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This issue contains:

- **ARTICLE**

  Need for National Tax Agency

- **TAX NEWS**

  FBR sends notices to over 31000 as part of expanding tax net

  Govt plan of replacing FBR chief opposed

  Online returns:
  FBR urged to modify e-filing software

  SHC stays payment of income support levy

  BoI asks FBR to withdraw increase in ST rate

  Withholding agents not depositing money caught by Crest

  Documentation drive suffers major setback:
  20,000 of 31,000 notices return to FBR

  One day Business conferences to be held in Berlin, Munich on October 30

- **STATUTES**

  C.No.1(162)/C-TPA(TY-2011)/2012-13/137337-R, dated October 09, 2013

- **CASE LAW**

  FOREIGN

  Bharat Petroleum Corporation Limited
  v
  1. Income Tax Appellate Tribunal
  through its Registrar
  2. Assistant Commissioner of Income
  3. Union of India through the Secretary

Kind regards

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Need for National Tax Agency

by
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Federal Board of Revenue (FBR)—the apex body responsible for collecting federal taxes—has earned notoriety in all areas: from failure of reforms to mega scandals, from lack of will in taxing the elected members to leaking their data to Press, from misreporting figures to bungling of funds, from corruption to highhandedness and from inefficiency to worthlessness. It is thus not surprising that FBR is dubbed as highly inefficient, ready-to-obey-any-command-from-political-masters, corrupt and incompetent organisation.

It is a matter of record that FBR mercilessly wasted borrowed funds of millions of dollars given by the World Bank and other donors for implementation of a comprehensive Tax Administration Reform Project (TARP). FBR, since the inception of TARP failed on all fronts—in meeting revenue targets, broadening of tax base, implementing sales tax, increasing share of direct taxes and improving tax-to-GDP ratio. At the end of TARP, our tax-to-GDP ratio nosedived to 8.8% from 9.4% in the year when the programme started! Despite having both money and expertise, FBR could not introduce an effective automated tax intelligence system to bridge the huge tax gap of over 200%. The World Bank in its report, "**Implementation, Completion and Result Report**" issued on the completion of TARP observed that "the current narrow-base of general sales tax (GST) in Pakistan remained almost entirely unchanged throughout 2005-2012, despite efforts to overhaul the indirect taxation structure by introducing a reformed GST featuring few exemptions and wide coverage of goods and services."

FBR is the biggest litigant in Pakistan

The present pathetic state of tax administration can be measured from the fact that every year over 35,000 writ petitions/appeals are filed in Pakistan—most of the appeals are by FBR after losing cases at various forms. Due to litigation imposed by FBR, taxpayers have to wait for years to obtain orders. On the contrary, in civilized countries, only a few cases go for litigation to higher courts. A case in point is the United Kingdom where the number of income tax payers alone is 30 million but appeals reaching the Lord Chancellor during a year number only around 25-30. This confirms the tremendous public satisfaction with the system and good governance by tax administration. In Pakistan, we have less than 1.5 million income tax return filers and around 35,000 active sale tax registered persons, but the number of appeals filed annually is in thousands! This speaks volumes of the putrid tax system.

The World Bank report, while highlighting the poor performance of FBR, notes: "different from other sources of tax revenue in Pakistan, administration of GST entails a full-fledged operation of major FBR

functionalities, including: registration, monthly tax return processing, collection, refunds, audit and enforcement. GST operation also integrates joint effort from both internal revenue administration and customs since GST import tax is collected at the borders and zero-rating is targeted for export operations, besides other activities."

The World Bank for evaluating FBR's overall performance during the TARP used GST administration as an indicator. The results compiled were highly disappointing—GST productivity turned out to be only 23 percent, compared to an average ratio of 34 percent worldwide. According to the World Bank, "the estimation covering the project life reflected an overall decreasing trend during 2005-06 to 2010-11 suggesting feeble tax administration efforts throughout the reform period." Shockingly, throughout the reform implementation period, there was "a declining performance in both tax policy and administration." Even during the economic boom (2005-08) GST productivity index "showed a rather declining trend despite modest buoyancy gains in FBR revenue collection, signaling relatively poor tax administration performance amidst relatively favorable overall economic conditions", says World Bank.

Table A: FBR: Performance : 1996-07 to 2012-13

(Rs. in billion)

Year	Targets	Collection	Growth in Collection (%)	Target Achieved (%)	Tax to GDP ratio
1996-97	286.0	282.1	5.2	98.6	11.6
1997-98	297.6	293.6	4.1	98.7	11.0
1998-99	308.0	308.5	5.1	100.2	10.5
1999-00	351.7	347.1	12.5	98.7	9.1
2000-01	406.5	392.3	13.0	96.5	9.3
2001-02	414.2	404.1	3.0	97.6	9.1
2002-03	458.9	460.6	14.0	100.4	9.4
2003-04	510	520.8	13.1	102.1	9.2
2004-05	590	590.4	13.4	101.8	9.1
2005-06	690	713.4	20.8	103.4	9.4
2006-07	935	847.2	18.8	101.5	9.8
2007-08	1.000	1008.1	18.9	100.8	9.8
2008-09	1,179	1157.0	14.8	98.1	8.9
2009-10	1,380	1327.4	14.7	69.0	9.0
2010-11	1,667	1587.0	19.6	95.2	8.8
2011-12	1952.3	1883.0	18.2	96.5	9.1
2012-13	2007	1939.4	03.0	96.6	8.5

Source: *Economic Annual Surveys & FBR Year Books*

The World Bank concluded that "during the economic crisis period and subsequent years (2008-11), GST productivity index declined at a higher rate compared to FBR tax-GDP despite a swift turn-around in project implementation and concomitant positive trends in some outputs by the last two years of project life." The report while pinpointing out weak

compliance levels, lackluster results in reform implementation, especially those related to short term actions aimed at curbing evasion through more effective enforcement actions by the final year of project implementation, noted "performance from 2008 onwards, far from the project's objectives envisioned at the outset". At the end of TARP like sales tax, income tax indicators were extremely poor (see **Table B**). Out of total population of 180 million less than 1.45 million filed returns in 2011—disturbingly the share of business returns was only 35.5%.

Table B: Total number of returns/statements received in 2011

Nature	**Number**
Business returns	513,044
Salary returns	160,903
Employees' statements	769,467
Total	**1,443,414**

Source: Data compiled by PRAL

This is the sordid story of tax reforms in Pakistan even when enormous funds—over US$100 million—and best professional advice was available. As confirmed by the report of World Bank, FBR not only as an organisation lost its credibility and usefulness, but proved to be counterproductive for the very purpose for which it was established—see figure of collections from 1996-97 to 2011-12 at **Table A** confirming over all poor performance.

It is a matter of great concern that on the one hand, FBR's own affairs are subject matter of serious criticism from the Public Accounts Committee and Auditor General of Pakistan and on the other it has been perpetually showing indifference towards enforcing tax laws in the country.

Long charge-sheet against FBR

The Auditor General of Pakistan (AGP) in its **Annual Audit Report for 2010-11**, published in *Business Recorder* of 20 June 2012, unearthed a number of internal control weaknesses in the working of FBR including non-reconciliation and misclassification of tax figures, blockage of revenue due to insufficient recovery and delay in disposal of appeals, etc. The AGP highlighted poor monitoring of withholding agents, acceptance of incomplete returns on web-portal, blockage of revenue due to insufficient recovery action and improper monitoring of recoverable taxes, non-reconciliation and misclassification of tax figures, non-collection of arrear demands, non-filing of returns, non-disposal of appeals, non-disposal/delay of refund claims, huge deferred liabilities of sales tax refunds resulting in over statement of receipts, non-recovery of sales tax due to blacklisting registered persons under the Sales Tax Act, excess carry forward of sales tax input, inadmissible refund of sales tax due to incomplete documents of export, non-assessment of government dues, non-finalisation of admissibility/legitimacy of refund of sales tax, over

and excess utilisation of budget, non-surrendering of unspent budget, non-conducting of internal audit and physical verification.

Legislators and tax collectors together have made Pakistan a haven for tax dodgers and plunderers of national wealth. Parliament has been encouraging tax evaders to bring as much money as they want to in Pakistan through normal banking channels with no questions asked about their "source"—legal cover is provided through section 111(4) of the Income Tax Ordinance, 2001. This facility, they claim, is necessary for growth of economy. Such lethal prescriptions for economic growth have actually destroyed the entire social fabric of the society as is proved during the last many decades. There is no tax culture, hence, no growth.

FBR has been a tool in the hands of businessmen-turned-politicians in getting enormous tax benefits through the infamous Statutory Regulatory Orders (SRO) system. The country can never come out of existing mess unless SRO culture is abolished and the present structure of FBR is dismantled and reconstructed. Had FBR been an effective and autonomous body, it could have compelled all the taxable persons to pay their due taxes. It should have focused on broadening the tax net instead of mercilessly squeezing existing taxpayers. It could have targeted the big fish rather than small fry. Pakistan is not a poor country—the State's kitty is empty because of reluctance to tax the rich, due to collossal wastage of taxpayers' money for the luxuries of the elites.

Perils of SRO culture

Through infamous SROs benefits are given to the powerful sections. On 26 May 2012, through SRO 569(I)/2012 for officers in Grade 20-22 rate of tax on monetized transport allowance was reduced to just 5%. This benefit for bureaucracy, including FBR officials, was secured by blatantly bypassing the Parliament. Obviously Auditor General of Pakistan never raised an objection, himself being a beneficiary! This proves how bureaucrats hoodwink the nation. Private sector employees for the same allowance are taxed at normal, rather exorbitant rates!

FBR, as it exists, lacks professionalism. It must be insulated from outside pressures and freed from bureaucratic controls—this is possible only if converted into National Collection Agency for centre, provinces and local governments, run by an independent Board of Directors comprising professionals as is the case with Mauritius Revenue Authority—http://www.mra.mu/download/MRAactFA201122Dec2012.pdf. Such Agency alone can ensure that taxes wherever due are collected without any exception. Once an autonomous National Collection Agency, headed by an Independent Board of Directors, is established, all the governments would certainly respect its autonomy. Since this Agency would not be a government department, it would collect taxes for all three tiers of State—centre, provinces and local governments. After charging an agreed collection fee, it will distribute the balance amount to the respective government.

For fiscal year 2012-13, FBR collected only Rs. 1,940 billion against original target of Rs. 2,381 billion—showing huge shortfall of Rs. 441 billion. FBR can easily collect Rs. 8 trillion as revenues. There are 10 million individuals having annual taxable income of Rs 1.5 million (a very conservative estimate), total income tax collection from them at the prevalent tax rates comes to Rs. 3,750 billion. If we add income tax collected from corporate bodies, other non-individual taxpayers and individuals having income between Rs. 400,000 to Rs. 1,000,000, the gross figure would not be less than Rs. 5,000 billion. FBR collected around Rs. 720 billion as income tax in 2012-13. Similarly, due to rampant corruption in sales tax, federal excise and custom duties, the total collection is not more than 30% of actual potential. In fiscal year 2012-13, FBR collected around Rs. 830 billion under the head sales tax. Estimates for customs and excise duties are Rs. 235 billion and Rs. 120 billion respectively. The total indirect collection of just Rs 1,185 billion was pathetically low. It should have been at least Rs 3,500 billion. If prevalent tax gap is bridged, the total revenue collection would be around Rs. 8,500 billion without imposing any new taxes or raising existing tax rates as has been done by Ishaq Dar in Finance Act 2013.

Dismal performance in 2012-13

"The original target of Rs.2381 billion was however downward revised to Rs. 2007 billion. FBR has collected Rs. 1,939.4 billion. In absolute terms an additional amount of Rs. 57 billion has been collected over the collection of past fiscal year. The growth in net revenue collection has been 3.0 percent over the collection of FY: 2011-12 which is lowest during last 13 years. Similarly the tax-GDP ratio dropped from 9.1% in the preceding year to 8.5% in 2012-13"—***FBR Year Book 2012-13***

If instead of FBR as government department, we have National Collection Agency, we can bridge monstrous tax gap at all levels. At present, both centre and provinces are not collecting taxes diligently and same will happen to local governments once installed. As narrated above, our tax potential at federal level alone is Rs. 8500 billion. If agricultural income tax and other provincial taxes are also collected efficiently, the total figure would be around Rs. 1400 billion. For harnessing the full tax potential at federal, provincial and local government levels, an autonomous, competent and efficient National Tax Agency is the need of the hour. This Agency, not controlled by any government, would certainly broaden tax net and counter organised tax evasion. Through consensus and democratic process, all the parliaments should enact a law for establishing autonomous National Revenue Agency. It will facilitate people to deal with only single Authority rather than multiple agencies at national, provincial and local levels. Presently FBR is extorting money by traumatizing taxpayers through a reign of terror, yet failed on all fronts.

FBR sends notices to over 31000 as part of expanding tax net

The Federal Board of Revenue has sent notices to over thirty-one thousand people as part of its campaign to broaden tax base.

Inaugurating the Taxpayers Facilitation Desk at National Press Club, Islamabad on Thursday, Member and Spokesperson of FBR Riffat Shaheen Qazi said the Board is making serious efforts to broaden the tax net.

She said the FBR has set a target of one hundred thousand people, who are presently out of tax net. She said during this drive one thousand one hundred and fifty three people have been registered with FBR and National Tax Number has been issued to them.

She said notices are being served with the help of data from NADRA, through Corrier service to avoid human interaction. However, she said one thirds of notices are being received due to certain reasons.

She said FBR is preparing a data bank with the help of NADRA and other related departments.

To a question, Riffat Shaheen said income tax levy is required to be filed by the taxpayers who have shown more than one million rupees liquid assets in their wealth tax statements.

Answering a question regarding revenue collection, the Spokesperson expressed optimism that revenue target will be achieved. She said their first quarter from July to September went well.

She called upon the journalists to make maximum use of the Taxpayers Facilitation Desk set up at the Press Club. – *Courtesy South Asian News Agency*

Govt plan of replacing FBR chief opposed

The Federal Revenue Alliance Union has opposed the federal government's plan of replacing present chairman of FBR Tariq Bajwa with member tax policy Shahid Hussian Assad. The union on Thursday held a meeting in regional tax office Lahore where all participants of the meeting unanimously flayed the proposed appointment of Shahid Assad as new chairman of the FBR when the tax department is struggling for broadening of tax base.

All members of union threatened the government of mass protest against the proposed appointment of a corrupt official as new

chairman of the FBR. They unanimously raised the voice in favor of the present chairman Tariq Bajwa, whose performance is excellent and who is known as an honest man throughout his carrier. They maintained that workers have attached their hopes with Tariq Bajwa because of his excellent performance as Punjab finance secretary.

The FBR union central president Mian Abdul Qayyum, addressing the meeting, stated that the union has already condemned the appointment of Shahid Hussian Assad as Member Tax Policy recently. He informed that Shahid has been accused in several corruption cases by the NAB and was later cleared through NRO. Shahid also issued exemption certificates of billions of rupees to favourite companies. How will he achieve the target of revenue collection by issuing exemption certificates to big companies?, he put question.

The member of tax policy is trying to confuse the finance ministry because the government is being proposed to transfer FBR's chairman Tariq Bajwa, and appoint Shahid Assad as new chief, despite several cases of corruption of billions of rupees against him. The ministry should take action against such criminals, instead of presenting them high and lucrative posts, they demanded.

Officials said that Tariq Bajwa was also given the additional charge of Secretary Revenue Division in July. The appointment of honest chief of the revenue body is crucial in view of historically massive revenue shortfall last financial year. Corruption and inefficiency have marred the federal board of revenue.

The FBR's tax system is running on auto mode since majority of taxes are collected at import or withholding stages, contributing practically nothing to the FBR. – *Courtesy The Nation*

Online returns: FBR urged to modify e-filing software

Transparency International Pakistan (TIP) has urged the Federal Board of Revenue (FBR) to modify its software for filing online tax returns due to exclusion of Income Support Levy.

The Sindh High Court on October 10 granted stay order against collection of 5% Income Support Levy (ISL) imposed through Finance Act 2013, TIP said in a letter to FBR chairman Tariq Bajwa.

The taxpayers filing returns online through e-portal of FBR will face difficulties when the software will reject their forms for not filling the columns for ISL, it said.

The last date for filing annual tax returns was extended from September 30 to October 31 due to inordinate delays by FBR in finalising the software of the e-portal system that would accept returns without ISL.

TIP reminded that ISL was challenged in the Sindh High Court on the grounds that it was double taxation and was imposed without lawful authority after the 18th Constitutional Amendment, whereby the concurrent list had been deleted. – *Courtesy The Express Tribune*

SHC stays payment of income support levy

A division bench of the Sindh High Court has passed an interim order, directing the Federal Board of Revenue (FBR) to allow taxpayers to file their income return without payment of income support levy.

In its interim order on October 22, 2013, the court also directed the Chairman FBR to make necessary modification in FBR-e-Portal to accept the return of income of taxpayers without payment of ISL.

This order of the high court was issued by bench, consisting of Justice Aqeel Abbasi and Justice Muhammad Junaid Ghaffar. The order was made applicable to the petitioners and also in case of other taxpayers to maintain uniformity and avoid confusion and inconvenience to taxpayers at large.

Abid Shahban Advocate representing the petitioners said on Thursday this is an interim order and the court will hear argument in the case on November 7, 2013.

He said that as the matter was sub-judice he would not comment on the petition. But, he confirmed it was order 'Rem' and in applicable to all taxpayers irrespective of the fact whether they have filed petitions in the high court, not challenging the income support levy.

According to a copy of the petition, the advocate challenged the validity and legality of the Income Support Levy Act 2013 through which the income support levy was imposed on taxpayers who were required to pay the levy along with the wealth statement – which is filed with the income return.

In the petition, it was contended the income support levy is discriminatory, violating the Article 25 of the Constitution of Pakistan – which ensures equality of citizens.

In the petition, the reliance was placed on a large number of decisions of the Supreme Court of Pakistan to establish that under the constitution equality of citizens is to be ensured and it was settled proposition of law that the tax laws should be imposed on similarly placed persons equally.

The petitioners prayed that after the passage of 18th Amendment to the Constitution of Pakistan, the federal government does not have authority to pass any legislation on the social welfare of public at large. The said right has now been devolved to the provinces.

It is interesting that last year about 770,000 non-corporate returns were filed, and this income support levy would only be payable by about 7,70,000 individuals who file their income return and have net moveable assets of over one million rupees at 0.5 percent and not by those who may own billions but do not file their return. Clearly, this levy in its present form is discriminatory.

In the petition, the validity of levy has also been challenged on violation of constitution requirement of introduction and passing of bills as laid down in Article 70 of the constitution.

Income Support Levy Act 2013 – which is a new law – was embedded in the Finance Act 2013 and passed as money bill under Article 73 of the constitution. This levy has also been challenged on touchstone of double taxation as wealth.

Legal experts said that the order had saved a large number of taxpayers, including salary taxpayers, from lot of inconvenience and hardship as now they could file their income return without payment of income support levy. – *Courtesy International The News*

BoI asks FBR to withdraw increase in ST rate

Board of Investment (BoI) has asked the Federal Board of Revenue (FBR) to rescind the decision of increase in the sales tax rate from 16 to 17 percent in budget (2013-14) to avoid hike in prices of commodities across the country. Sources said the BoI and FBR discussed the taxation issues being faced by Overseas Investors Chamber of Commerce and Industry (OICCI) and Pakistan Business Council at BoI office here on Thursday.

The OICCI appreciated the government's decision on reduction of corporate tax rate by one percent to 34 percent from 35 percent and a proposed further reduction in subsequent years. The business community argued that the reduction of initial depreciation allowance on plant and machinery from 50 percent to 25 percent would cause an adverse impact on new investment. Therefore, they proposed that it should be maintained at 50 percent.

They showed their apprehensions that sales tax rate in the country was already high and one percent increase would further increase prices and put more pressure on low and middle income groups. These proposals were put before Chairman BoI Mohammad Zubair during his recent meeting with the representatives of OICCI, Pakistan Business Council and M/s Proctor and Gamble, which took place in Karachi. During the meeting, the BoI raised issues of a leading multinational company. The company requires some clarifications on Sections 65D and 65E as follows: Firstly, whether the investment via 100% fresh equity through issuance of new shares needed only for plant & machinery related investment or for the full project investment including building, civil works, furniture and fixture, but not limited to plant & machinery. Secondly, once qualified for tax credit under section 65D and 65E, can any subsequent investment in the PME of the same project (say for increasing capacity or productivity) made after June 30, 2016 be done via commercial borrowing or finance via fresh equity injection to retain the earlier tax credit?

Thirdly, under section 65E, in case where both the investment/instalment of plant and machinery and the commencement of commercial production are made during the prescribed period (before June 2016) but not in the same tax year, would the first year tax credit be the year of commencement of commercial production under section 65E (1) or the year of installation of plant and machinery under section 65E (5)?

As per present practice, sales tax is being charged on the products being sold in Sindh and Punjab. Are clarifications regarding jurisdiction of Sindh and Punjab provinces with respect to collection of sales tax from multinational companies solicited? The representative of FBR may be requested to examine the issues/proposals and convey their viewpoint, so that the chambers concerned may be informed accordingly, BoI added. – *Courtesy Business Recorder*

Withholding agents not depositing money caught by Crest

The Computerised Risk-Based Evaluation of Sales Tax (Crest) system of the Federal Board of Revenue caught sales tax registered persons operating as withholding agents and not paying the withheld amount of tax to the tune of billions. Sources told here on Thursday that FBR Member IR Operation was alerted when he found that the Crest inbuilt log-rhythm has checked the available data and detected such sales tax registered persons, who have been declared as withholding agents.

However, they are not depositing the withheld amount of tax to the tune of billions. Details revealed that quite a large number of withholding agents are not paying the withheld amount besides not filing the income tax withholding statement. The amount to be withheld amounted to billions of rupees. It has yet to be ascertained whether the sales tax registered persons withheld and did not pay or failed to withhold the due amount of tax. It is pointed out that sales tax is paid only when supply made on direct tax is with-held once payment is made.

Source added that FBR Member IR Operations has taken serious note of such tax default. This detection was noticed by crest. The Crest used the information of purchases as given in the sales tax returns. As per the amendment vide Finance Act 2013 in Section 153(7), all sales tax registered persons have been made withholding agents of the income tax. Consequently these persons who are showing purchases are supposed to withhold the income tax and pay it with the withholding statement. It is learnt that this system was successfully utilised by RTO Lahore and substantial amount of revenue recovered. Now the Board has decided to use this information country-wise across all RTOs/LTUs. Currently, this data has been made available in the Crest. All the RTOs/LTUS have been informed electronically to verify the cross matching and after their verification the system shall confront defaulters to make the default payment they have withheld and also file the statement. These serious lapses helped the potential taxpayers to escape and only the technology unearthed them. IR operation wing of FBR swiftly moved in and deployed Crest resources for segregating cases of defaults and mismatching. It is further learnt that the Crest team worked dedicatedly and developed the application for electronically showing the cases where there is a huge gap between withheld taxes payable and against what actually has been paid.

Tax analysts expected there would be substantial upward push in collection of withholding tax collection through such linkage of information from different and reliable third party data and reliable independent resource. It is further learnt that default on payment withheld is a common phenomenon across the country which was going un-noticed before technology detected them. – *Courtesy Business Recorder*

Documentation drive suffers major setback: 20,000 of 31,000 notices return to FBR

A major chunk of the notices issued to potential persons under the tax base broadening exercise has returned to the Federal Board of Revenue due to incomplete addresses and non-availability of persons on declared addresses. After inauguration of a new tax facilitation desk at Islamabad Press Club on Thursday, Riffat Shaheen Qazi, Member Facilitation and Taxpayer Education (FATE) and official spokesperson for the FBR, said that out of 31,000 notices served to unregistered persons, 11,000 have been served whereas 20,000 returned to the FBR.

The FBR Chairman has taken a serious notice of the poor performance of the courier company and decided to invite more courier companies through a competition to ensure timely dispatch of notices. Reportedly, tax authorities are not satisfied with the performance of the existing courier company and called a high-level meeting at the Board to ascertain reasons behind delay in serving notices at the declared addresses of potential persons. The FBR wanted to ensure timely delivery of notices to unregistered persons on declared addresses for which Board is taking appropriate measures. The courier company has informed the FBR that the areas are out of their jurisdiction or incomplete addresses are available for serving of notices. The FBR has also taken up the matter with the Chairman Nadra. As per the courier company, a large number of people have not been found available on the addresses as per their CNICs.

She further said one-third of the notices have been received by the potential persons during the ongoing exercise of documentation. The FBR has set a target of one lakh potential persons for serving notices during 2013-14. So far, the FBR has dispatched 31,000 notices to the persons identified with the help of central database and tax profiles of individuals. Out of these persons, 1,153 new taxpayers have obtained National Tax Numbers (NTNs) and

deposited the due amount of Rs 8.3 million as tax. The FBR has served notices on potential persons under section 114 of the Income Tax Ordinance 2001 through the courier company to ensure serving of notices. However, the FBR is facing a lot of difficulty in serving notices to the concerned persons. After profiling of taxpayers, the notices have been served on the addresses declared on the computerised national identity card numbers (CNICs) available with the Nadra.

A major chunk of notices has retuned due to non-availability of the concerned persons on the declared addresses. This is not a mistake on the part of the FBR, but the data of declared addresses on the CNICs have been used for the dispatch of notices to unregistered persons, she explained. Riffat pointed out that the FBR Chairman has directed the courier company to ensure serving of notices and also directed the FBR officials to expedite the whole exercise including provisional assessment of cases before the expiry of extended deadline of November 30, 2013 for filing of returns.

To a query, she said that all taxpayers are liable to pay income support levy except one petitioner in Sindh High Court. The court has not granted stay order and case is in progress at the SHC. The taxpayer has been allowed to file income tax return and wealth statement without payment of income support levy.

When asked whether FBR is aware of a new SHC order in four petitions where interim relief was allowed to the general public from ISL payment, Official Spokesperson of FBR responded no. Ms Riffat Shaheen Qazi added that the FBR is not aware of any new order in which SHC allowed relief to the general public at large from payment of Income Support Levy (ISL). "I have read the SHC order in a specific case of one petitioner, but we are no aware of any new order relating to four petitions giving relief to general public. Similarly, no such new order has been received in the FBR Headquarters yet", she added.

Responding to a query, FBR Member FATE said that the FBR has yet not exercised powers for accessing bank account information of the accountholders. The provision is available under the law, but the Board has not exercised the powers. It would take some time to exercise this power by FBR.

When asked about survey of business markets for expanding the tax-base, she said that the FBR has no intention to physically go to the markets for documentation. The FBR is relying on the

centralised databank having third party information for expanding the tax net.

When asked about revenue shortfall in 2013-14, FBR Member FATE said that the Board is very much optimist about revenue collection position. The revenue collection during the first quarter of 2013-14 was satisfactory. Tax machinery is working very hard and we are confident to achieve the assigned revenue collection target of Rs 2475 billion by the end of current fiscal.

FBR Member FATE said that the journalists' community should avail the facility of 'new tax facilitation desk' at Islamabad Press Club established with the help of Pakistan Revenue Automation Limited (PRAL). If 3,000 to 4,000 working journalists living in Islamabad-Rawalpindi file their income tax returns, it would be a great achievement of the Islamabad Press Club. It will send a very positive message across the country that the persons, who write about documentation etc, are themselves filing their income tax returns and wealth statement. – *Courtesy Business Recorder*

One day Business conferences to be held in Berlin, Munich on October 30

The day-long business conferences on Pakistan would be held in Berlin and Munich (Germany) on October 30 and 31 respectively to further strengthen trade and economic relations, official sources said.

According to the sources, the conferences have been organized by Federation of Chamber of Commerce and Industry (DIHK),Berlin in collaboration with Pak-German Business Forum (PGBF),Karachi.

The day-long conferences would be attended by a business delegation of about 60 to 70 persons from Pakistan led by the Chief Minister of Punjab, Mian Mohammad Shahbaz Sharif and Governor State Bank of Pakistan (SBP) Yaseen Anwar.

According to details of the conferences in Berlin in the opening session Stefan W Dirck,Board International ,Association of German Chamber of Commerce and Industry, Dr.Harald Braun State Secretary of the federal Foreign Office Germany, Anne Ruth Herkes ,State Secretary of Federal Ministry of Economics and Technology , Qasi Sajid Ali President PGBF would highlight the importance of the conference focusing on furthering trade and economic relations between Pakistan and Germany.

Chief Minister Punjab Mian Shahzab Sharif would deliver his key note address in the opening session.

Similarly in the other sessions a round table discussions on Pakistan at cross roads -chances-opportunities would be held where Ambassador Michael Koch Federal government commissioner for Afghanistan and Pakistan, Yaseen Anwar Governor SBP, Muhammad Zubair Umar Chairman Board of Investment (BOI) , Qasim Niaz Secretary Commerce, Dr.Cyrill Nunn Ambassador of Germany to Pakistan, and Abdul Basit Ambassador of Pakistan to Germany would participate in the discussion.

In the panel discussions topics like how to promote sustainable Pakistan-German economic and trade relations-expectations and cooperation would be participated by Syed Maratib Ali Chairman Punjab Board of Investment , Tariq Bajwa Chairman Federal Board of Revenue (FBR) Ahsan Bashir Chairman All Pakistan Textile Mills Associations, Faizan Mitha Country Manager Deutsche Bank AG, Dr. Andree Buhl Deputy head of division south east asia federal ministry of Economics and Technology, Rima Al Tinawi Director North Africa and Middle east ,Association of German Chamber of Commerce and Industry and Felix Neugart Deputy Managing Director International Economic Affairs Association of German Chamber of Commerce and Industry. – *Courtesy Business Recorder*

C.No.1(162)/C-TPA(TY-2011)/2012-13/137337-R

Islamabad, the 9th October, 2013

To:

Dr. Muhammad Irshad,
Chief Commissioner Inland Revenue,
Regional Tax Office-II
Lahore

Subject: **Clarification regarding deletion of cases of commercial importers selected for audit under Section 72B of Sales Tax Act, 1990.**

Reference: your office's letter No. RTO-II.SO-IV/A-103/4061 dated 2.10.2013 on the subject.

2. In continuation of the Board's letter of even number dated 4th October, 2013, it is to inform that the matter has been considered by the IR Policy Wing of the Board and their opinion in this regards is as under,

> "any audit selection prior to the deletion of Rule 58E(2) ibid should be subjected to the provisions of Rule 58E(2) which expressly states that the importers who do not claim any refund of excess input tax shall not be subjected to audit except with the permission of the Board. However, section 72B of the Sales Tax Act, 1990 deals with the selection of cases for audit by the Board, therefore, any such selection of a case of commercial importer shall be deemed to have the permission of the Board as envisaged in Rule 58E(2) of the Sales Tax Special Procedure Rules, 2007."

3. You are, therefore, advised to please complete audit of all such cases expeditiously as per law.

(Ali Husnain)
Chief (Taxpayers Audit)

2013 TRI 1726 (H.C. Bom.)

HIGH COURT OF BOMBAY

Mohit S. Shah, Chief Justice and M.S. Sanklecha, J.

Bharat Petroleum Corporation Limited
v
1. Income Tax Appellate Tribunal
Through its Registrar
2. Assistant Commissioner of Income
3. Union of India
Through the Secretary

FACTS/HELD

Tribunal has no power to dismiss appeal for non-appearance of appellant. It has to deal with the merits. An application for recall of an ex-parte dismissal order is under section 254(2) & must be filed within 4 years from the date of the order. The Tribunal must permit "mentioning" of matters

1. The assessee's appeal was fixed for hearing before the Tribunal on 4.12.2007. As nobody appeared for the assessee, the Tribunal dismissed the appeal for want of prosecution. The assessee filed a Miscellaneous Application before the Tribunal on 6.8.2012 seeking to recall the exparte order. The Tribunal dismissed the MA on the ground that the application for recall had been filed beyond a period of 4 years from the date of the ex-parte order. The assessee filed a Writ Petition contending that (a) the Tribunal had no power under Rule 24 to dismiss an appeal for want of prosecution, (ii) an application for recall of an ex-parte order does not fall u/s 254(2) and the time limit of 4 years does not apply to it. It was also contended that the Tribunal ought to allow the system of "mentioning" matters as is done in the High Court. HELD by the High Court dismissing the Petition.

   (i) It is a little strange that the Tribunal does not permit the practice of mentioning matters at any time of the day. If it had done so, the exercise of filing an application for recall

may not have been necessary. The ultimate object of the Tribunal is to decide a dispute between the revenue and assessee in accordance with law to ensure that justice is done. In the aid of ensuring that justice is done, the Tribunal cannot as a matter of practice bar any Advocates/representative from mentioning their matters before the Tribunal. If indeed this is so, the Tribunal must do away with such a practice. The mentioning of matters should be allowed by the Tribunal. It is of course in the Tribunal's discretion to allow the request made by the parties while mentioning but prohibiting mentioning of matters before a Court/Tribunal is a likely recipe for injustice. We request the Tribunal to henceforth do away with such a practice and allow mentioning of matters;

(ii) Under Rule 24, the Tribunal has no power to dismiss an appeal for non-appearance of the assessee. It has to decide the appeal on merits. The dismissal order is consequently erroneous and the assessee is entitled to have the order set aside (S. Chenniappa Mudaliar 74 ITR 41 (SC) followed; Chemipol (244) ELT 497 (Bom) distinguished);

(iii) However, because dismissing an appeal for non-prosecution in the face of Rule 24 is an error apparent on the face of the record, an application to set right the error of dismissal for non-prosecution is an application u/s 254(2) and not under s. 254(1). Where Parliament has provided a specific provision to deal with a particular situation, it is not open to ignore the same and apply some other provision. Such an application has to be filed within a period of 4 years from the date of the order;

(iv) Though the Proviso to Rule 24 empowers the Tribunal to recall an ex-parte order without specifying any period of limitation, this applies only where the appeal is decided ex-parte on merits. Where the appeal is dismissed ex-parte for non-prosecution, it is a case of an erroneous order which only be rectified u/s 254(2). Also an order passed in breach of Rule 24 is an irregular order but not a void order. Assuming the said order is a void order, yet it continues to be binding till it is set aside by a competent

authority (Sultan Sadik v/s. Sanjay Raj Subba 2004 (2) SCC 277 followed)

Petition dismissed.

Writ Petition No. 1740 of 2013.

Heard on: 20th September, 2013.

Decided on: 23rd October, 2013.

Present at hearing: J.D. Mistry, Sr. Advocate i/y Atul K. Jasani, for Petitioner. Suresh Kumar, for Respondent.

JUDGMENT

M.S. Sanklecha, J.–

Rule. Returnable forthwith.

2) At the instance and request of the Counsel for both the sides the petition itself is taken up for final disposal.

3) This petition under Article 226 of the Constitution of India assails the order dated 10 April 2013 passed by the Income Tax Appellate Tribunal ("the Tribunal"). By the impugned order dated 10 April 2013, the Tribunal dismissed the Miscellaneous Applicationfiled by the petitioner seeking to recall its earlier order dated 06 December 2007 (dismissing the appeal for want of prosecution) in respect of Assessment Year 2000-01.

4) We are conscious of the fact that when an alternative remedy in terms of an appeal is provided under the Income Tax Act 1961, ("the Act") this Court would not normally entertain a writ petition. However, we have entertained this petition in view of the peculiar facts of this case. This petition is filed from an order dated 10 April 2013 dismissing a Miscellaneous Application for restoration of the petitioner's appeal dismissed by the Tribunal on 6 December 2007 for non prosecution. This Court in its order in the matter of *Chem Amit vs. CIT* 272 ITR 397 has held that no appeal under Section 260A of the Act would lie from an order dismissing a Miscellaneous/rectification application of an earlier order of the Tribunal disposing of the appeal. In such cases, the appeal under Section 260A of the Act would be from the earlier order which in this case is dated 6 December 2007. In view of the above, no appeal would be available under Section 260A of the Act from the order dated 10 April 2013. However, as the issue raised in the petition is of crucial importance in the passing of orders under the Act by the Tribunal viz. the issue of interpretation of Rule 24 of the Income Tax Appellate Tribunal Rules, 1963 ("Tribunal Rules"), Section 254(1) and (2) of the Act we have entertained this petition in our extraordinary writ jurisdiction.

5) The issues which arise for consideration in the present petition are as under:

a) Whether the Tribunal has power in terms of Rule 24 of the Tribunal Rules to dismiss an appeal before it without considering the merits of the appeal and only on the ground for want of prosecution?

b) Whether the application for recall of an order dismissing the petitioner's appeal for want of prosecution is an application which falls for consideration under Section 254(1) of the Act or under Section 254(2) of the Act?

c) Whether in the event it is held in (b) above that the application is under Section 254(1) of the Act, is the Tribunal barred from entertaining an application for recall of an order by any period of limitation or by laches on the part of the petitioner?

6) **Factual backdrop:**

a) The petitioner is a public sector undertaking engaged in the import of crude oil, refining and marketing the same. The petitioner is regularly assessed to tax under the provisions of the Act.

b) The petitioner filed its return of income for assessment year 200001 declaring taxable income of Rs.597 crores in its return of income. This income was determined inter alia after having claimed deduction under Section 80I & 80IB of the Act in respect of its LPG bottling plant.

c) The Assessing Officer by an order dated 31 December 2002, inter alia, disallowed the claim for deduction under Section 80I and 80IB of the Act and determined the taxable income at Rs.730 Crores. On appeal the Commissioner of Income Tax (Appeals) by order dated 24 March 2004 upheld the order of the Assessing Officer and dismissed the petitioner's appeal, thus leaving undisturbed the disallowance of deduction under Section 80I and 80IB of the Act claimed by the petitioner.

d) Being aggrieved by the order dated 24 March 2004 of the Commissioner of Income Tax (Appeals) the petitioner filed an appeal to the Tribunal. On 4 December 2007 the appeal was fixed for hearing before the Tribunal. The petitioner's executives i.e. Chief Manager (Finance) and Assistant Manager were to attend the hearing before the Tribunal, but were late in reaching the Tribunal. However, on reaching the Tribunal, they learnt that the petitioner's appeal had been called out and dismissed for want of prosecution. By order dated 6 December 2007 the appeal was dismissed by the Tribunal without considering the merits of the petitioner's case, only on the

ground of want of prosecution, as none was present on behalf of petitioner.

e) On 18 December 2007, the petitioner received the order dismissing the petitioner's appeal. The order dated 6 December 2007 of the Tribunal records the fact that when the appeal was called out on 4 December 2007, none was present on behalf of the petitioner, therefore, the appeal was dismissed for want of prosecution.

f) The petitioner states that on receipt of the order dated 6 December 2007, the petitioner's executives initiated process of drafting a Miscellaneous Application seeking to recall the said order and for that purpose even had a meeting with their Counsel. The Senior Officers of the petitioner were under the impression that the process of filing of Miscellaneous Application was complete and according to them they were waiting for a notice for hearing of the Miscellaneous Application from the Tribunal.

g) It was sometime in July 2012 (no specific date mentioned) when the petitioner was preparing for the hearing of its appeal for a subsequent assessment year, it noticed that though a draft Miscellaneous Application was in the file, an acknowledged copy of the same from the Tribunal, was not available in its record. On enquiry with the Tribunal the petitioner learnt that no Miscellaneous Application for recalling of the order dated 6 December 2007 was on the file of the Tribunal.

h) It was in the above circumstances that on 6 August 2012 the petitioner filed a Miscellaneous Application before the Tribunal seeking to recall the order dated 6 December 2007 passed by the Tribunal relating to assessment year 200001.

i) On 8 March 2013, the Tribunal heard the petitioner on its Miscellaneous Application. By an order dated 10 April 2013, the Tribunal dismissed the Miscellaneous Application on the ground that the application for recall had been filed beyond a period of 4 years from the date of the order dated 6 December 2007 of the Tribunal. Consequently, the Tribunal held that in view of Section 254(2) of the Act it is not open to the Tribunal to entertain the application for rectification/amendment of an order beyond the period of 4 years from the date of the order being sought to be rectified/recalled. Alternatively, the Tribunal in the impugned order held that even if one proceeded on the basis that Section 254(2) of the Act is not applicable to an application for recall yet the same would be barred by limitation as the period provided under Limitation Act for setting aside an

exparte order would be 30 days from the date of passing the order. Therefore, in view of inordinate delay of more than 4 years in filing on 6 August 2012 its Miscellaneous Application from order dated 6 December 2007 was dismissed.

j) This petition challenges the impugned order dated 10 April 2013.

Submissions:

7) Mr. J. D. Mistry, learned Senior Counsel for the petitioner in support of the petition challenging the impugned order dated 10 April 2013 urges the following:

a) The original order passed by the Tribunal on 6 December 2007 on the petitioner's appeal is an order in breach of Rule 24 of the Tribunal Rules. This Rule mandates that when the appellant before the Tribunal is not present and/or represented at the hearing then the Tribunal can only dispose of the appeal on merits after hearing the respondent and not for default. In the present case, order dated 6 December 2007 was an order dismissing the appeal only on account of want of prosecution i.e. without considering the merits of the appeal;

b) The Miscellaneous Application dated 6 August 2012 for recall of the order dated 6 December 2007 made by the petitioner is an application to be considered within the province of Section 254(1) of the Act. However, the Tribunal misdirected itself by treating the application for recall as an application for rectification under Section 254(2) of the Act and not under Section 254(1) of the Act;

c) The application dated 6 August 2012 for recall was made by the petitioner under the proviso to Rule 24 of the Tribunal Rules which does not provide for any period of limitation. Thus, such an application is appropriately required to be considered by the Tribunal under the proviso to Rule 24 of the Tribunal Rules without incorporating any period of limitation therein;

d) The delay in moving the Miscellaneous Application on 6 August 2012 for recall of order dated 6 December 2007 was on account of genuine mistake /misunderstanding and no sooner the appellant realized the same in July 2012 an application was filed within a month for recall of the same. Thus, in the facts of the case, there was no delay and/or laches on the part of the petitioner; and

e) The interests of justice would require that the order dated 6 December 2007 be recalled and the matter be heard on merits. This is for the reason that the petitioner's representatives were

not present at the time when the matter was called out by the Tribunal but reached soon thereafter to be informed that the matter has been dismissed. However, the petitioner's representative were unable to mention the appeal before the Tribunal on that very day to apply for recall of the order dismissing its appeal only on account of such a practice of mentioning not being permitted by the Tribunal. Consequently, the petitioner was unable to have the order of dismissal for nonprosecution recalled on 4 December 2007 itself and correct the injustice.

8) On the other hand, Mr. Suresh Kumar, learned Counsel on behalf of the revenue submits that the impugned order dated 10 April 2013 passed by the Tribunal calls for no interference and in support submits as under:–

a) The impugned order dated 10 April 2013 has been passed on an application made for recall of an order dated 6 December 2007 under Section 254(2) of the Act. In these circumstances, as the application filed by the petitioner is beyond the period of 4 years, the Tribunal has no jurisdiction to entertain the application. Thus the application dated 6 August 2012 has rightly been dismissed by the impugned order.

b) Without prejudice to the above, even if it is assumed that the application filed by the petitioner appropriately falls for consideration under Section 254(1) of the Act, the same has rightly been held to be barred by limitation. This is on account of the fact that the period of 30 days as provided under the Limitation Act would apply for setting aside an exparte order i. e. 30 days from the date of the order.

c) In any event, it is submitted that even if, it is held that no period of limitation has been provided for application made under Section 254(1) of the Act and the period of limitation under the Limitation Act is inapplicable, yet the impugned order is justified in dismissing the application on the ground of laches. For the purpose of considering the period of laches the period of 4 years provided under Section 254(2) of the Act has appropriately been taken as the outer most limit for filing the application for recall which could then be considered on merits of the application including the delay, if any, if not more than 4 years.

d) The order of which recall has been sought is dated 6 December 2007. The aforesaid order was received by the appellant on 18 December 2007. At no point of time prior to August 2012 did the petitioner make any movement to have the

order dated 6 December 2007 recalled. The period to consider the limitation/laches commences from 18 December 2007 and not from July 2012 as urged on behalf of the petitioner.

Statutory Provisions:

9) Before dealing with the submissions of the Counsel, it may be convenient to reproduce the relevant provisions of the Act and Tribunal Rules which would have a bearing in considering the submissions made by the Counsel.

Orders of Appellate Tribunal

Section 254 : (1) The appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Appellate Tribunal may at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under subsection (1), and shall make such amen dment is the mistake is brought to its notice by the assessee or the [Assessing] Officer:

Provided that an amendment which has the effect of enhancing an amount or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard.

Provided further.....

Rule24 of the Income Tax Tribunal Rules
[Hearing of appeal ex parte for default by the appellant.

Where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorized representative when the appeal is called on for hearing. The Tribunal may dispose of the appeal on merits after hearing the respondent:

Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal.]

Findings:

10) We have considered the rival submissions. Before dealing with the submissions on merits we wish to point out that this entire exercise of filing an application for recall of an order dated 6 December 2007 may not

have been necessary if the Tribunal allowed/permitted the practice of mentioning matters before it, atleast at one time during the course of the day. In this case it is the petitioner's case (not disputed by the revenue) that on 4 December 2007 when the petitioner's matter was listed for hearing before the Tribunal the petitioner's executives happened to reach the Tribunal late as they were held up in a traffic jam. However, in the meantime the petitioner's appeal was called out and as none was present on behalf of petitioner, the appeal was dismissed for nonprosecution. On reaching the Tribunal the petitioner's executives learnt about the dismissal of its appeal from the Court Master. However, the petitioner was unable to mention the above facts before the Tribunal so as to make a request to the Tribunal to recall the order dismissing its appeal. We are informed that practice of mentioning is not permitted/ allowed by the Tribunal at any time of the day. If so, we find this a little strange. The ultimate object of the Tribunal is to decide a lis/dispute between the revenue and assessee in accordance with law to ensure that justice is done. In the aid of ensuring that justice is done, the Tribunal cannot as a matter of practice bar any Advocates/representative from mentioning their matters before the Tribunal. If indeed this is so, the Tribunal must do away with such a practice. The mentioning of matters should be allowed by the Tribunal. It is of course in the Tribunal's discretion to allow the request made by the parties while mentioning but prohibiting mentioning of matters before a Court/Tribunal is a likely recipe for injustice. In case the Tribunal is following the practice of not allowing mentioning of matters before it, we would request the Tribunal to henceforth do away with such a practice and allow mentioning of matters. It is made clear whether or not to allow the application made on mentioning by the parties is for the Tribunal to decide in exercise of its discretion.

11) Now turning to the merits of this petition, it is contended by the petitioner that the order passed on 6 December 2007 on its appeal was an order passed in breach of Rule 24 of the Tribunal's Rules. We find that when the appellant is not present before the Tribunal when the appeal is called out for hearing the Tribunal could either adjourn the hearing of the appeal in its inherent jurisdiction or in terms of Rule 24 of the Tribunal Rules dispose of the appeal on merits after hearing the respondent. In this case the Tribunal has dismissed the petitioner's appeal for non prosecution. The Tribunal has not considered the merits nor heard the respondents on merits before dismissing the appeal. Thus the Tribunal has not exercised its inherent jurisdiction of adjourning the appeal or in terms of Rule 24 of the Tribunal Rules of deciding the appeal on merits after hearing the respondents. We find that in terms of Rule 24 of the Tribunal Rules the option of dismissing an appeal for default is not available to the Tribunal. In fact, Income Tax Appellate Tribunal Rules 1946 as amended in 1948 (Tribunal Rules 1946) provided for dismissal of

appeal by the Tribunal for default on the part of the appellant before it. Rule 24 of the Tribunal Rules 1946 as amended in 1948 reads as under:

> *"24Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion either dismiss the appeal for default or may hear it exparte."*

The aforesaid Rule allowing the Tribunal to dismiss an appeal for non prosecution/default was a subject matter of challenge before the Supreme Court in *CIT vs. S. Chenniappa Mudaliar* (1969) 74 ITR Page 41 and the Apex Court held that such a provision in the rule was ultra vires the provisions of the parent Act viz. Section 33(4) of the Income Tax Act, 1922 which mandated the Tribunal to decide the appeal on merits. Therefore, we find that Rule 24 of the Tribunal Rules as applicable in this case advisedly does not provide for dismissal of appeal for default.

12) At this stage it was faintly suggested by the revenue that such a power of dismissal for default can be exercised by the Tribunal in exercise of its inherent powers as judicial/quasi judicial authority. This course is not open to the Tribunal as the Apex Court in S. Chenniappa Mudaliar (supra) has held that the Tribunal is mandated by Section 33(4) of the Income Tax Act 1922 (1922 Act) to decide the appeal before it on merits. Section 33(4) of the Income Tax Act, 1922 read as under:"

> 33(4) The Appellate Tribunal after giving both the parties to the appeal an opportunity of being heard pass such orders thereon as it thinks fit and shall communicate any such order to the assessee and to the Commissioner".

The provisions of Section 254(1) of the Act though reproduced herein above are again reproduced for convenience and read as under:"

> 254(1) The appellant Tribunal may after giving both the parties to the appeal an opportunity of being heard pass such order thereon as it thinks fit.

It would therefore, be noted that Section 33(4) of the 1922 Act and Section 254(1) of the Act are almost identically worded. Thus it is not open the Tribunal to exercise its inherent powers to dismiss the appeal for default as the mandate of Section 254(1) of the Act is to dispose of the appeal on merits even in the absence of the appellant. This would logically follow from the decision of the Apex Court in S. Chennippa Mudaliar (supra).

13) This Court in the matter of *Chemipol vs. Union of India* (244) E.L.T. 497 (Bom.) while dealing with the powers of Customs Excise and Service Tax Appellate Tribunal to dismiss an appeal for default has observed that though every Court or Tribunal has an inherent power to

dismiss the proceeding for non prosecution yet this inherent power is lost where the statute requires the Court or the Tribunal to hear the appeal on merits. In this case Rule 24 of the Tribunal Rules mandates the Tribunal to decide the appeal on merits even in absence of the appellant after hearing the respondents. In view of the above, we hold that the Tribunal did commit an error in passing the order dated 6 December 2007 in dismissing the appeal on the ground of want of prosecution. Therefore, in such a case the appellant (i.e. petitioner herein) is entitled to move the Tribunal to set right the breach of Rule 24 of the Tribunal Rules and have an order passed in breach thereof to be set aside.

14) The next issue that arises for consideration is whether an application to set right the above error in the order dated 6 December 2007 would be an application to correct the same under Section 254(1) of the Act as contended by the petitioner or under Section 254(2) of the Act as contended by the revenue. It was submitted by the petitioner that Section 254(2) of the Act is not applicable in the present facts as there is no mistake apparent on record in the order dated 6 December 2007. Therefore, such an application to recall the order dated 6 December 2007 would not fall under Section 254(2) of the Act. We find that the order dated 6 December 2007 does suffer from an error apparent on the face of the record namely dismissing the appeal on account of non prosecution in breach of Rule 24 of the Tribunal Rules. The Tribunal has no power to dismiss the application on the ground of non prosecution (as urged by the petitioner and accepted by us) keeping in view Rule24 of the Tribunal Rules. Therefore, dismissing an appeal for non prosecution in the face of Rule 24 of the Tribunal Rules is an error apparent on the face of the record leading to an irregular order which can be rectified under Section 254(2) of the Act. In fact during the course of hearing the petitioner placed reliance on the Bombay High Court decision in Khushalchand B. Daga vs. T.K. Surendran and others (1972) 85 ITR 48 to support its view that the Tribunal cannot dismiss an appeal for default. In the case of Khushalchand B. Daga (supra) this Court held that in view of Rule 24 of the Tribunal Rules 1946 as then existing the Tribunal cannot dismiss an appeal for non prosecution in view of the decision of the Supreme Court in the matter of S. Chenniappa Mudaliar (supra). However, it further also held that such an order dismissing an appeal for default of appearance by the Tribunal was an order which suffered from an error apparent on the face of the record. We are of the view that in the above circumstances if there is an error apparent on the face of the record, Section 254(2) of the Act alone is applicable. Where Parliament has provided a specific provision in the Act to deal with a particular situation, it is not open to ignore the same and apply some other provision. Section 254(2) of the Act empowers the Tribunal to correct/rectify its order only within four years from the date of the order which is sought to be rectified. In this case it is an admitted position that the miscellaneous application is filed on 6

August 2012 i.e. beyond four years of the order dated 6 December 2007 which is sought to be rectified.

15) It was next contended that in any event Section 254(2) of the Act would have no application on the ground that Miscellaneous Application made in August 2012 is under the proviso to Rule 24 of the Tribunal Rules which does not have any period of limitation. Moreover in such cases, it is contended that the application is not to rectify an error in the order but is an application to set aside an order. We find that the miscellaneous application made by the petitioner on 6 August 2012 could not have been made under the proviso to Rule 24 of the Tribunal Rules. This is for the reason that the proviso would be applicable only when the Tribunal has exercised its power on the basis of the main part of Rule 24 of the Tribunal Rules i.e. deciding the appeal on merits after hearing the respondents. This would be evident from the fact that the proviso to Rule 24 of the Tribunal Rules clearly states:"

> "Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards....."

Thus the application of the proviso can only take place where the main part of Rule 24 of the Tribunal Rules has been applied for dismissing the appeal i. e. appeal has been disposed of on merits after hearing the respondents, in the absence of the appellant. In this case admittedly the main part of Rule 24 of the Tribunal Rules has not been applied and therefore, no occasion to invoke the proviso thereto can arise. The proviso to Rule 24 of the Tribunal Rules has no application where there is an error apparent on record. The invocation of the proviso takes place when the Tribunal has correctly disposed of the appeal before it in terms of the main part of Rule 24 of Tribunal Rules. Consequently, in the present facts the issue of application of either Rule 254(1) or (2) of the Act to an application made under the proviso to Rule 24 of the Tribunal Rules does not arise.

16) It was next contended on behalf of the petitioner that the power of the Tribunal under Section 254(2) of the Act is only to rectify an error apparent from the record. It does not empower the Tribunal to recall its earlier order dated 6 December 2007 for which the miscellaneous application was filed on 6 August 2012. It was submitted on behalf of the petitioner that the application under Section 254(1) of the Act would be the only provision under which an application could be made for recall of an order, as underSection 254(2) of the Act only the order can be rectified but cannot be recalled. We find that there is an error apparent on record and the miscellaneous application is to correct the error apparent from the record. The consequence of such rectification application being allowed may lead to a fresh hearing in the matter after having recalled the original order. However, the recall, if any, is only as a consequence of rectifying the original order. It is pertinent to note that Section 254(2) of

the Act does not prohibit the recall of an order. In fact the power/jurisdiction of the Tribunal to recall an order on rectification application made under Section 254(2) of the Act is no longer resintegra. The issue stands covered by the decision of the Apex Court in *Assistant Commissioner of Income Tax vs. Saurtashtra Kutch Stock Exchange Limited* (2008) 305 ITR 227 which held that though the Tribunal has no power to review its own order, yet it has jurisdiction to rectify any mistake apparent on the face of the record and as a consequence therefore, Tribunal can even recall its order. In the above case before the Apex Court on 27 October 2000 the Tribunal dismissed the appeal of Stock Exchange holding that it was not entitled to exemption under Section 11 read with Section12 of the Act. On 13 November 2000 the Stock Exchange filed a rectification application under Section 254(2) of the Act before the Tribunal. The Tribunal by its order dated 5 September 2001 allowed the application and held that there was mistake apparent on the record which required rectification. Accordingly, the Tribunal recalled its order dated 27 October 2000 for the purpose of entertaining the appeal afresh. The revenue filed a writ petition in the Gujarat High Court challenging the order dated 5 September 2001. The above challenge by the revenue was turned down by the Gujarat High Court. The revenue carried the matter in appeal to the Apex Court which also dismissed the appeal of the revenue. The Apex Court observed that the Tribunal in its original order while dismissing the Stock Exchange (assessee's) appeal overlooked binding decisions of the jurisdictional High Court. This mistake was corrected by the Tribunal under Section 254(2) of the Act. The Supreme Court held that the rectification of an order stands on the fundamental principle that justice is above all and upheld the exercise of power under Section 254(2) of the Act by the Tribunal in recalling its earlier order dated 27 October 2000. Thus recall of an order is not barred on rectification application being made by one of the parties. In these circumstances, the application would be an application for rectification of the order dated 6 December 2007 and would stand governed by Section 254(2) of the Act.

17) In the facts of the present case there can be no denial that the order dated 6 December 2007 suffers from an error apparent from the record. The error is in having ignored the mandate of Rule 24 of the Tribunal Rules which required the Tribunal to dispose of the matter on merits after hearing the respondents. In these circumstances, an application for rectification would lie under Section 254(2) of the Act. The recall of an order would well be a consequence of rectifying an order under Section 254(2) of the Act. In these circumstances, we find no reason to interfere with the order of the Tribunal holding that Miscellaneous Application filed by the appellant is barred by limitation under Section 254(2) of the Act as it was filed beyond a period of four years from the order sought to be rectified.

18) Before concluding, we would like to make it clear that an order passed in breach of Rule 24 of the Tribunal Rules, is an irregular order and not a void order. However, even if it is assumed that the order in breach of Rule 24 of the Tribunal Rules is an void order, yet the same would continue to be binding till it is set aside by a competent Tribunal. In fact, the Apex Court in the Sultan Sadik v/s. Sanjay Raj Subba reported in 2004(2) SCC 277 has observed as under:

> *"Patent and latent invalidity*
> *In a wellknown passage Lord Radcliffe said:*
>
> > *"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."*
> >
> > *This must be equally true even where the brand of invalidity is plainly visible, for there also the order can effectively be resisted in law only by obtaining a decision of Court."*

Further the Supreme Court in Sneh *Gupta v/s. Dev Sarup* (2009) 6 SCC 194 has observed

> *"We are concerned herein with the question of limitation. The compromise decree, as indicated herein before, even if void was required to be set aside. A consent decree as is well known, is as good as a contested decree. Such a decree must be set aside if it has been passed in violation of law. For the said purpose, the provisions contained in Limitation Act 1963 would be applicable. It is not the law that where the decree is void, no period of limitation shall be attracted at all."*

Therefore, in this case also the period of four years from the date of order sought to be rectified/recalled will apply as provided in Section 254(2) of the Act. This is so even if it is assumed that the order dated 6 December 2006 is a void order.

19) We shall now answer the questions arising in this case as raised by us in Paragraph 4 above as under:

Question(a): No. The Tribunal has no power in terms of Rule 24 of the Tribunal Rules to dismiss an appeal before it for non prosecution.

Question(b): The Miscellaneous application for recall of an order falls under Section 254(2) of the Act and not under Section 254(1) of the Act.

Question(c): Does not arise in view of our response to query (b) above.

20) In view of the reasons given herein above, we find the Tribunal was correct in dismissing the Miscellaneous Application by its order dated 10 April 2013 as being beyond the period of four years as provided under Section 254(2) of the Act.

21) Accordingly, the petition is dismissed with no order as to costs.

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