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FOREIGN

ITA No.352/Vizag/2008

(Assessment Year: 2005-06)

Kind regards

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Budget deficit approaching 10pc of GDP

ISLAMABAD: Dr. Hafeez Sheikh, Pakistan's Finance Minister, presented Budget 2011-2012 some ten months ago. Back then the finance minister targeted GDP growth of 4.2 percent and a budgetary deficit of 4 percent of GDP. Pakistan's growth prospects have since been tapered down to under 3 percent and the budgetary deficit is going through the roof.

Budget 2011-2012 was heavily dependent on foreign assistance in terms of project aid, commodity aid, Tokyo pledges and Kerry Lugar. The total expected from these four foreign sources stood at a colossal Rs344 billion.

A sum of Rs70 billion was expected from privatization. A billion dollar injection was expected from the US in the form of Coalition Support Funds (CSF) and an additional \$800 million was to come through the auction of 3G licenses. Etisalat was also expected to pay \$800 million into the Pakistani treasury.

Budget 2011-2012 was also dependent on bank borrowing in the amount of Rs303 billion and Eurobonds worth Rs44 billion. Ten months ago subsidy to Wapda/Pepco was estimated at Rs122 billion.

To be certain, most of what had been expected hasn't come through. There are only two remaining months in the current financial year and the auction of 3G has been delayed. Etisalat isn't paying up and CSF may or may not be in the pipeline.

The federal government, as a consequence, has borrowed an unprecedented Rs1.033 trillion-as oppose to the budgetary estimate of Rs303 billion-for budgetary support from the State Bank of Pakistan and scheduled banks. On April 20, the Planning Commission revealed that power sector subsidies actually amount to Rs360 billion as oppose to the budgetary estimate of Rs122 billion.

In a scenario where GDP growth is some 30 percent below target, power subsidy is 300 percent above budgetary estimates, foreign sources have dried up and internal bank borrowing is a wholesome trillion rupees the real budgetary deficit is fast approaching 10 percent of GDP. I could find only four countries in the world with a higher budgetary deficit-Madagascar, Turkey, Maldives and Benin. – *Courtesy The News*

No investor avails tax credit for equity investment scheme

The Federal Board of Revenue (FBR) has shown surprise that so far not a single investor has availed the lucrative 'tax credit for equity investment scheme' announced in budget (2011-2012) for newly established industrial undertakings and tax credit to companies with 100 per cent equity investment in the purchase and installation of plant and machinery for balancing modernisation, replacement.

Sources told here on Monday that 'tax credit for equity investment scheme' was the biggest tax relief measure announced in last budget (2011-2012).

So far, no new investor has availed the benefits of the tax credit scheme.

However, exact status of the 'tax credit for equity investment scheme' would be known at the closure of current financial year on June 30, 2012.

By the end of current fiscal, the FBR will be in a better position to give proper status of the 'tax credit for equity investment scheme' based on data being collected from the field formations.

It is important to mention that a new section 65D was introduced in the Income Tax Ordinance in last budget to provide incentive for investment in new industrial undertaking in Pakistan.

Tax rebate equal to 100 of the tax payable by a newly established company is admissible where all laid down conditions are fulfilled.

The industrial undertaking managed by such company is set up/established in Pakistan between July 1, 2011 and June 30, 2016.

The said industrial undertaking is established with 100% equity owned by the said company.

The company or the industrial undertaking is not established by the splitting up or reconstruction or reconstitution of an industrial undertaking already in existence and the company or the industrial undertaking is not established by transfer of machinery or plant from an existing industrial undertaking.

Tax credit under this section shall be available for a period of five years, which will begin from the date of setting up of such industrial undertaking or from the date of commencement of commercial production.

In case of tax credit for equity investment for BMR/Expansion in Industrial unit, the newly introduced section 65E is meant to provide tax credit on investment by a company with 100% equity investment in balancing, modernisation, replacement, or for expansion of the plant and machinery already installed, in an industrial undertaking set up in Pakistan before July 1, 2011 subject to the fulfilment of laid down conditions.

Tax credit shall be allowed on the basis of proportion which such equity investment bears to the total investment in the company.

The tax credit shall be allowed if the plant and machinery is purchased and installed at any time between July 1, 2011 and June 30, 2016 and amount of tax credit shall be allowed against the tax payable by the taxpayer in respect of the tax year in which the plant or machinery is purchased and installed and for the subsequent four years, FBR added. – *Courtesy Business Recorder*

Tax arrears worth billions: FBR to initiate legal proceedings against units

In an extraordinary development, the Federal Board of Revenue has decided to legally proceed against units for recovery of tax arrears stuck up in courts to the tune of billions following expiry of stay orders beyond period of six months under clause (4A) of Article 199 of the Constitution.

Official sources told here on Sunday that the FBR will start recovery proceedings in cases where six months have been expired after grant of stay orders in order to ensure implementation of the landmark observations of Chief Justice Iftikhar Muhammad Chaudhry during his address at the concluding session of the International Judicial Conference.

The CJP said, "I would like to point out that under clause (4A) of Article 199 of the Constitution, an interim order passed by a High Court in a case relating to assessment or collection of public revenues ceases to have effect on the expiration of a period of six months and the High Court is required to finally decide such matters within the said period of six months from the date on which the interim order is made.

However, it is observed that despite the aforesaid constitutional clog, such matters continue to linger on for longer periods of time on one pretext or the other without any extension having been granted by the competent court.

As a matter of fact, in view of the above constitutional provision, no extension at all can be granted by any Court.

Since the interim order ceases to have effect on expiration of a period of six months from the date of passing of the order, the concerned authorities are well within their right to seek enforcement of the judgement/order, against which any such interim order is passed after the expiry of the aforesaid period of six months, CJP added.

Under clause (4A) of Article 199 of the Constitution, the FBR would now be able to recover tax demands from the units involved in litigation and proceed for completion of income tax assessments against the taxpayers where stay has been expired beyond a period of six months.

The FBR would be able to resolve major tax related cases to the tune of billions pertaining to income tax assessments and recovery of taxes.

So far, over Rs 50 billion has been stuck up in courts due to litigation and recovery would help the tax department to meet the revenue collection target of Rs 1952 billion for 2011-2012, official said.

The FBR has found that certain lawyers and legal representatives in courts try to prolong litigation in courts to avoid orders.

They obtain stay orders against the tax department and further prolong the cases by using delaying tactics even after expiry of six months of obtaining stay orders.

Resultantly, the FBR was unable to proceed against the taxpayers for completion of the income tax assessments or recovery of tax arrears in courts.

Now, the FBR will rightly resume proceedings against the units through proper interpretation of the clause (4A) of Article 199 of the Constitution.

This would enable the tax department to start recovery or assessment proceedings against all such taxpayers where stay orders have been expired beyond a period of six months, official added.

Meanwhile, a press release issued by the FBR here on Sunday said, "Honourable Chief Justice of Pakistan, Mr Justice Iftikhar Muhammad Chaudhry, while addressing the concluding session of the International Judicial Conference, held a few days ago, said

that "To streamline the expeditious disposal of cases pertaining to assessment or collection of public revenues, it is desirable that sufficient courts are established."

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To streamline the expeditious disposal of cases pertaining to assessment or collection of public revenues, it is desirable that sufficient courts are established.

To completely thrash out the issue, we will be further examining it in the next meeting of the National Judicial (Policymaking) Committee," the FBR added. – *Courtesy Business Recorder*

Individuals/firms communications: acknowledgement receipts to help restore taxpayers' confidence: experts

The confidence of taxpayers would be restored by receiving written acknowledgement receipts of their emails, letters, applications, presentations, communications and queries from the Federal Board of Revenue under the government policy of good governance.

Tax experts told *Business Recorder* on Tuesday the FBR on March 3, 2011 issued a standing order on the standardised acknowledgement in response to private sector individuals/firms communications.

The standing order was issued to ensure that the taxpayers having problems with the tax department can file their applications or timely obtain clarifications on legal issues involving tax matters.

This initiative was a part of the overall reforms and facilitation to the taxpayers.

However, the standing order of the FBR has not been fully implemented and taxpayers are unable to obtain the standardized acknowledgement prescribed by the Board.

The standing order on the standardized acknowledgement was issued with the aim to timely respond to the queries of the taxpayers.

The applicants, who receive such kinds of acknowledgement, have confidence that someone in the tax department is ready to hear their problems or grievances.

If the FBR issue standardized acknowledgement receipts, it would have a positive impact on the taxpayer.

The taxpayer will gain confidence that the tax department has acknowledged his application and he will timely receive response of the same, tax expert said.

The issuance of such kind of standardized acknowledgement receipts also make its mandatory for the tax officials in the Board to timely resolve the problems of the taxpayers and issue clarifications of small and medium taxpayers having no political backing.

The taxpayers having no backing of the influential groups or powerful mafia would be entertained on priority basis on receiving such kind of written standardized acknowledgement receipts issued by the FBR.

This would also give a clear message to the small and medium taxpayers that the tax machinery will also resolve their individual problems on merit.

Contrary to this, the standing order of the FBR has not been implemented in its true spirit.

This point towards immediate establishment of the Complaint Management System within the FBR to address complaints and queries of the taxpayers, tax experts added.

According to the standing order of the FBR March 3 2011, Secretary, Revenue Division/Chairman, FBR has been pleased to observe that the communications made by Private Sector

individuals/ firms are not acknowledged at any level to whom these are addressed.

This silence is not only discourteous but also raises doubts in public mind regarding the responsiveness of our organization.

In future an acknowledgement whether by way of a letter, SMS or e-mail, should invariably be provided so as to create confidence about our organisational behaviour in the public mind.

A standardized acknowledgement receipt may also be circulated for the facility of officers.

It is therefore decided that in future an acknowledgement in the laid down format, either in writing or through e-mail, should invariably be provided by the office where the communication is addressed, so as to create confidence on our organisational behaviour in the public mind, standing order of the FBR added. –
Courtesy Business Recorder

Collection out of current demand created: LTU Islamabad registers landmark increase

Large Taxpayer Unit (LTU) Islamabad, Federal Board of Revenue has achieved a new landmark, showing 729 percent increase in the income tax collection out of current demand created during July-March (2011-12) as compared to the corresponding period of last fiscal.

Sources told here on Monday that the performance of the LTU Islamabad during July-March (2011-12) has shown remarkable growth in all taxes particularly recovery of income tax arrears.

The latest data revealed that the income tax collection out of current demand created was Rs 20.8 billion during July-March (2011-12) against Rs 2.5 billion in the same period last fiscal, reflecting an exceptional increase of Rs 18.3 billion.

In percentage terms, there is a record increase of 729 percent in the income tax collection out of current demand created during the period under review.

Similar kind of positive trend has been observed in the income tax demands created by the LTU Islamabad.

Income tax demand of over Rs 95 billion has been created during this period against Rs 43 billion in the corresponding period last fiscal, showing an extraordinary increase of 120 percent.

The ongoing performance of the LTU Islamabad would enable the FBR to achieve the ambitious revenue collection target of Rs 1952 billion by the end of current fiscal.

According to the data, LTU Islamabad has collected Rs 107.648 billion as income tax during July-March (2011-2012) against Rs 73 billion in the corresponding period of last fiscal, showing a growth of 47 percent.

The collection of sales tax was Rs 91.078 billion during the first nine months of current fiscal against Rs 81 billion in the same period last fiscal, showing an increase of 12 percent.

During this period, LTU Islamabad has collected Rs 33.158 billion as Federal Excise Duty (FED) during July-March (2011-2012) against Rs 31.726 billion in the corresponding period of last fiscal, showing a growth of five percent.

Sources acknowledged that Chief Commissioner Large Taxpayer Unit (LTU) Islamabad Ijaz Hussain Shah has followed the FBR policy of enforcement and compliance through proper monitoring and timely payments of refunds to the large taxpaying units of the country during current fiscal (2011-2012).

Through persistent efforts of the Chief Commissioner LTU Islamabad, the units falling within the territorial jurisdiction of the LTU have paid their due amount of taxes during current fiscal.

Sources said the jurisdiction of Large Taxpayer's Unit (LTU) Islamabad primarily consists of cases relating to Oil & Gas, Banking, Telecommunication, Textile, Cement, Pharmaceutical, Fertiliser and Construction sectors.

The country which was already under the pressure of world-wide recession has been further burdened with Circular debt issue which has adversely affected the major oil and gas companies in particular and the refineries and Oil & Gas Marketing Companies in general.

Big financial institutions as well as corporations are also facing the crisis of heavy circular debt which have depleted their liquidity.

The spending by the Government itself is at a halt which is obviously affecting the deduction of income tax.

Moreover, the Government has also imposed cuts on Public Sector Development Program (PSDP) spending, which also adversely impacted the withholding taxes.

In spite of the above dismal economic scenario, LTU Islamabad strived very hard to achieve the revenue estimates of Income Tax, Sales Tax and Federal Excise Duty for the current financial year.

The performance of collection of taxes up to March 2012 when compared with the preceding period reflects increase.

LTU, Islamabad shall make strenuous efforts to ensure collection of Inland Revenue Taxes in the remaining period of the current financial year in order to achieve the revenue estimates for financial year 2011-2012, sources added. – *Courtesy Business Recorder*

FBR issues list of 473 tax-related cases decided by Supreme Court

The Federal Board of Revenue has issued the list of 473 major tax-related cases of income tax, sales tax, federal excise duty and customs duty decided by the Supreme Court of Pakistan.

Sources told here on Monday that the FBR has placed the list of 473 tax related cases involving major issues on the FBR website.

The FBR issued the list so that the field formations should also know the latest status of the major cases decided by the Supreme Court of Pakistan.

The FBR has started the exercise to give updated data of the cases decided by the apex court to the field formations.

The Board would also update the "list of decided cases of income tax, sales tax, FED and customs by the Supreme Court of Pakistan".

The cases are related to the non-payment of further tax on goods supplied to the un-registered persons.

In another case, the registered person made taxable supplies in December 2000 to May 2000 to unregistered person without payment of further tax amounting to Rs 56.550 m in contravention of the provisions of section 3(1A), 6, 26 of the Sales Tax Act, 1990.

The cases are also related to the levy of customs duty on manifested quantity of oil or recovered oil.

Other cases cover issues of collection of tax under section 235 of Income Tax Ordinance, 2001; rejection of Trading Account under section 32 of Income Tax Ordinance, 1979; penalty for reduction to a lower stage and scale for a period of seven years; question of

limitation; time limitation of 52/86 of the repealed Ordinance, 1979; selection of case for audit u/s 177(4)(d); retrospective promotion to inspectors income tax; smuggling of foreign origin betel nuts; interpretation of section of 153(6A) & (6B) of the Income Tax Ordinance, 2001; overriding effect of section 25B over section 25 of the Customs Act; valuation under section 25 of the Customs Act; exemption of section 2(f)(vi) therefore exempted from levy of WWF; seizure of foreign currency and levy of special excise duty levied through SRO 655(I)/07 dated 29.6.2009 was without jurisdiction before insertion of section 3A of FED Act 2005 because on 29.6.2009 no legislative support was available.

The tax related cases also cover issues of collection of tax u/s 235 of Income Tax Ordinance, 2001, sources added. – *Courtesy Business Recorder*

C.No.1/23-STB/2010(Pt)/52102-R

Islamabad, the 11th April, 2012

S. Mushtaque Kazimi,
Member (Tax Policy),
Sindh Revenue Board,
9th Floor, Shaheen Complex,
M.R. Kayani Road,
Karachi.

Subject: **Input Tax Credit of Sindh Sales Tax against the Output Tax on Goods in Terms of Section 7(1) of the Sales Tax Act, 1990, Read with Section 2(14)(d) thereof.**

I am directed to refer to SRB's D.O. No. SRB-3-4/MTP/11/2012, dated 30th March, 2012 on the subject cited above and to say that input adjustment is allowed at the time of filing of return in accordance with section 7(1) of the Sales Tax Act, 1990. However, in some instances due to non-availability of SRB data with FBR, the bonafide of input claimed by the taxpayer in lieu of Sindh Sales Tax on Services, were not accepted. Recently, SRB have mutually agreed to provide access to their respective databases for the purpose of verification of input adjusted by their taxpayers, which will eventually facilitate system based input tax adjustment without recourse to manual verifications thus resolving the issue of input adjustment.

No.SRB-3-4/4/2012, Karachi, the 14th April, 2012.— In exercise of the powers conferred by section 72 of the Sindh Sales Tax on Services Act, 2011 (Sindh Act No XII of 2011), read with sections 9, 13 and 75 thereof, the Sindh Revenue Board is pleased to direct that the following further amendment shall be made in the Sindh Sales Tax on Services Rules, 2011, namely:—

In the said rules, in rule 30, in sub-rule (2), the words “issuance cheque return” shall be omitted.

No.SRB - 3 - 4/5/2012, Karachi, the 14th April, 2012.— In exercise of the powers conferred by sub - section (2) of section 30 of the Sindh Sales Tax on Services Act, 2011 (Sindh Act No. XII of 2011), the Sindh Revenue Board is pleased to direct that the following amendment shall be made in its notification No. SRB - 3 - 4/10/2011 dated 18th October, 2011, namely:—

In the aforesaid notification, in the Table, S. No. 3 in column (1) and entries relating thereto in column (2) shall be omitted.

S.R.O. 378(I)/2012, Islamabad, the 16th April, 2012.— In exercise of powers conferred by regulation 4(1)(c) of the Securities and Exchange Commission of Pakistan (Conduct of Business Regulations, 2000, and in supersession of S.R.O. 26(I)/2012, dated January 13, 2012, the Chairman, Securities and Exchange Commission of Pakistan, is pleased to decide that the Commissioners shall, in addition to any other work assigned to them from time to time, be responsible to oversee the work of Divisions/Departments of the of the Securities and Exchange Commission of Pakistan as specified below, namely:—

1. Mr. Mohammad Ali	1. Specialized Companies Division 2. Strategy, Development, Legislation and External Relations Division 3. Talent Management, Finance and Communication Division 4. Organizational Effectiveness Division 5. Commission's Secretariat 6. Chairman's Secretariat 7. Investor Education Department
2. Mr. Tahir Mahmood	1. Company Law Division 2. Internal Audit 3. Audit Oversight Board
3. Mr. Imtiaz Haider	1. Securities Market Division 2. Appellate Bench
4. Mr. Mohammad Asif	1. Insurance Division 2. Shariah Advisory Board

S.R.O. 383(I)/2012, Islamabad, the 18th April, 2012.— In exercise of powers conferred by sub-section (2) of section 53 of the Income Tax Ordinance, 2001 (XLIX of 2001), the Federal Government is pleased to direct that the following further amendments shall be made in the Second Schedule to the said Ordinance, namely:—

In the aforesaid Schedule:—

(a) In Part-I,—

(i) in clause 61, after sub-clause (xliii), the following new sub-clause shall be added, namely:—

“(xliv) Any amount donated to Federal Board of Revenue Foundation.”; and

(ii) in clause 66, after sub-clause (xxvii) the following new sub-clause shall be added, namely:—

“(xxviii) Federal Board of Revenue Foundation.”.

- (b) In Part-IV, after clause (61), the following new clause shall be inserted, namely:—

“(61A) The provisions of section 231A shall not apply in respect of any cash withdrawal by exchange companies duly licensed and authorized by the State Bank of Pakistan on their bank account exclusively dedicated for their authorized business related transaction:

Provided that, -

- (a) exemption under this clause shall be available to exchange companies who are issued exemption certificate by the concerned Commissioner Inland Revenue for a financial year; and
- (b) the Commissioner shall issue the exemption certificate after obtaining relevant details and particulars of the Bank Accounts.”.

C.No.4(1)ST-L&P/2011

Islamabad, the 18th April, 2012

SALES TAX GENERAL ORDER NO. 21/2012

Subject: **Amendment in STGO 10/2007 dated 13-09-2007 – Allowing Facility of Zero-Rating on Supply of Electricity.**

In exercise of powers conferred by clause (d) of section 4 of the Sales Tax Act, 1990, the Federal Board of Revenue is pleased to make the following further amendments in its Sales Tax General Order No. 10 of 2007 dated 13th September, 2007, namely:—

In the aforesaid General Order, in the table, after serial number 282 in column (1) and the entries relating thereto in columns (2), (3) and (4), the following new serial numbers and the entries relating thereto shall be **added**, namely:—

S.#	Name of Unit	Registration No.	Consumer No.
283	M/S SHAHTAB FABRICS (PVT) LIMITED	0408520806846	27156130002300U

C.No.57(2)Jurisdiction/2011-Vol-IV-55926-R

Islamabad, the 18th April, 2012

ORDER

Subject: **Jurisdiction of Commissioner Inland Revenue, Large Taxpayer Unit, Karachi.**

In pursuance of jurisdiction order C.No.57(2)Jurisdiction/2011-Vol-IV-50407-R dated 7th April, 2012 following further amendments are made as under:—

ST. 224*Statutes*

2. In column 4 of the table following paragraph may be added against each Commissioner IR mentioned in column 2 of the table.

“Jurisdiction over all provident funds, superannuation funds, Gratuity Funds of companies being assessed at LTU, **Karachi as mentioned in Annexure-“A”, “B”, “C” & “D”** as the case may be.

3. The following further cases are also included in the jurisdiction of Large Taxpayer Unit, Karachi.

i) Zone-I

After S.No.226.

S#	NTN	NAME	
227	0801434-5	Dawood Hercules Chemicals Limited	In “Annex-A”
228	0816469-0	Silk Bank Ltd (formerly Saudi Pak Commercial Bank)	-do-
229	0804497-0	Philip Morris (Formerly Lakson Tobacco Ltd)	-do-

ii) Zone-II

After S.No.226.

S#	NTN	NAME	
230	30463358	Arwen Tech (Pvt) Ltd. (Employ Provident Fund Trust	In “Annex-B”

iii) Zone-III

After S.No.226.

S#	NTN	NAME	
227	0711987-9	Sapphire Power Generation Ltd.	In “Annex-C”

iv) Zone-IV

After S.No.226.

S#	NTN	NAME	
228	3396527	Engro Goods Supply Chain (Pvt) Ltd.	In “Annex-D”
229	1420897	Ranipur Sugar Mills (Pvt) Ltd.	-do-

4. The following 02 cases are deleted as the jurisdiction of the same lies with LTU, Islamabad and RTO, Peshawar respectively.

S#	NTN	NAME	
75	0709389	Adamjee Insurance Company Limited	In “Annex-C” at Sr. No. 75.

26	0710034	Cherat Cement Company Ltd.	In "Annex-D" at Sr. No. 26.
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2. This notification shall take effect from 7th April, 2012.

C.No.3(9)ST-L&P/2010

Islamabad, the 20th April, 2012

**All Chief Commissioners,
LTUs/RTOs**

Subject: **Extension of the date for filing of Sales Tax/Federal
Excise Duty Returns for the Period March, 2012 for all
Registered Persons.**

In exercise of the powers conferred under section 74 of the Sales Tax Act, 1990 and section 43 of the Federal Excise Act, 2005, the Federal Board of Revenue is pleased to further extend the date of filing of Sales Tax/Federal Excise returns up to 25th April, 2012, for the tax period March, 2012, for all registered persons.

2012 PTR 902 (Trib. Ind.)

INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM

Sunil Kumar Yadav, Judicial Member and
B.R. Baskaran, Accountant Member

FACTS/HELD

1. **S. 40(a)(ia): Non-jurisdictional High Court prevails over Special Bench**
2. For AY 2005-06, the AO disallowed Rs. 47.26 lakhs u/s 40(a)(ia) on the ground that the TDS had not been paid in time. The assessee claimed that the *amendment to s. 40(a)(ia) by the Finance Act 2010 w.e.f. 1.4.2010 to provide that no disallowance could be made if the TDS was paid on or before the due date specified in s. 139(1) was retrospective* in nature as held in CIT vs. Virgin Creations and that the contrary ruling of the Special Bench in Bharti Shipyard Ltd vs. DCIT 132 ITD 53 (Mum) could not be followed. HELD by the Tribunal:

In Virgin Creations the Calcutta High Court has passed a reasoned order and held that the amendment to s. 40(a)(ia) is retrospective in nature. The binding nature of the decision of the Special Bench when a lone decision of non-jurisdictional High Court is available on the very same issue was examined in the Third Member decision in Kanel Oil & Export Ltd 121 ITD 596 where it was held that **where there is only a judgement of the non-jurisdictional High Court prevails over an order of the Special Bench** even though it is from the jurisdictional Bench (of the Tribunal). As the Calcutta High Court's decision is the lone one on the issue whether s. 40(a)(ia) is retrospective, it has to be followed in preference to the decision of the Special Bench of the Tribunal in Bharti Shipyard Ltd. Consequently, amounts in respect of which TDS is paid on or before the due date of filing the ROI is eligible for deduction.

Appeal partly allowed.

ITA No.352/Vizag/2008 Assessment Year: 2005-06.

Heard on: 11th April, 2012.

Decided on: 14th April, 2012.

Present at hearing: GVN HARI, CA, for Appellant. T.L. PETER, CIT-DR, for Respondent.

JUDGMENT

Per B.R. Baskaran:– (Accountant Member)

The assessee is aggrieved by the order dated 31-3-2008 passed by Learned CIT(A), Rajahmundry relating to the assessment year 2005-06 in respect of following two issues:–

- (a) Allocation of common expenditure between shipping business and non-shipping business.
- (b) Disallowance made under section 40(a)(ia) of the Act.

3. The facts relating to the above said issues are stated in brief. The assessee is engaged in shipping business and also in other business activities. For Shipping business, the assessee preferred to offer income under tonnage tax scheme under section 115VJ of the Act, under which the income is assessed on some fixed basis without referring to the book results. The Assessing Officer noticed that the assessee has not properly distributed the common expenses between the shipping business and other business. Accordingly he identified the common expenses and allocated it in the ratio of gross receipts between the two businesses. In this process, the Assessing Officer made an addition of Rs.8,00,103/- to the total income. The assessee had made payments towards Painting and blasting contract to the tune of Rs.52,26,577/-. The assessee had deducted tax on Rs.47,26,577/-, but the said tax was remitted only on 23.11.2005, i.e. not within the due date prescribed for the said purpose. The assessee did not deduct tax on the balance amount of Rs.5.00 lakhs. Hence the Assessing Officer disallowed the above said aggregate amount of Rs.52,26,577/- u/s 40(a)(ia) of the Act. The Learned CIT(A) confirmed both the additions. The Learned CIT(A) also enhanced the income by making further disallowance of Rs.1,40,000/- u/s 40(a)(ia) of the Act. Aggrieved, the assessee is in appeal before us.

4. The Learned Authorised Representative first addressed the issue of disallowance made under section 40(a)(ia) of the Act. He submitted that the Assessing Officer disallowed a sum of Rs.47,26,577/- for the reason that the assessee has failed to remit the tax deducted at source in time. He submitted that though there was delay in remitting the TDS amount, yet the assessee has remitted the same before the due date for filing return of income for the year under consideration. He submitted that the Finance Act 2010 has amended the provisions of sec. 40(a)(ia) w.e.f. 1.4.2010, whereby no disallowance is required to be made if the TDS is paid on or before the due date specified in sec. 139(1) of the Act.

He contended that the said amendment shall have retrospective operation, since it is a beneficial amendment. For this proposition, he placed reliance on the decision dated 23-11-2011 rendered by Hon'ble Calcutta High Court in the case of CIT Vs. Virgin Creations. Accordingly he submitted that the impugned disallowance made by the Assessing Officer is liable to be deleted as the assessee has remitted the TDS amount before the due date for filing the return of income.

5. With regard to other two disallowances viz., Rs.5,00,000/- and Rs.1,40,000/- made u/s 40(a)(ia) of the Act, the Learned A.R, by placing reliance upon the decision of Visakhapatnam Special bench of Tribunal in the case of M/s Mrilyne Shipping & Transports which was pronounced on 09-04-2012, submitted that the provisions of sec.40(a)(ia) cannot be invoked to disallow the amounts which have already been paid during the previous year and does not remain payable as at the end of the financial year. He submitted that the assessee has paid both the amounts referred (Supra) and hence the provisions of sec.40(a)(ia) cannot be invoked to disallow the same.

6. On the contrary, the Learned D.R submitted that the provisions of sec. 40(a)(ia) of the Act shall apply to all payments covered by sec. 194C of the Act whether they have already been paid or remain as payable as at the end of the relevant financial year. He drew support from the following case law:-

- (a) *Dey's Medicals (UP) (P) Ltd* (216 ITR 83 (All))
- (b) *Sree Chaudhry Transport* (225 CTR 125 (Raj))
- (c) *CIT vs. Orient Goa (P) Ltd* (325 ITR 554 (Bom))

With regard to the amendment brought out by the Finance Act, 2010 in sec. 40(a)(ia) of the Act, the Learned D.R submitted that the same shall not have retrospective effect and for that proposition he placed reliance on the decision of Mumbai Special Bench of ITAT in the case of Bharti Shipyard Ltd Vs. D.C.I.T reported in (2011)(132 ITD 53). He further submitted that the decision has been rendered by the Hon'ble Calcutta High Court by passing a non-speaking order and hence the decision of Special bench is binding on this division bench.

7. We have heard the rival contentions and perused the record. We find that the Hon'ble Calcutta High Court in the case of *Virgin Creations*, (Supra), has passed a reasoned order in holding that the amendment brought out in sec. 40(a)(ia) is retrospective in nature. The binding nature of the decision of Special Bench when a lone decision of non-jurisdictional High Court is available on the very same issue was examined in the Third Member decision of Ahmedabad bench in the case of *Kanel Oil & Export Inds. Ltd* (121 ITD 596). For the sake of convenience, we extract below the relevant observations made by the Third Member:-

“7. I have considered the rival arguments presented before me by both the sides. It all boils down to this, viz., whether the order of the Special Bench upholding the levy of interest in light of sub-section (4) of section 115JA should be followed or the judgment of the Bombay High Court in *Snowcem India Ltd.*'s case (Supra), also rendered in the context of section 115JA, has to be applied. Both the decisions are under section 115JA with which we are concerned. One is of a Special Bench of the Tribunal, Ahmedabad and the other is of a High Court, though not the jurisdictional High Court. A simple answer would be that the judgment of a High Court, though not of the jurisdictional High Court, prevails over an order of the Special Bench even though it is from the jurisdictional Bench (of the Tribunal) on the basis of the view that the High Court is above the Tribunal in the judicial hierarchy. But this simple view is subject to some exceptions. It can work efficiently when there is only one judgment of a High Court on the issue and no contrary view has been expressed by any other High Court. But when there are several decisions of non-jurisdictional High Courts expressing contrary views, it has been recognized that the Tribunal is free to choose to adopt that view which appeals to it. In *kishiroop Chemicals Co. (P.) Ltd. vs. ITO* [1991] 36 ITD 35 (SB) (Delhi), it was held by the Special Bench, Delhi that “if there were conflicting decisions of the High Courts, other than the jurisdictional High Court, the Benches of the Tribunal were free to adopt the view which to the Benches appear to be better and that in certain circumstances the view which was favourable to the taxpayer should be adopted”

8. There is no dispute that the decision rendered by the Hon'ble Calcutta High Court is the lone decision available on the issue under consideration as on date. Accordingly, we are inclined to follow the same in the instant case in preference to the decision rendered by the Special bench of ITAT in the case of *Bharti Shipyard Ltd*, referred (Supra). Accordingly, by following the decision of Hon'ble Calcutta High Court, we hold that the assessee herein is entitled to claim deduction of expenses if the TDS deducted there on is remitted before the due date for filing the return of income. In the instant cases, it is stated that the assessee has remitted the TDS amount on 23.11.2005. However, the details of due date for filing return of income for the year under consideration was not furnished to us. Accordingly, we are of the view that this matter requires to be verified at the end of the Assessing Officer.

9. The assessee would also get benefit of the decision of Special bench in the case of *Merilyne Shipping and Trasports*, referred (Supra). The issue viz., whether the provisions of sec.40(a)(ia) would apply to all payments made during the course of the year or it would apply only to the

expenditure which remain payable as at the end of relevant year was considered by the Visakhapatnam Special Bench in the case of Merilyn Shipping & Transports, referred (Supra) and the Special bench, by majority view, has held that the provisions of section 40(a)(ia) of the Act would apply only to the expenditure which is payable as on 31st March of every year and cannot be invoked to disallow the amounts which have already been paid during the previous year without deducting tax at source. With regard to the decisions relied upon by the Learned D.R, it was specifically observed at paragraph 11 of the Judicial Member's order that the specific issue regarding "paid", "credited" or "payable" has not been considered in those decisions and even it was not argued. Accordingly it was held by the Judicial Member that these judgments will in no way affect the issue before them. Accordingly, by following the decision rendered by the Special bench referred (Supra), we hold that the provisions of sec.40(a)(ia) would apply only to the expenditure which remain payable as at the end of the relevant financial year.

10. In the instant case, the submission of the assessee is that it has paid the entire amount of expenditure subjected to disallowance under section 40(a)(ia) of the Act before the end of the financial year and hence the provisions of sec.40(a)(ia) cannot be invoked on them. However this claim is not borne out of the orders of tax authorities. Accordingly, we are of the view that the said claim requires verification at the end of the Assessing Officer.

11. In view of the foregoing discussions, we set aside the order of Learned CIT(A) on the issue of disallowances made u/s 40(a)(ia) of the Act and restore the same to the file of the Assessing Officer with the direction

- (a) to verify the details of remittance of TDS and delete the additions, if the due TDS had been remitted before the due date for filing return of income or/and
- (b) to verify whether the impugned expenditure has been paid before the end of the relevant financial year and restrict the disallowance only to those amount which remain payable as at the end of the relevant financial year in respect of those items of expenditure on which the TDS was not deducted at all or in respect of those cases where the TDS was remitted after the due date for filing the return of income.

12. The next issue pertains to the allocation of common expenditure between the shipping business and other business. The Learned A.R contended that the Managing Director is exclusively looking after the shipping business and hence the salary paid to him amounting to Rs.4,20,000/- should not have been taken as common expenditure. He also submitted that the assessee has allocated the common expenses in a fair and reasonable manner and accordingly prayed that the addition made in this regard may be deleted. On the other hand, the Learned D.R strongly

defended the order of Learned CIT(A). On a careful consideration of the rival submissions and the order of Learned CIT(A), we notice that the assessee, apart from offering oral submissions, has failed to substantiate its claim with tangible material before the tax authorities and hence the Learned CIT(A) has confirmed this addition. Before us also, the assessee did not file any evidence in support of its claim. Hence, we do not find any reason to interfere with the order of Learned CIT(A) on this issue.

13. In the result the appeal of the assessee is treated as partly allowed for statistical purposes.

Pronounced in the open Court on 13.04.2012.
