47A, 47A(4), 48(1A), 55, 62 and 74.

**2. Exercise powers and perform functions of the Board under the following provisions of Income Tax Ordinance, 2001;**

Sections 26(2), 28(3), to the extent of granting approvals in the light of criteria of leasing companies, etc., 74(11), 80(2)(b)(vi), 134A(2), 134A(4), 165(3), 180, 181A, 202, 209(1) except for CIR (A), 209(2), 2012 to the extent of powers conferred on him by this distribution/delegation of powers order, 214A, except for appellate body and 217(1) in consultation with Member (IT).

3. **Exercise powers and perform functions of the Board under the following provisions of Federal Excise Act, 2005;**  
Sections 16(3), 22(1), 23(1), 29(3), 35(1), 38(1) to (4), 43, 45(2), 45(3), 45A and 46(1).
4. **Exercise powers and perform functions of the Board under the following provisions of Income Tax Rules, 2002;**  
Rules 90, 94, 109, 220B and 231C.
5. **Exercise powers and perform functions of the Board under the following provisions of Federal Excise Rules, 2005;**  
Rules 2(b), 2(g), 3(5), 5(1), 5(4), 25, 26, 28, 31(1), 33(4) in consultation with Member (IR-Policy), 36(4), 40A(3), 41A(2), 53, 54, 55, 56, 57, 58, 64, 74(3), 76, 77 and 78.
6. **Exercise powers and perform functions of the Board under the following provisions of Sales Tax Rules, 2006;**  
Rules 5, 6, 10, 12, 27, 28, 30, 41, 44, 52, 62, 64, 65, 66, 67, 68, 69 and 150F.

#### **Member (Legal)**

1. **Exercise powers and functions under the following provisions of Customs Act, 1969;**  
Sections 185G(2) and 193A(3) [1<sup>st</sup> Proviso].
2. **Exercise powers and perform functions of the Board under the following provisions of Sales Tax Act, 1990;**  
45A (to the extend of orders by CIR(A) and 74 to the extend of granting condonation to CIR(A) in respect of appellate matters.
3. **Exercise powers and perform functions of the Board under the following provisions of Income Tax Ordinance, 2001;**  
Sections 209(1) to the extend of CIR(A), 214A in respect of orders by CIR(A) and 223(7).
4. **Exercise powers and functions under the following provisions of Federal Excise Act, 2005;**  
Sections 35(1) and 43 – to the extend of appellate orders.

#### **Member (Administration)**

1. **Exercise powers and perform functions of the Board under the following provisions of Customs Act, 1969;**  
Sections 3, 3A, 3AA, 3B, 3BB, 3C, 3CC, 3D, 3DD and 3DDD (all with the with approval of Chairman)

**2. Exercise powers and perform functions of the Board under the following provisions of Sales Tax Act, 1990;**

Sections 30 with approval of chairman and 30(1) with approval of Chairman.

**3. Exercise powers and perform functions of the Board under the following provisions of Income Tax Ordinance, 2001;**

Section 208(1) with the approval of Chairman.

**4. Exercise powers and perform functions of the Board under the following provisions of Federal Excise Act, 2005;**

Section 29(1) with approval of Chairman.

**Member (FATE)**

**1. Exercise powers and perform functions of the Board under the following provisions of Income Tax Ordinance, 2001;**

181B and 216(5).

**Member (Taxpayers Audit)**

**1. Exercise powers and perform functions of the Board under the following provisions of Sales Tax Act, 1990;**

Sections 32A and 72B to the extend of actual selection on the basis of criteria approved by Board-in-Council.

**2. Exercise powers and perform functions of the Board under the following provisions of Income Tax Ordinance, 2001;**

Sections 177(8) and 214C to the extend of actual selection on the basis of criteria approved by Board-in-Council.

**3. Exercise powers and perform functions of the Board under the following provisions of Federal Excise Act, 2005;**

Sections 42B(1) to the extend of actual selection on the basis of criteria approved by Board-in-Council and 45(4).

**Member (Information Technology)**

**1. Exercise powers and perform functions of the Board under the following provisions of Sales Tax Act, 1990;**

Sections 2(5AAA) in consultation with Member (IR-Operations), 22(2A) in consultation with Member (IR-Operations), 22(3) in consultation with Member (IR-Operations), 26(1) 3<sup>rd</sup> Proviso in consultation with Member (IR-Operations), 50A in consultation with Member (IR-Operations) and 52A in consultation with Member (IR-Operations).

2. **Exercise powers and perform functions of the Board under the following provisions of Income Tax Ordinance, 2001;**  
Section 237A in consultation with Member (IR-Operations).
3. **Exercise powers and perform functions of the Board under the following provisions of Federal Excise Act, 2005;**  
Sections 4(6) in consultation with member (IR-Operations) and 17(2)(b) in consultation with Member (IR-Operations).
4. **Exercise powers and perform functions of the Board under the following provisions of Income Tax Rules, 2002;**  
Rules 73(2), 73(6) and 229.
5. **Exercise powers and perform functions of the Board under the following provisions of Federal Excise Rules, 2005;**  
The electronic Filing of Federal Excise Rules, 2005.
6. **Exercise powers and perform functions of the Board under the following provisions of Federal Sales Tax Rules, 2006;**  
Rules 150B, 150D, 150G, 150I, 150J, 150K, 150L and 150O.

#### **JOB DESCRIPTIONS OF MEMBERS, FBR**

##### **Member (Customs)**

1. Deal with all policy matters, rules, regulations, interpretation of relevant laws and perform all allied functions, relating to Customs, including:
  - i) Exemptions
  - ii) Duty Drawbacks
  - iii) Rebates
  - iv) Changes/modifications in Pakistan Customs Tariff
  - v) Judicial/Legal Issues
2. Formulate and present proposals relating to Customs for annual Finance bill;
3. Liaise with international organizations/agencies on matters relating to Customs;
4. Process, short list and nominate officers of Customs for Customs specific foreign training;
5. Supervise all inter-ministerial issues relating to Customs;
6. Exercise powers and perform functions of the Board under the provisions of Customs Act 1969, Customs Rules 2001 and Customs Notifications as delegated by the Board;

7. Perform any other duty or task assigned by the Chairman, FBR.

**Member (Inland Revenue-Policy)**

1. Deal with all policy matters, rules, regulations, interpretation of relevant laws and perform all allied functions, relating to Income Tax, Sales Tax, Federal Excise Duty, Income Support Levy, Capital Value Tax, Wealth Tax and Corporate Asset Tax; including:
  - a. Exemptions
  - b. Avoidance of Double Taxation Agreements
2. Formulate and present proposals relating to Income Tax, Sales Tax, Federal Excise Duty, Income Support Levy and Capital Value Tax for annual Finance Bill;
3. Liaise with international organizations/agencies on matters relating to Inland Revenue;
4. Supervise all inter-ministerial issues relating to Inland Revenue;
5. Coordinate in matters relating to Inter Provincial Coordination committee;
6. process, short list and nominate officers of IRS for IRS specific training;
7. Exercise powers and perform functions of the Board under the provisions of Sales Tax Act 1990, Income Tax Ordinance 2001, Federal Excise Act 2005, Income Tax Rules, 2002, Federal Excise Rules 2005 and Sales Tax Rules 2006, as delegated by the Board;
8. Perform any other duty or task assigned by the Chairman, FBR.

**Member (Inland Revenue-Operations)**

1. Achieve revenue targets and manage operations relating to Inland Revenue;
2. Supervise revenue collection by Chief Commissioners of all RTOs/LTUs who shall report to him;
3. Monitor enforcement and Withholding Tax activities relating to Inland Revenue;
4. Law & Procedure except matters falling in the purview of Member (IR-Policy);
5. Liaise with the Member Customs for WHT on imports;
6. Exercise powers and perform functions of the Board under the provisions of Sales Tax Act 1990, Income Tax Ordinance 2001, Federal Excise Act 2005, Income Tax Rules 2002, Federal Excise Rules 2005 and Sales Tax Rules 2006, as delegated by the Board;

7. Perform any other duty or task assigned by the Chairman, FBR.

**Member (Legal)**

1. Grant approval for filing of appeals/references before High Courts and CPLAs before the Supreme Court;
2. coordinate with field officers to ensure representation, filing of Para-wise comments, and pursuing litigation in various courts;
3. Coordinate with field offices and FTO office to ensure submission of reports to FTO, implementation of FTO recommendation, filing of representation before the President and review before the FTO;
4. Coordinate with Law Division and Attorney General of Pakistan;
5. Coordinate with field offices in matters relating to recommending names of advocates to the Ministry of Law for their nomination on FBR Panel, appointment of ASCs and AORs in tax cases, assigning cases to and monitor performance of Legal Advisors and Advocates on panel and their fee matters;
6. Maintain and update list of pending cases before the Supreme Court and High Courts through Appeal Management Processing System and Litigation Management System;
7. Monitor performance of Task Forces constituted for the purpose of liquidation of sub-judice cases before the Supreme Court and High Courts;
8. Monitor performance of CIR(A) and Collector (A) and rationalize their work load;
9. Circulate important judgments of courts to the field offices and place the same on web;
10. Exercise powers and perform functions of the Board under the provisions of Customs Act 1969, Sales Tax Act 1990, Income Tax Ordinance 2001 and Federal Excise Act 2005, as delegated by the Board;
11. Perform any other duty or task assigned by the Chairman, FBR.

**Member (Administration)**

1. Manage administration of Federal Board of Revenue;
2. Recruitment of officers/officials of FBR;
3. Transfer/posting of officers (BS-17 and above) of Inland Revenue and Customs in consultation with the concerned Line Members and with the approval of the Chairman;

4. Transfer/Posting of Commissioners (Appeal) and Collectors (Appeal) in consultation with Member (Legal).
5. Short list and nominate officers of FBR for mandatory training such as MCMC, SMC, NMC and NDU;
6. Deal with promotion/disciplinary/litigation cases of FBR employees;
7. Manage record of FBR employees and HRIS;
8. Manage sanctioned strength of FBR employees;
9. Development budget and its expenditure under PSDP;
10. Manage current budget of FBR;
11. Administer expenditure budget of field formations;
12. Process all matters relating to official/gratis passports and Exit Control List (ECL);
13. Coordinate in matters relating to the National Assembly, Senate Standing Committees on Revenue and Finance, Cabinet Decisions and other Ministries/Divisions;
14. Manage logistics, vehicles, library, buildings, internal/external security and procurements pertaining to their repairs/maintenance at FBR (HQ);
15. Process all matters relating to purchase/condemnation of vehicles at FBR (HQ and field offices);
16. Process hiring, de-hiring and rent payment of office buildings at FBR (HQ) and field offices;
17. Process hiring, de-hiring and rent payment of residential accommodations for employees at FBR (HQ);
18. Process re-imburement of medical claims of employees at FBR (HQ) and field offices;
19. Manage all administrative and coordination arrangements for Annual Revenue Budget;
20. Perform/initiate welfare activities for FBR employees;
21. Exercise powers and perform functions of the Board under the provisions of customs Act 1969, Sales Tax Act 1990, Income Tax Ordinance 2001 and Federal Excise Act 2005, as delegated by the Board;
22. Perform any other duty or task assigned by the chairman, FBR.

**Member (SPR&S)**

1. Formulate revenue targets and do strategic planning for their achievements, in consultation with line members;

2. Provide analysis of date relating to collection of taxes i.e. Direct Taxes, Indirect Taxation, Customs Duty etc and fiscal updates on revenue generating efforts;
3. Conduct studies, as suggested by other Wings, particularly sectoral analysis on tax contributions;
4. Coordinate with other financial institutions;
5. Perform any other duty or task assigned by the Chairman, FRB.

**Member (Accounting)**

1. Deal with all matters relating to PAC/DAC on Audit Reports/ Performance audit reports/Special Studies Reports;
2. Deal with all matters relating to PAC/DAC on Appropriation Accounts (Grants with AGPR);
3. Deal with all matters relating to DAC on management/MFDAC (Memorandum for Departmental Accounts Committee) reports and Financial Attest of Financial Statements (Revenue Components) for each financial year;
4. Coordinate with Auditor General of Pakistan and Public Accounts Committee in matters relating to Audit and Vice Versa;
5. Perform any other duty or task assigned by the Chairman, FBR.

**Member (FATE)**

1. Facilitate and Educate taxpayers through development and execution of Media Campaigns on operational and policy matters of FBR;
2. Conduct Awareness Campaigns, Conferences, Workshops, Seminars, etc. for taxpayers;
3. Publish FBR's News letter;
4. Assist taxpayers by addressing their queries through Call Centre/ Helpline/e-mails/Fax etc.
5. Update and print all the statutes administered by FBR.
6. Manage and update FBR's official website;
7. Comply with the provisions of the Freedom of Information Act;
8. Process taxpayers' grievances under Section 7 of FBR Act, 2007;
9. Disseminate explanatory literature, brochures, FAQs for taxpayers;
10. Exercise powers and perform functions of the Board under the provisions of Income Tax Ordinance 2001, as delegated by the Board;
11. Perform any other duty or tax assigned by the Chairman, FBR.

**Member (Taxpayers Audit)**

1. Plan and design audit procedures;
2. Evaluate tax audits for all domestic taxes;
3. Devise and implement Annual National Audit Plan;
4. Prepare selection criteria for audit coverage of higher risk areas;
5. Spearhead the process of developing the audit methodology to assure audit quality;
6. Exercise powers and functions of the Board under Sales Tax Act 1990, Income Tax Ordinance 2001 and Federal Excise Act 2005, as delegated by the Board.
7. Perform any other duty or task assigned by the Chairman, FBR.

**Member (Information Technology)**

1. Prepare plan and strategy for FBR in the field of Information & Communication Technology (ICT).
2. Provide support and assistance to the Senior Management in taking informed decision in the field of ICT;
3. Forecast and budget procurement of Software/Hardware/Networks, in coordination with PRAL;
4. Manage all ICT projects, including contract and Vendor Management, preparation of bidding Documents/RFPs/Bid Evaluation Reports, Consultants TORs, etc, for award of contracts for procurement of Software/Hardware, Networks, in coordination with PRAL;
5. Monitor and control software development and implementation by PRAL/external vendors and grant mandatory prior approval for initiating new or modifying/enhancing/shelving existing software application;
6. Undertake periodic System Audits for Quality Assurance, especially security of the Operational Software, under development or developed and deployed, and resource Management for such System Audits;
7. Constitute use groups for various ICT activities;
8. Liaise with other Wings of FBR for Business Need Analysis;
9. Coordinate with Directorates General (T&R) for ICT Training of end-users;
10. Oversee cleansing of existing data;

11. Supervise PRAL's overall management, including administrative, financial and technical activities;
12. Monitor and evaluate overall performance of CEO, PRAL;
13. Serve as an essential interchange for all communications between PRAL and FBR(HQ)/ its field offices;
14. Spearhead the process of developing the audit methodology to assure audit quality;
15. Deal with all legal, administrative and financial matters relating PRAL, including agreement/contract and verification of invoices raised by PRAL;
16. Deal with all matters relating to SAP, including renewal of Licenses, Training and implementation, etc, in FBR and field offices;
17. Exercise powers and perform functions of the Board under the provisions of Sales Tax Act 1990, Income Tax Ordinance 2001, Federal Excise Act 2005, Income Tax Rules 2002, Federal Excise Rules 2005 and Sales Tax Rules 2006, as delegated by the Board;
18. Perform any other duty or task assigned by the Chairman, FBR.

**Member (Enforcement & WHT)**

1. Preparation of Annual Integrated Enforcement Action Plan
2. Analysis of data obtained from field formations regarding enforcement activities, including data of withholding taxes, arrears, etc.
3. Quarterly presentation of findings and recommendations based on aforementioned analysis before BIC
4. Liaison with Member (IR-Operations) regarding collection of withholding taxes

## Plan &amp; Design procedures regarding

- i) Taxpayer Registration including control of non-registration
  - ii) Tax Declarations including control of non-filing
  - iii) Tax payments
  - iv) Collection of tax arrears
  - v) Collection of with-holding taxes
5. Perform any other duty or task assigned by the Chairman, FBR.

**Member (HRM)**

1. Process, short list and nominate offices for local and foreign training, other than mandatory training and IRS specific and Customs specific training;

2. Deal with all matters relating to Policies & Procedures for Performance-linked Bonus Schemes, Voluntary Severance Scheme, Job Descriptions and Organizational Structure, work force planning;
  3. Conduct awareness campaigns regarding changes and issues relating to human resources;
  4. Perform any other duty or task assigned by the Chairman, FBR.
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2013 TRI 1983 (H.C. Mad.)

HIGH COURT OF MADRAS

**Chitra Venkataraman and T.S. Sivagnanam, JJ.**

*Commissioner of Income Tax, Chennai -IV*

*v.*

*M/s. Gem Granites*

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**FACTS/HELD**

**Section 271(1)(c) penalty cannot be levied if the assessee discharges the primary burden by a cogent explanation and the AO is unable to rebut it. MAK Data (SC) explained**

1. Pursuant to a search conducted u/s 132 it was revealed that the assessee had “on-money” transactions in real estate dealings. The assessee accepted the “on-money” but claimed that it was taxable only on completion of the projects under the ‘completed contract method’. The assessee’s claim was rejected by all the authorities including the High Court. In the s. 271(1)(c) penalty proceedings, the assessee claimed that there was a mistake in the entries regarding the sale of flats to J.B. Exports in as much as the rate at which the property was shown as sold to the said party was much higher than the rate at which the property was sold to other parties. The AO and CIT(A) rejected the claim but the Tribunal accepted it on the basis that the huge difference in the rate of sale of the flat recorded in other cases and in the case of J.B. Exports supported the assessee’s contention that there may be a mistake in recording the rate. It held that as the department had failed to prove concealment without any doubt, penalty could not be imposed. On appeal by the department to the High Court, HELD dismissing the appeal:

Merely because the assessment proceedings have been confirmed does not automatically mean that penalty u/s 271(1)(c) is justified. Unless the case is strictly covered by s. 271(1)(c), penalty cannot be invoked. For sustaining penalty, the bona fide explanation of the assessee must be looked at so that the contumacious conduct of the

assessee for the purpose of sustaining the penalty would be taken as condition that is the main requirement u/s 271(1)(c). In Mak Data P. Ltd vs. CIT the Supreme Court held that when a difference is noticed by the AO between the reported and assessed income, the Explanation to Section 271(1) raises a presumption of concealment and the burden is on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the Explanation has been discharged by the assessee, the onus shifts on the Revenue to show that the amount in question constituted undisclosed income. On facts, the onus cast upon the assessee has been discharged by giving a cogent and reliable explanation. If the department did not agree with the explanation, the onus was on the department to prove that there was concealment of particulars of income or furnishing inaccurate particulars of income. Such onus has not been discharged by the department and so the Tribunal's finding cannot be interfered with (Dharmendra Textiles Processors 306 ITR 277 (SC) & Reliance Petroproducts 322 ITR 158 (SC) referred)

*Appeal dismissed.*

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**Tax Case (Appeal) No. 504 of 2009.**

**Decided on: 12<sup>th</sup> November, 2013.**

**Present at hearing: M. Swaminathan, for Appellant. M.P. Senthilkumar, for Respondent.**

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## **JUDGMENT**

*T.S. Sivagnanam, J.–*

This Tax Case (Appeal) by the Revenue is directed against the order passed by the Income Tax Appellate Tribunal Chennai 'A' Bench, dated 11.11.2008 in I.T.A.No.715/Mds/2007, for the assessment year 1996-97.

2. The assessment in respect of the respondent/assessee for the assessment year 1996-97 was completed under Section 143(3) of the Income Tax Act (Act) on 30.03.1999, on a total income of Rs.26,12,140/-. The assessee owns quarries and is also a dealer in granite. There was a search conducted under Section 132 of the Act, and in which it was revealed that in a real estate dealings, there were “on-money” transactions and cash of Rs.27,00,000/- was seized. The assessee offered to admit the “on-money”, but claimed that they will do so on completion of the projects under the ‘completed contract method’ and therefore, no

income was offered by the assessee in the said year, namely, 1996-97. The assessee took a stand that the cash found at the time of search represented “on-money” and the notings and workings made in the slips of paper, were not of relevance, since such notings related to one purchaser. The Assessing Officer found the explanation given by the assessee as not credible. Accordingly, the Assessing Officer based on the evidence included “on-money” component and completed the assessment. Penalty proceedings were also initiated under Section 271(1)(c) of the Act. As against the quantum assessment, the matter ultimately came before this Court in T.C.(A).Nos.1150 to 1152 of 2006, for the assessment years 1995-96 and 1996-97 respectively and this Court by order dated 03.08.2012, dismissed the appeals filed by the assessee holding that at no point of time, the assessee has taken steps to examine their Accountant nor produce any evidence to substantiate what could be the correct value per sq.ft, if the property was sold to J.P.,Exports. In respect of the penalty proceedings initiated under Section 271(1)(c) of the Act, the Assessing Officer passed a penalty order dated 26.04.2006. Aggrieved by the same, the assessee preferred an appeal to the Commissioner of Income of Tax (Appeals) contending that the Assessing Officer did not record his satisfaction about the concealment while initiating penalty proceedings and unless the said satisfaction is recorded, the penalty is not automatically leviable. In this regard, reliance was placed on decisions of various High Courts. The first Appellate Authority after analysing the contentions raised, held that the seized documents clearly evidenced the fact that the assessee was in the habit of receiving “on-money” in respect of sale of each and every flat at the rate of 50% of the sale consideration. Further, it held that this fact was borne out by various entries in the seized documents. Further, the first Appellate Authority observed that the entries relating to “on-money” received from J.B.Exports are clearly recorded in the seized documents and there is no escape from inevitable and infallible conclusion that the assessee had received “on-money” of Rs.86,50,250/. Taking note of the findings recorded by the Tribunal in its order in the quantum appeal, the first Appellate Authority held that there is no reason for deviating from the view and there is no infirmity in the imposition of the penalty under Section 271(1)(c) of the Act. Aggrieved by such order, the assessee preferred an appeal to the Tribunal.

3. Before the Tribunal, the assessee contended that there was a mistake in the entries regarding the sale of flats to J.B.Exports and the assessee also filed copies of the entry register in respect of two flats and also in respect of other similar flats, which were sold to other parties. Therefore, it was contended that even J.B.Exports produced the documents before the Assessing Officer, which were examined by the department wherein, it was stated that no “on-money” was paid to the assessee. Therefore, it was contended that the onus is on the department

to prove that the non-disclosure of the said income was deliberate and intentional on the part of the assessee.

4. The Revenue resisted the appeal by contending that in view of the decision of the Hon'ble Supreme Court in the case of *Union of India vs. Dharmendra Textile Processors* reported in [2008] 306 ITR 277 (SC), wherein it was held that the penalty provision is a civil liability and willful concealment was not essential. Thus, the Revenue sought to sustain the order passed by the first Appellate Authority. The Tribunal after considering the contention raised on both sides, allowed the appeal. As against which, the present Tax Case (Appeal) has been preferred by the Revenue and admitted on the following substantial question of law:-

Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in cancelling the penalty of Rs.24,25,700/- levied under Section 271 (1)(c) of the Income Tax Act made on the basis of evidence relating to 'on money' receipts on sale of flats found during the search without properly applying the ratio of the Supreme Court in the case of *Union of India vs. Dharmendra Textile Processors* (306 ITR 277).

5. The short question which falls for consideration is whether the order of penalty under Section 271(1)(c) of the Act passed by the Assessing Officer and confirmed by the first Appellate Authority, is just and proper.

6. The case of the Revenue is that the quantum appeal had attained finality as the assessee's appeals in T.C.(A) Nos.1150 to 1152 of 2006, were dismissed by this Court, by order dated 03.08.2012, that itself would be sufficient to sustain the order of penalty under Section 271(1)(c) of the Act. The learned counsel for the Revenue relied upon the observations made by the first Appellate Authority in its order dated 31.01.2007 and submitted that the Tribunal erroneously reversed the said order.

7. Per contra, the learned counsel appearing for the assessee by relying upon the reasons assigned by the Tribunal sought to sustain the order of the Tribunal.

8. The Tribunal while allowing the assessee's appeal pointed out that onus to prove that there was a concealment of income with a view to avoid the tax, is on the department and penalty is not automatic and merely because the addition is confirmed does not *ipso facto* attract the penalty proceedings. While considering the facts of the case, the Tribunal observed that there is a huge difference in the rate of sale of the flat recorded in other cases and in the case of J.B.Exports and the document that has been relied on in its entirety cannot be considered a part of the document and in the seized material, 15 entries of sale of flats reveal the rate of flats between Rs.1300/- and Rs.3700/-. Moreover, the rate of flats in 'G' block and very next flat of G8 and G9 has been recorded in the seized material at the rate of Rs.3600/- and Rs.3700/-, whereas the rate of

flats G6 and G7 has been recorded at Rs.7500/-. Taking note of these factual details, the Tribunal pointed out that this prima facie supports the contention of the assessee that there may be a mistake in recording the rate and there may be a possibility that the rate of two flats are merged and recorded. Considering the facts and circumstances, the Tribunal observed that the possibility of wrong entry cannot be ruled out and the department having failed to prove concealment without any doubt, by relying upon the decision of the Hon'ble Supreme Court in the case of Dharmendra Textile Processors,(supra), allowed the assessee's appeal.

9. Firstly, it is to be stated that the findings recorded by the Tribunal is a finding of fact. Therefore, unless it is shown that such finding is perverse, the same cannot be interfered, while considering an appeal which can be entertained only on a question of law. Further, it has to be pointed out that merely because the assessment proceedings namely, the quantum assessment having been confirmed by this Court in T.C.(A).Nos.1150 to 1152 of 2006, dated 03.08.2006, cannot automatically lead to the conclusion that the penalty proceedings are justified. Infact, the Tribunal rightly made an observations to the said effect that the quantum assessment cannot have a direct impact automatically leading to inference of concealment and consequent imposition of penalty.

10. The Hon'ble Supreme Court in the case of *Union of India vs. Rajasthan Spinning and Weaving Mills* reported in (2009) 13 SCC 448, considered the earlier decision of the Hon'ble Supreme Court in the case of *Union of India and Ors vs. Dharmendra Textiles Processors & Ors.*, reported in [2008] 306 ITR 277 (SC) and held that it goes without saying that for applicability of Section 271(1)(c) of the Act, condition stated therein must exist. The above said decision came up for consideration in the case of *Commissioner of Income Tax vs. Reliance Petroproducts Pvt., Ltd.*, reported in [2010] 322 ITR 158 (SC). On reading of Section 27(1)(c), the Hon'ble Supreme Court pointed out that in order to bring the case under Section 271(1)(c), there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision could not be invoked. Thus, the Hon'ble Supreme Court pointed out that a mere making of a claim, which is not sustainable in law, by itself, would not amount to furnishing of inaccurate particulars regarding the income of the assessee. The reading of the decision of the Hon'ble Supreme Court referred to above, thus points out that for sustaining penalty, the bonafide explanation of the assessee must be looked at, so that the contumacious conduct of the assessee for the purpose of sustaining the penalty would be taken as condition that is the main requirement under Section 271(1)(c) of the Act. Referring to the decision in the case of Dharmendra Textile Processors, (supra), the Hon'ble

Supreme Court pointed out that in the background of Section 271(1)(c) of the Act, there is no necessity of mens rea being shown by the Revenue, however referring to the Explanation to Section 271(1)(c) penalty being a multiple liability, the bonafide of the conduct of the assessee necessarily assumes significant, even though willfulness of the assessee may not be a criteria, the conduct is to be considered. Thus, a mere fact that the addition in this case has been sustained by this Court by itself would not lead to the automatic application to Section 271(1), the Tribunal went into the explanation offered by the assessee as regards the charging of a higher amount in the case of J.B.Exports. Although, the Tribunal rejected the explanation for the purpose of assessment of goods, it considered it as a good ground for cancellation of penalty, when the explanation on the differential amount was given by the assessee that the entries were made in the account and the Accountant had not made the correct entry.

11. In a recent decision of the Hon'ble Supreme Court in Civil Appeal No.9772 of 2013, dated 30.10.2013 (*Mak Data P. Ltd., vs. Commissioner of Income Tax-II*), the Hon'ble Supreme Court while considering the Explanation to Section 271(1), held that the question would be whether the assessee had offered an explanation for concealment of particulars of income or furnishing inaccurate particulars of income and the Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer between the reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence and when the initial onus placed by the explanation, has been discharged by the assessee, the onus shifts on the Revenue to show that the amount in question constituted their income and not otherwise. Factually, we find that the onus cast upon the assessee has been discharged by giving a cogent and reliable explanation. Therefore, if the department did not agree with the explanation, then the onus was on the department to prove that there was concealment of particulars of income or furnishing inaccurate particulars of income. In the instant case, such onus which shifted on the department has not been discharged. In the circumstances, we do not find that there is any ground for this Court to substitute our interfere with the finding of the Tribunal on the aspect of the bonafides of the conduct of the assessee.

12. In the circumstances, following the decision of the Hon'ble Supreme Court, we uphold the order of the Tribunal and the Tax Case Appeal stands dismissed. No costs.