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Kind regards

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Legitimizing dirty money

by
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Promulgation of Finance (Amendment) Ordinance) 2012, by the President on 24 April 2012, just one day before the scheduled session of National Assembly, was certainly an undesirable and questionable act, though not strictly against Article 89 of the supreme law of the land—Constitution of Islamic Republic of Pakistan. In emergent situation when the Senate or National Assembly is not in session, the President can promulgate any Ordinance having life of 120 days, unless it is disapproved by the elected members before the date of expiry. What was the emergency that necessitated this Ordinance? Nothing, except protection of tax evaders, who have made (or intend to make) enormous investment in shares, but cannot explain the source of their funds.

Money laundering facility has been provided to all kinds of criminals—rent-seekers, terrorists, drug traffickers, arms sellers, extortionists and tax evaders. Two disturbing features of the Ordinance are:

- Where a person has made any investment in the shares of a public company traded on a registered stock exchange in Pakistan from the date of coming into force of the Eighth Schedule to the Income Tax Ordinance, 2001 till June 30, 2014, enquiries as to the nature and sources of amount invested **shall not be made** provided the amount remains invested for a period of **120 days** in the manner as may be prescribed and tax on capital gains, if any, has duly been discharged in the manner laid down plus a statement of investments is filed with the Commissioner along with the return of income and wealth statement for the relevant tax year within the due date as provided in section 118 of Income Tax Ordinance, 2001.
- Where a person has made any investment in the listed securities, enquiries as to the nature and source of the amount invested **shall not be made** for any investment **made prior to the introduction of Eighth Schedule**, provided that a statement of investments is filed with the Commissioner along with the return of income and wealth statement for tax year 2012 within the due date as provided in section 118 of Income Tax Ordinance, 2011 and in the manner prescribed and the amount remains invested **for a period of 45 days** up to June 30, 2012, in the manner as may be prescribed.

The above two provisions of the Finance (Amendment) Ordinance, 2012 have been justified by official circles on the following grounds:

1. The revised capital gains tax (CGT) regime would improve documentation and collection from investments made in the stock exchanges.
2. FBR collected merely PKR 418 million from the CGT during 2011, reflecting low collection as compared to the projected revenue of Rs. 4 billion.
3. Under the revised CGT regime, stock market would attract new investments which would further increase revenue collection.

This nation has a right to know who the big investors at the stock markets are. Why are they incapable of explaining their source(s) of investment? Why these fat-cat investors need to be given protection from scrutiny of the origin of their funds? Why have the provisions of the Income Tax Ordinance, 2001 been made inoperative debarring tax authorities to inquire about the source of money invested or to be invested in the stock markets till 30 June 2014?

The Securities and Exchange Commission of Pakistan (SECP), the initiator behind this Ordinance, claims that it would provide a boost to the markets, and the ultimate goal is increase in state revenues. For the law-abiding taxpayer it is just a slap on his face. Legitimizing dirty money, generated from informal or black economy, at the State level in the name of increasing revenue is simply deplorable. Why not instead, confiscate all such assets created out of illegal activities?

Moves like the Finance (Amendment) Ordinance, 2012 cannot help promote the fundamental purpose of the stock market: promoting IPOs (initial public offers). This "favour" for stock exchanges is totally unjust as there were less than 25 IPOs floated from 2008 to 2011. The government should have given incentives to new industries, creating new jobs in underdeveloped areas, rather than amnesty to tax evaders and money launderers. The fundamental question is whether such amnesties do actually lead to positive long-term changes from the societal point of view or promote money power through accumulation of wealth? A robust stock market is not possible unless there is positive growth in the industrial sectors through IPOs.

It is a curious paradox that while funds for worthwhile industrial and business growth and public benefits are scarce in Pakistan, there is colossal unaccounted, untaxed, hidden money circulating in the economy in search of further undercover gains. The corrupt and corrupting elements ruling and controlling Pakistan are ever ready to give legal cover to dirty money—permanent immunity is available under the garb of Protection of Economic Reforms Act, 1992. But a few powerful ones do not want to have their trace in any remittance process so they have managed a new money laundering device in the form of this new Ordinance—the rest is just a cover-up. Immunity announced by the Finance (Amendment) Ordinance, 2012 is meant for "big players" at the stock exchanges to fleece small investors in the name of "boosting volumes". In fact, they would enhance their "profits" as fund managers of tax evaders,

drug barons, terrorists and plunderers of national wealth. This immunity is in conflict with section 3 of the Anti-Money Laundering Act, 2010 defining the acts that constitute "money laundering". It is pertinent to mention that section 2(f)(vii)(a) of this Act covers all kinds of instruments traded at the stock exchanges.

Pakistan is facing multiple challenges on the economic front: reckless borrowing by the government for meeting its day-to-day expenses and lack of resources for rapid infra-structure improvements, meeting trade deficits, fiscal deficit and balance of payments, and what not. One of the factors responsible for failure in revenue generation is the speed with which black money is generated every day—courtesy mafia-like operations of apex revenue authority that include amongst others, missing containers, refund scams, smuggling, under invoicing, and abuse of legal tool of issuing Statutory regulatory Orders (SROs) rather than going to Parliament for amendments in fiscal laws. In the context of the prevailing grave challenge to combat terrorism, together with money laundering operations funding the criminals, and the problem of ever-growing black money, which according to independent experts is about three times of the documented economy, there is an urgent need to launch an asset-seizure legislature, rather than giving legal cover to tax cheats and money launderers at stock exchanges and elsewhere.

Achieving tax collection target depends on Sindh Revenue Board

The Federal Board of Revenue (FBR) is depending on the Sindh Revenue Board (SBR) for achieving the tax collection target of Rs1,952 billion, an official told The News.

The SBR's decision to collect Rs23 billion on account of services, especially from the telecom sector, will help meet the collection target otherwise it would be revised downwards, the official said.

In case SRB fails to collect and deposit the due amount the tax target will be revised downward from Rs1,952 billion to Rs1,929 billion for the outgoing fiscal year.

"The FBR had incorporated Rs23 billion amount at the time of envisaging Rs1,952 billion for the current fiscal year. We expect favourable response from SRB till Mau 10," FBR's Member Facilitation and Taxpayers' Education (FATE), Riffat Shaheen Kazi, who is also spokesperson of the FBR told The News after meeting on Tuesday.

The FBR has so far collected Rs1,424 billion in first ten months (July-April) period of outgoing fiscal year and in last two months the tax authorities required collection of Rs528 billion to meet its desired target. Independent experts say that the FBR can maximum collect Rs1,900 to Rs1,920 billion in the current fiscal year.

When contacted another top official of the FBR, was of the view that it would be quite difficult for the board to broaden the tax base or move towards bringing new sectors into the tax net in upcoming fiscal year when political leadership is heading towards next general elections in 2012/13.

According to statement issued by the FBR, the Tax Reforms Coordination Group (TRCG) met in FBR on Tuesday under the chairmanship of Federal Minister for Finance Dr. Abdul Hafeez Shaikh.

The TRCG and FBR have so far held discussions on policies and strategies to improve the tax policy with a view to increase the revenue. Budget proposals for were also discussed.

The Federal Minister for Finance stressed the need of increasing the momentum of revenue collection to achieve the current target of Rs1,952 billion. He appreciated the efforts of FBR where the Provisional Collection up to April was about Rs1,424 billion and

still counting against last year's collection for the same period at Rs1,150 billion.

He expressed confidence and hope that the assigned budget targets would be achieved through sustained efforts. He desired that the detailed collection under various heads be sent to him on daily basis. The day-long meeting continued till late evening.

The meeting was attended by Deputy Chairman Planning Commission Dr. Nadeem ul Haque, Federal Secretary Finance Abdul Wajid Rana, Secretary EAD Dr. Waqar Masood, DG (ERU) Dr. Khaqan Najeeb and Members TRCG Irfan Nadeem, Arshad Zuberi, Bashir Ali Mohammad, Shabbar Zaidi and Ali Jameel along with FBR members Riffat Shaheen Qazi Member (FATE), Shahid Hussain Asad Member (IR), Sardar Amimullah Khan Member (Enforcement & WHT), Raza Baqir Member (Admin), Azra Mujtaba Member (SP&S) and Nisar Muhammad Chief Collector (North) FBR.

The Tax Reforms Coordination Group crystallized the current proposals on the forthcoming budget, with the objective to facilitate business, reduce cost of doing the business, avoid economic burden, harmonize tax laws and promote industry and commerce while improving tax collection. – *Courtesy The News*

Budget 2012-13: ST on raw material import may be halved

The federal government is seriously considering 50 percent reduction in the standard rate of 16 percent sales tax to 8 percent on the import of raw materials and inputs consumed by local industries and manufacturers in the upcoming budget (2012-13).

Sources told here on Tuesday that the Ministry of Finance and the Federal Board of Revenue (FBR) are reviewing the budgetary proposal to reduce sales tax rate on the import of raw materials from next fiscal year.

This is expected to be a major relief measure for the business community.

However, the FBR has no intention to propose overall reduction in the standard rate of sales tax of 16 percent.

The 50 percent reduction in the sales tax rate on the import of raw materials would check the inadmissible input tax adjustments and control the overall quantum of sales tax refunds.

"Nothing has been final in this regard, but FBR is seriously examining this proposal for budget 2012-13", sources said.

Instead of reducing the standard rate of 16 percent sales tax in next budget (2012-13), sources said that the expanding the sales tax net would be used as an important measure to increase sales tax collection in 2012-2013.

Following increase in the number of sales tax registered units in next fiscal it would increase the sales figures of the new units which would automatically improve sales tax collection in 2012-13.

The increase in profits of the newly registered units would also be reflected on the income tax side, which would increase direct taxes collection as well.

This would also be instrumental in achieving the proposed revenue collection target of Rs 2346 billion for 2012-13.

The FBR has proposed increase the rate of federal excise duty on cigarettes in the upcoming budget (2012-13).

The incentives to encourage investment in power sector are also expected in budget to overcome energy shortage in the country.

Some major budget proposals expected to be incorporated in the Finance Bill (2012-13) included mandatory filing of wealth statement by every individual irrespective of the income declared in a Tax Year; amendment in the section 111 (un-explained assets or income) to question the un-disclosed and un-explained income and assets; waiver of default surcharge/penalty on payment of certain amount of principal amount of sales tax by claimants of illegal input tax adjustments under amnesty scheme and a new tax card for persons operating under the Presumptive Tax Regime (PTR) and rental income would be taxed on the basis of annual letting value.

According to sources, the FBR has dropped the proposal to increase the tax burden of around 10,000 individuals earning salaries above Rs 6 million per annum in the budget (2012-13).

Earlier, the Board had proposed that the salaried individuals with taxable salary in excess of Rs 6 million per annum should be required to pay higher amounts as compared to their liability under the current rates.

However, the proposal has not been accepted by the policy makers on the argument that every salary individual should be provided maximum relief in the coming budget.

The government has also decided that the existing minimum income threshold for salaried persons would not be changed in the budget (2012-13).

Sources said that the members of the Tax Reforms Co-ordination Group strongly opposed proposal to introduce any kind of amnesty scheme for the legalisation of the un-disclosed assets and income.

The amnesty could be granted to the extent of non-payment of withholding tax, penalties and out standing arrears, but there should be no general amnesty for the legalisation of un-disclosed assets.

Sources stated that the FBR will discourage Presumptive Tax regime and make it unviable for those operating under the PTR.

One of the methods could be increase in the rates of withholding tax on different industries/sectors operating under the PTR.

In this way, taxpayer will either have to pay higher rate of withholding tax for not maintaining books of accounts or pay lower rate under normal tax regime and file income tax returns.

Another proposal is that a new schedule or tax card may be introduced for the taxpayers operating under the PTR.

The higher rates of tax would be applicable for those operating under the PTR.

The FBR has proposed that every individual should file wealth statement irrespective of the income declared for the Tax Year.

Under the existing law, it is mandatory for an individual deriving income over Rs 1 million per annum shall file statement of assets and liabilities along with personal expenditure under section 116 of the Income Tax Ordinance 2001.

It has been proposed that irrespective of the quantum of income declared for the tax year every individual including salaried persons would be liable to file a statement of assets and liabilities (wealth statement).

This would be done by making appropriate amendment in the section 114 and section 116 of the Income Tax Ordinance 2001.

The mandatory filing of wealth statements by all individuals would ensure filing of details of assets maintained by each person for documentation of the economy.

The FBR has also proposed a major amendment in the section 111 (un-explained assets or income) to document the un-disclosed and un-explained income and assets.

The provision of section 111 was amended by Finance Act 2010 so as to enable the commissioner to assess the undisclosed or un-explained income of a person in the year to which the said income would relate.

This means that if the asset pertains to Tax Year 2003 the addition would be made to Tax Year 2003 only.

The limitation provided in section 122 of the Income Tax Ordinance 2001 automatically barred the Commissioner to open the assessment prior to five years.

This meant that asset of the earlier years ie beyond limitation could not be taxed by the tax authorities.

It is proposed that the outer limit of five years be extended to ten years so that the un-disclosed assets prior to Tax Year 2006 would also be brought into the ambit of section 111 of the Income Tax Ordinance 2001.

It is a measure to assess un-disclosed assets or income of the persons whether or not in the tax net.

Under the present regime, the property income is being assessed on gross rent received.

No expense/deduction is being allowed against the said income since Tax Year 2007.

It is proposed that the rental income be taxed on the basis of annual letting value ie value on which a property can be let out from year to year basis.

It is further proposed that various deductions as were available under deleted section 17 of the Ordinance 2001 would be available under the new scheme.

This means that the property income would once again be taxed on net income basis.

When asked from a tax consultant it was explained that if that be the case then the rate of taxation on property income would be equated with that applicable to an individual or a company respectively.

Under the proposed scheme, deductions may be allowed while computing income chargeable under the head ie "Income from Property".

In computing the income of a person chargeable to tax under the head- "Income from Property" for a tax year, deduction shall be allowed for various expenditures or allowances.

So far no major income tax exemption has been identified to be withdrawn from the Second Schedule of the Income Tax Ordinance 2001.

Some redundant or superfluous exemptions would be taken away from the Income Tax Ordinance 2001 in budget (2012-13).

Following is the text of the press release issued by the FBR here on Tuesday: The Tax Reforms Co-ordination Group (TRCG) met in FBR today, under the chairmanship of Federal Minister for Finance Dr Abdul Hafeez Sheikh.

Chairman FBR Mumtaz Haider Rizvi, in his opening remarks informed the Minister about the discussions so far held between the TRCG and FBR.

Exclusive discussions on policies and strategies to improve the tax policy with a view to increase the revenue were held along with presentations by FBR.

Budget proposals for the upcoming budget to be presented in May 2012 were extensively discussed and strategised.

The Federal Minister for Finance stressed the need of increasing the momentum of revenue collection to achieve the current target of Rs 1952 billion.

He appreciated the efforts of FBR where the Provisional Collection up to April was about Rs 1424 billion and still counting against last year's collection for the same period at Rs 1150 billion.

He expressed confidence and hope that the assigned budget targets would be achieved through sustained efforts.

He desired that the detailed collection under various heads be sent to him on daily basis.

The day-long meeting continued till late evening.

The meeting was attended by Deputy Chairman Planning Commission Dr Nadeem ul Haque, Federal Secretary Finance Abdul Wajid Rana, Secretary EAD Dr Waqar Masood, DG (ERU) Dr Khaqan Najeeb and Members TRCG Irfan Nadeem, Arshad

Zuberi, Bashir Ali Mohammad, Shabbar Zaidi and Ali Jameel along with FBR members Ms Riffat Shaheen Qazi Member (FATE), Shahid Hussain Asad Member (IR), Sardar Amimullah Khan Member (Enforcement & WHT), Raza Baqir Member (Admin), Mrs Azra Mujtaba Member (SP&S) and Nisar Muhammad Chief Collector (North) FBR.

The Tax Reforms Co-ordination Group crystallised the current proposals on the forthcoming budget, with the objective to facilitate business, reduce cost of doing the business, avoid economic burden, harmonise tax laws and promote industry and commerce while improving tax collection. – *Courtesy Business Recorder*

Appointment of SRB Chairman: selection committee shortlists five names

The Selection Committee for appointment of Chairman/Members of Sindh Revenue Board (SRB) has short-listed five applications out of the 12 received by it for the post of Chairman SRB, informed sources told here on Tuesday.

SRB is a provincial tax collection body, which was established in 2010 under Sindh Revenue Board Act 2010, but it started functioning from July 2011 after the passage of Sindh Sales Tax on Services Act 2011.

The contract of the incumbent Chairman Nazar Hussein Mehar is going to complete on June 30, 2012.

The maiden meeting of the Selection Committee was held on April 26, 2012 in the absence of its chairman, Dr Kaiser Bengali, who was out of the country, the sources said.

Sindh Chief Secretary Raja Mohammad Abbas chaired the meeting, who is also a member of the committee.

Secretary Services, Secretary Law, Secretary Finance and a representative of Sindh Public Service Commission (SPSC) are other members of the committee.

The committee was notified on March 24, 2012, while the advertisement inviting applications for the post of SRB Chairman was published on March 29, in various newspapers.

As per the advertisement, the candidates had to submit their applications till April 7, 2012.

Sources said that the Committee had received only 12 applications for the post of Chairman SRB and it short-listed only five during its maiden meeting.

They said that the Committee would meet again on May 4, 2012 to review the applications of the short-listed candidates.

The sources said that during the meeting the committee would fix the date and time of interviews of the short-listed candidates and call letters for interview would be sent to them, they said. – *Courtesy Business Recorder*

Autonomous bodies: excise department told to recover Rs 110 million

The Public Accounts Committee (PAC) of the Khyber-Pakhtunkhwa Assembly has directed the Department of Excise and Taxation to recover Rs 110 million from various autonomous bodies in the province.

These directives were issued in a meeting held here on Monday chaired by provincial assembly's Speaker Karamatullah Khan.

Participants of the meeting included Abdul Akbar Khan, Saqibullah Khan Chamkani and Mukhtar Ali Khan, MPAs.

The meeting held detailed discussion on audit objections relating to the Department of Excise and Taxation in the financial year 2009-10.

The committee took strict notice of the matter that during various periods, audit had called for the recovery of about Rs 170 million.

But, the department had so far recovered just Rs 60 million.

Various departments still owed the remaining Rs 110 million.

The committee directed the department to recover and deposit the amount in the provincial exchequer within three months.

The committee asked the department to get the matter verified from the Department of Audit and inform the Public Accounts Committee in this regard.

The committee also expressed anger over the weak internal system of the Department of Excise and Taxation because of which it had failed to achieve its revenue targets.

Speaker Karamatullah Khan warned that presentation of incorrect statistics and defrauding was tantamount to breaching the

committee's privilege and officials responsible could face an imprisonment of up to six months.

The committee also criticised the department for holding talks with major private institutes for the recovery of taxes and explained that instead of holding negotiations, it should initiate legal proceedings for the recovery of outstanding amounts, ruling out any leniency in this regard.

The provincial assembly is scheduled to start a session from May 4, therefore, the committee's meeting was adjourned for an indefinite period. – *Courtesy Business Recorder*

S.R.O. 413(I)/2012, Islamabad, the 25th April, 2012.– In exercise of the powers conferred by section 219 of the Customs Act, 1969 (IV of 1969), the Federal Board of Revenue is pleased to make the following rules, namely:–

CHAPTER-I
Preliminary

1. Short title and commencement.– (1) These rules may be called the Tracking and Monitoring of Cargo Rules, 2012.

(2) They shall come into force at once.

2. Scope.- These rules shall apply to tracking and monitoring of the following types of cargo throughout the journey from the port of entry to the port of exit or from one warehouse to another, on real time basis, namely:–

(a) transit cargo under Chapter XXV of the Customs Rules, 2001;

(b) petroleum, oil and lubricants (POL) products exported to Afghanistan under Chapter XXII of the Customs Rules, 2001;

(c) trans-shipment cargo under Chapter XIV of the Customs Rules, 2001; and

(d) safe transportation under Customs General Order (CGO) No. 12 of 2002:

Provided that the cargo transported by Pakistan Railways shall be tracked and monitored under these rules from the date to be specified by the Board, through a General Order.

3. Definitions.- In these rules, unless there is anything repugnant in the subject or context,–

(i) "Act" means the Customs Act, 1969 (IV of 1969);

(ii) "applicant" means any company which applies for a license under these rules;

(iii) "Board" means the Federal Board of Revenue established under the Federal Board of Revenue Act, 2007;

(iv) "carrier" means the carrier defined under Chapter XIV of the Customs Rules, 2001;

(v) "Central Control Room" means a control room established by the licensee in Model Collectorate of Customs (MCC) Preventive at Custom House, Karachi or any other control room specifically designated by the Board;

(vi) "Goods Declaration" means a declaration filed under the provision of the Act or rules made thereunder;

(vii) "Licensing Committee" means a Committee comprising Collectors of Customs (Appraisement), (Port Qasim), (PaCCS),

(Exports), Karachi, and Director of Intelligence and Investigation, FBR, Karachi or any other authority designated by the Board;

(viii) "PCCSS" means Pakistan Customs Container Security System, as specified in CGO No. 4 of 2007, dated 31st March, 2007;

(ix) "ports of entry and exit" means an officially designated location at seaport, airport or land Customs station where Customs officers and officials are assigned to accept declarations of merchandise and vehicles, control imports and exports, clear passengers, collect duties and enforce the various provisions of Customs, and other relevant laws;

(x) "Project Director" means the Collector, Model Collectorate of Customs (Preventive), Karachi;

(xi) "Regional Control Room" means a control room established by the licensee in various Model Collectorates of Customs across Pakistan or any other control room designated by the Board;

(xii) "transport operator" means the transport operator defined and licensed under Chapter XXV of the Customs Rules, 2001; and

(xiii) "vehicle" means any rigid road vehicle, articulated vehicle, unaccompanied trailer or semi-trailer.

CHAPTER-II
Licensing

4. Licensing of Companies for tracking and monitoring of cargo.– (1) No company shall carry out tracking and monitoring of cargo unless it has obtained a license under these rules.

(2) No licensee under these rules shall establish, maintain or operate any telecommunication system or provide any telecommunication service which is not authorized under the license issued to it by Pakistan Telecommunication Authority (PTA) established under the Pakistan Telecommunication (Re-organisation) Act, 1996.

5. Functioning of Licensing Committee.– (1) The licensing committee shall function in accordance with the provisions of these rules.

(2) Collector of Customs (Preventive), Karachi shall be the convener of the licensing committee and its headquarters shall be located in Model Collectorate of Customs (Preventive), Karachi. The Collectorate shall provide secretarial and other allied support required for functioning of the licensing committee.

(3) The licensing committee shall devise procedures for its functioning, which shall be in accordance with these rules.

6. Application for grant of a license.– (1) An application to carry out tracking and monitoring of cargo mentioned in these rules shall be made in duplicate to the Board.

(2) An application under sub-rule (1) shall be accompanied by all the supportive and relevant documents including the following, namely:–

(a) a comprehensive profile of the company;

(b) brief about managerial and technical personnel indicating name, position, qualification and experience;

(c) total number of current employees;

(d) list of major clientele;

(e) documents showing relevant experience in tracking and monitoring of vehicles and containers;

(f) complete history of activities undertaken and synopsis of the projects done;

(g) current commitments and status of in-hand projects;

(h) valid license obtained from the PTA for the activity or category approved for;

(i) Incorporation Certificate under the Companies Ordinance 1984;

(j) National Tax Number (NTN) Certificate;

(k) audited accounts of the last three financial years;

(l) Income Tax returns for the last three years;

(m) registration with Sales Tax Department, if required;

(n) computerized National Identity Cards (CNICs) of the Directors of the company; and

(o) undertaking that the company has never been blacklisted by any Government or private department or organization and has not been involved in confirmed cases of fiscal fraud including that specified in section 32A of the Act.

(3) The applicant shall also declare the fee and charges that it intends to collect from importers of the cargo and from carriers or transport operators during the license period.

7. Criteria for grant of a license.– (1) The applicant shall be required to provide technological solutions on the basis of GSM or GPRS or Satellite Communication or any other modern technology for monitoring and tracking, on real time basis, of containers and vehicles carrying the cargo mentioned in these rules.

(2) The applicant shall possess the following qualifications to be considered for issuance of license, namely:–

(a) it shall be a company duly incorporated under the Companies Ordinance, 1984 (XLVII of 1984);

(b) it shall have relevant experience and past performance in vehicles and containers tracking;

(c) it shall be in a financial position to undertake the project – minimum turnover of rupees 350 million or financial worth of rupees 200 million; and

(d) it shall have appropriate managerial capacity to execute and run the project.

(3) The system based solution offered by the applicant must have the following features, namely:–

(a) container, vehicle synchronization;

(b) alert on deviation from specified or designated routes;

(c) location, direction and GPS speed data for containers and vehicles;

(d) container doors monitoring (unauthorized opening, unhinging, tampering, intruding, etc.) alerts;

(e) route time monitoring;

(f) unauthorized stoppages (include stoppages which cannot be reasonably excused by the relevant customs officials or as elaborated by the Collector of customs concerned through a Public Notice) reporting;

(g) electronic geo-fencing;

(h) theft incidence and reaction;

(i) data analysis and communication results thereof to Central Control Room (CCR) and Regional Control Room (RCR); and

(j) must be stable, fault-tolerant, secured, and can be accessed only by authorized username and password as authorized by the customs.

(4) The system based solution offered by the applicant shall be able to perform the following functions, namely:–

(a) monitoring capability on real-time basis of a minimum of 3000 containers or trucks from CCR;

(b) monitoring and tracking of vehicles and containers throughout the journey from Customs point of entry to Customs point of exit on real time basis;

(c) geo-fencing and creating buffer zones around a certain route or area;

(d) generate detailed journey reports that include stop points and durations, start and end points, area names, etc.;

(e) the ability to configure the tracking unit remotely;

(f) the system should work on Client Server basis so that adding and removing users and their privileges could be done efficiently;

(g) the system must be capable of sending alert messages and trigger alarms (visible and audible) in case of occurrence of abnormal event such as route deviation, stoppages in risky zones and tampering with the tracking unit or cargo etc (different alarms to be shown by different colored icons on the map. Clicking the icon of any vehicle should enable the operator to access the vehicle data base);

(h) the system shall be able to assign containers and vehicles of one licensee to another licensee for tracking containers and vehicles;

(i) container and vehicle locations on the map and screen should be represented by icon or symbol;

(j) in case of absence of one communication network coverage the tracking unit of the system must be able to switch over to another network so as to ensure real time tracking without interruption or break;

(k) the system should be capable to assign more than one route for one destination and geo fencing for all routes;

(l) the software package of the system must *inter alia* include,-

(i) transit and fleet management application; and

(ii) mapping and graphical application to display position of the vehicle and container on digital map of the country;

(m) the system should be flexible enough to interface with other international databases, if required;

(n) the availability of extra tools to measure distance, meter scale, change coordinate system, change symbol colours, etc.;

(o) the ability to assign specific alerts to specific pins (relays) in the tracking unit and the ability to monitor tracking operations through a web page;

(p) the ability to enter data into the system through electronic media (barcode reader, etc.);

(q) the system reporting should be capable to filter and process the trip data for statistical and analytical purposes;

(r) the system must include replay function and allow sharing of information with remote client station;

(s) the licensee should ensure secure data storage and archiving of data for five years from its generation or recording;

(t) ability to use Palm-held Devices (PDA's, etc) for reading and writing data into the system at regional sites;

(u) ability to assign Unique load identifier (ULI) which should contain information about unit number of tracking device (GPS, etc.), Goods Declaration (GD) No. and date, carrier name, vehicle number, location etc.;

(v) the Communication media should cover all the geo-fenced routes across the country; and

(w) all Electronic Data Interface (EDI) communication should be encrypted to ensure secure communications.

(5) The applicant shall also submit a complete list of operations and maintenance required to operate the system based solution.

(6) The applicant shall specify the expected delivery and implementation time, which shall not exceed four months from the date of issuance of license. The applicant shall also undertake to meet these timelines.

8. Procedure for grant of a license.– (1) On receipt of an application for grant of license in the Board, the licensing committee shall evaluate it.

(2) The licensing committee may also fix a date for a hearing to be attended by the applicant for the purposes of evaluation of the application submitted under sub-rule (1).

(3) The licensing committee may also carry out visits and physical inspections to ascertain eligibility of the applicant for licensing under these rules.

(4) The applicant shall be required to give practical demonstration of the technological solution offered for licensing.

(5) The licensing committee shall send its recommendations to the Board within one hundred and twenty days from the date of submission of the application. It shall give detailed reasons for recommending rejection of any application under these rules:

Provided that where complete documents or any information needed for the requisite evaluation have not been provided within fifteen days of the requisition or within thirty days of the submission of application, whichever is later, the application shall be summarily rejected.

(7) In case a company meets the technical and financial criteria given in these rules, the licensing committee shall recommend to the Board for grant of license to such a company.

(8) The Board may grant license to the recommended company.

(9) The qualified company shall be required to deposit bank guarantee for rupees ten million to the licensing committee, as financial

security, before issuance of the license. The bank guarantee shall be valid for whole duration of the license and shall be encashable in case of violation of these rules or terms of license leading to loss of government revenue.

9. Rights granted to the licensee.– A licensee shall have the right to establish, maintain and operate a system to monitor and track the cargo on real time basis, in accordance with terms and conditions of the license.

10. Terms and conditions of the license.– (1) Subject to these rules, license shall be granted for a period of three years.

(2) The license granted under these rules shall be subject to the provisions of the Act.

(3) The license granted under these rules shall be non-transferrable and shall not be allowed to be used by any sub-contractor.

11. Renewal of the license.– (1) An application for renewal of license shall be made to the Board, three months before its expiry.

(2) The licensing committee shall evaluate the application and may recommend renewal of license to the Board.

(3) The Board may renew the license for further two years on the basis of recommendations of the licensing authority.

(4) The licensee shall be required to comply with all the provisions of these rules for the renewed period.

CHAPTER III
Responsibilities of the Licensee

12. Licensee to run and manage the system.– (1) The licensee shall be responsible to operationalize the system within four months of issuance of license.

(2) The licensee shall run and manage the system under proper warrantee and shall ensure maintenance during the period of license.

(3) The licensee shall abide by all relevant laws while running the system.

13. Establishment of Central Control Room.– (1) The licensee shall design, furnish and establish a Central Control Room (CCR) in the Custom House, Karachi or in any other control room designated by the Board.

(2) The CCR shall be equipped with hardware, software, plasmas, LCDs, communication and other allied equipment for viewing, analyzing the movements of goods and vehicles and responding in cases of alerts.

(3) The CCR shall have necessary servers and data storage facilities to store and manage data bases for the vehicles monitored daily, with report printing capabilities for each trip.

(4) The operators at the CCR shall be able to transfer the map or any section of it to any monitor or licensee connected to the system based on pre-assigned priorities.

14. Establishment of Regional Control Rooms.– (1) The licensee shall design, furnish and establish Regional Control Rooms (RCR) in various Collectorates of Customs or in any other places designated by the Board.

(2) The RCRs shall be connected with the CCR and equipped with the requisite infrastructure for monitoring the movement of goods and vehicles, and for responding in cases of alerts.

15. Establishment of Mobile Enforcement Units.– The Collectorates of Customs shall establish Mobile Enforcement Units (MEU) in respective Collectorates on shift rotation basis (twenty four hours and seven days a week). The MEUs shall be responsible for reacting in case any alert is communicated to them by CCR or RCR and shall co-ordinate with enforcement units of the licensee.

16. Requirements to be met at the points of entry and exit.– (1) The licensee shall ensure that–

(a) Each point of entry and exit is connected to the system with adequate IT infrastructure for initialization and termination of each trip; and

(b) each point of entry and exit is connected with the CCR and RCRs.

(2) The licensee shall arrange testing and storing facilities for all equipments and mounting or un-mounting of tracking device at each point of entry and exit.

(3) The licensee shall provide and maintain Palm-held Devices, printers, UPS, etc for smooth operation of the system at each point of entry and exit.

(4) The system shall be expandable to cover future required points of entry and exit.

17. Services to be provided by the licensee.– The licensee shall be required to provide the following services, namely:–

(a) monitoring and tracking of vehicles and containers carrying the cargo mentioned in these rules from Customs port of entry to Customs port of exit on real time basis;

(b) maintaining en-route integrity of cargo by preventing pilferage or theft or losses;

(c) access to relevant information through Web-Portal to all stakeholders as allowed under these rules or by the customs;

(d) flexible solution to cater for any future requirements of tracking under multi-modal and inter-modal transportation environment, e.g. with other stakeholders like Pakistan Railways etc.;

(e) monitoring timely deliveries and reporting on transport efficiencies;

(f) managing the system under proper maintenance to ensure smooth operation of the system, compatible with customs procedures and operations so as to ensure running of the system by customs also;

(g) vehicle immobilization and securing as and when required, and mandatory in case of geo-fencing violation, pilferage attempts, unauthorized or unusual stoppage;

(h) reporting application capable of generating the following reports:-

(i) a map of the route followed by the vehicle and container during the journey;

(ii) vehicle and driver details as well as any violation made during the journey;

(iii) trip report for each journey as soon as the truck arrives at the destination customs center;

(iv) incomplete journeys reports; and

(v) full documentations covering all stages of the journey (electronic and hard copy);

(i) the licensee shall ensure tracking and monitoring enroute covering following:-

(i) location and direction of containers and vehicles;

(ii) data gathering on real time basis;

(iii) mounting, securing and ensuring integrity of device during journey by using machine readable serialized seals;

(iv) data analysis on real time basis;

(v) jamming device; and

(vi) alerts for:

(a) unusual Stoppages;

(b) device / Tampering or Infringement or Intrusion or Removal or Door Opening; and

(c) unusual Deviation from Geo-fencing Device Mounting or Un-mounting; and

(j) the licensee shall also provide:

(i) extension of tracking or monitoring to trans-border, if required;

(ii) customized land marking;

(iii) customized analytical reports;

(iv) scalable solution to handle additional units; and

(v) single interface for monitoring of containers and authorized carriers.

18. Tracking device provided or used by the licensee.– (1) The tracking device provided or used by the licensee shall have the following features, namely:–

(a) it should be small, of compact size, shock-proof, temperature and fire resistant and with water proof casing;

(b) it should be reusable, easy to install or mount and remove or un-mount, with high storage capacity;

(c) It should operate on the following modes:–

(i) stand alone using long life (not less than fifteen days) rechargeable battery without connection to the vehicle power supply; and

(ii) using power supply of the vehicle, if needed or for rechargeable purpose;

(d) it should have a motion detector; and

(e) the system should have a provision for fast and effective immobilization of vehicle, whenever required.

(2) The Project Director shall get the tracking and monitoring devices as well as the tracking system installed in vehicles, tested before use. On satisfaction, the Project Director shall allow use of tracking and monitoring devices and installation of tracking system in the vehicles. Same procedure shall be followed in case new device is introduced.

(3) The Project Director may require replacement of device or tracking system if he is of the view that the equipment is not giving satisfactory results.

19. Mounting of tracking device.– (1) The licensee shall establish designated areas at the point of entry, which would be in proximity of PCCSS office of MCC Preventive, Karachi and shall be responsible for active and close liaison with it.

(2) The licensee shall make arrangements in the designated areas for mounting and un-mounting of tracking or monitoring device. Once the GD-TP or GD-AT is out of charged by the relevant Customs Collectorate, the carrier shall take delivery of the goods on the registered vehicle and bring it to the tracker installation area, where the designated tracker company shall install the tracking device on the container. The tracking device shall be synchronized with the fixed tracking device already installed on the vehicle and once both the tracking devices are synchronized the staff of the tracking company shall activate the data on the relevant computer software to be accessed by Customs scanning staff, PCCSS sealing Focal Point and Exit Gate of the terminal operator as well as customs focal point of entry and exit, and CCR.

(3) The licensee upon being approached by the carrier or transport operator shall affix the tracking device and make it synchronized with the tracking device fixed on the prime mover or vehicle and upload the data in the system and activate the tracking system. The whole procedure shall be completed within fifteen minutes.

(4) The system shall generate a certificate to this affect, which shall contain details of G.D., container and vehicle number, and the tracker unit ID number.

(5) If any device is found malfunctioning, it shall be forthwith replaced with a functioning device.

(6) The vehicle shall then be taken to the designated PCCSS focal point entry, where procedure prescribed under Customs General Order (CGO) No.4 of 2007 shall be completed.

20. Un-mounting of tracking device.– (1) The licensee shall establish designated areas at the point of exit, which would be in proximity of PCCSS office of Focal Point Exit, and shall be responsible for active and close liaison with it.

(2) The licensee upon being approached by the carrier or transport operator shall un-mount the tracking device from the container and cargo and upload the data in the system and de-activate or terminate the tracking device journey. The whole procedure shall be completed within fifteen minutes.

(3) The certificate generated at the time of mounting of tracking device shall be endorsed accordingly.

(4) If any discrepancy is found, the same shall be reported to the Focal Point of Exit as well as the Collectorates of Customs enroute for taking appropriate action as prescribed under Act or the rules made thereunder.

21. Generation of MIS reports.– Reconciliation of each journey of container and vehicle shall be done, on real time basis, by the licensee and delay, unusual or unauthorized stoppages, discrepancies, etc. shall be reported at once. The licensee shall generate report in soft as well as hard copies, giving details of the monthly reconciliation and alerts and results thereof for the Project Director.

22. Technical and training support.– (1) The licensee shall provide the technical support, as detailed below:–

(a) setting up and maintenance of all information technology (IT) infrastructure, wherever needed, for the purposes of these rules;

(b) the licensee shall be fully responsible for,–

(i) all upgrades of the system, hardware and software;

(ii) all bug fixes; and

(iii) immediate response and repair of any technical problem in the system during holidays or working days to cover the major, minor and moderate problems for uninterrupted working of the system; and

(c) software applications shall be flexible and compatible with other customs related softwares (e.g. PaCCS, One Customs, WeBOC, etc)

(2) The licensee shall undertake to upgrade, as per the new technological requirement, the installed IT structure, related software, communication equipment etc., as and when required.

(3) The licensee shall arrange to provide comprehensive technical and operational training to the Customs officers and officials, and other concerned officials and ensure provision of all documentation and technical manuals, wherever and whenever required.

(4) Quarterly appraisal reviews of functioning and efficacy of the system shall be carried out for which the licensee shall make necessary arrangements.

(5) The Board shall have proprietary rights of the system for subsequent forensic audit and the licensee shall make available all or any information requisitioned by the Board, the Licensing Authority or the Project Director promptly.

CHAPTER IV
Supervision of the System, Enforcement and Early Termination

23. Responsibilities of the Project Director.– (1) The Project Director shall be responsible for overall supervision of the system.

(2) The Project Director shall send quarterly performance reports to the Board covering *inter alia* the functioning and efficacy of the system, the scope and need of improvements observed in the system, and the steps taken to address problems encountered during operation of the system.

(3) The Project Director shall be assisted, as and when required, by the Collectors of Customs in preparation of these performance reports.

24. Procedure for cancellation or termination of license.– (1) The Project Director shall immediately refer the matter to the Licensing Committee for further action under these rules, if he, as a result of supervision of the system, or on receipt of a report from any of the Collector of Customs or on a valid complaint, has reasons to believe that the licensee has,–

(a) failed to set up the infrastructure and to operationalise the system within the time lines committed at the time of issuance of license;

(b) failed to provide the required services to the satisfaction of Customs authorities;

(c) contravened any condition of the license;

(d) contravened any provision of these rules or the Act; or

(e) violated any applicable law while carrying out activities of license under these rules.

(2) On receipt of reference from the Project Director under sub-rule (1), the Licensing Committee shall cause to serve a notice upon the licensee within fifteen days of receipt of reference, to show cause within thirty days after the date of the notice, as to why the license issued under these rules should not be cancelled or terminated:

Provided that in cases where the Licensing Authority, on the basis of material evidence, is of the opinion that there exits prima facie a sufficient case against the licensee, it may suspend the license to safeguard public finances and to prevent any other serious damage.

(3) The Licensing Committee may, after giving the licensee adequate opportunity of being heard and after examination of the record, cancel or terminate the license issued under these rules.

(4) In case of cancellation of license under these rules, the affected company shall have the right to file representation against the orders of the Licensing Committee before the Board.

(5) The Board shall decide the representation, after giving proper opportunity of being heard.

CHAPTER V
Fee and Charges

25. Fee and charges.– (1) The licensee may charge fee for installation, maintenance and tracking or usage of fixed tracking device on the vehicle from the carrier or the transport operator.

(2) The licensee may collect fee or charges for installation, and monitoring or usage or tracking of removable tracking device installed on the cargo containers from importers of the cargo.

(3) No fee whatsoever shall be charged from any of the Collectorates of Customs or the Board.

26. Determination of fee and charges.– (1) The licensing committee shall at the time of issuance of license get the maximum amount of fee and charges determined which can be collected by the licensee from importers of the cargo, carriers or transport operators during the duration of the license.

(2) The Project Director shall notify these fee and charges through a public notice for information of all the relevant persons.

(3) The Project Director and the Collectors of Customs concerned shall ensure that only the fee and charges determined by the licensing authority are being collected by the licensee.

27. Revision or alteration of fee and charges.– (1) The fee and charges determined in accordance with rule 25 shall not be revised or altered in normal circumstances during the duration of the license.

(2) In cases where the basis of such determination has undergone significant and material change or where major economic disruption has occurred, the licensee may petition the licensing committee accordingly to revise or alter the determined fee or charges.

(3) The licensing committee may in circumstances mentioned in sub-rule (2) allow review or alteration in such fee and charges:

Provided that in case where petition has been filed for upward revision or alteration of fee and charges, the representatives of importers and carriers or transport operators shall be given an opportunity to present their point of view during the proceedings.

(4) The licensee may in case where the petition for upward revision or alteration of the fee and charges has been rejected shall have the option to request the Licensing Committee for cancellation of the license issued under these rules.

(5) The licensing committee shall, on receipt of such a request under sub-rule (4), cancel the license forthwith.

CHAPTER VI
RESPONSIBILITIES OF THE CARRIER AND TRANSPORT OPERATOR

28. Tracking and monitoring of cargo.– (1) No cargo mentioned in these rules shall be transported from the Customs port of entry unless the tracking and monitoring devices have been installed on the containers and vehicles.

(2) The carrier and transport operator shall not be allowed to operate a vehicle unless a permanent tracking device is installed in the vehicle.

(3) While carrying out transportation of cargo under these rules carriers and transport operators shall be required to comply with the relevant provisions of the rules under which they are licensed.

29. Liabilities of the carriers and transport operators.– (1) The carrier or transport operator shall be responsible for any loss, damage, unauthorized removal or disappearance of the tracking equipment during the course of transportation of goods.

(2) The carrier or transport operator shall be liable to compensate the licensee in case of occurrence of events mentioned in sub-rule (1).

(3) In case a dispute arises regarding the extent and nature of liability mentioned in sub-rule (2) on the basis of bona fide error or an accident, the matter shall be referred to the Collector of Customs in whose jurisdiction such an event takes place. The Collector concerned shall decide the matter within fifteen days of its receipt. The carrier or transport operator may, on being aggrieved with orders of the Collector, prefer an appeal before the licensing committee. The licensing committee shall decide the matter within thirty days, which shall be final and binding on the licensee and the carrier or transport operator.

(4) The carriers and transport operators shall remain liable to punitive and other related actions in cases of violation or contravention of the applicable provisions of the Act and rules made thereunder while complying with the provisions of these rules.

CHAPTER VII
Miscellaneous

30. Liabilities of the licensee.– (1) Without prejudice to the action that can be taken under Chapter IV of these rules, the licensee shall be liable to punitive action under the Act and rules made there under, in cases of its wilful collusion with the transport operator or carrier for violation or contravention of any of such provision.

(2) The licensee shall also be liable to deposit duty and taxes along with surcharges and penalties under the Act and the relevant rules, where it is established through proceedings under the Act, after providing an opportunity of being heard, that the licensee has colluded with the carrier or transport operator resulting in damage or pilferage or loss of cargo specified in these rules.

(3) In case of loss of synchronization of container tracker with the fixed tracking device installed on the vehicle, appropriate penal action shall be taken against the licensee, if no explanation to the satisfaction of customs authorities is made.

31. Functioning of Mobile Enforcement Units.– To check and verify any of the eventualities enroute, the customs squad of MEUs shall patrol the designated routes on which transit and transshipment cargo is plying. The mobile squad may check a vehicle in case it receives authentic information or has reasons to believe that the goods have been pilfered or lost. The squad shall report the eventuality to the nearest RCR. The Mobile Squad shall make endorsement of the action taken with regard to cargo, the transport unit etc, by feeding the information in the system.

32. Audit.– The Project Director shall arrange to carry out audit of the system every year. The report shall be used for system related improvements and corrective and remedial actions, where warranted.

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2012 PTR 930 (H.C. Chnd.)

HIGH COURT OF CHANDIGARH

M.M. Kumar and Alok Singh, JJ.

Commissioner of Income Tax (Central) Ludhiana
v.
Punjab Breweries Ltd. Ludhiana
(now amalgamated with M/s United Breweries)

FACTS/HELD

1. **Tribunal's order not dealing with finding of "sham" transaction is "perverse"**

2. The AO disallowed payments made by the assessee to M/s Blue Chip & Co towards "C&F handling charges" on the ground that the transactions were a *"sham" and intended to provide interest-free funds to Vijay Mallya & his wife Samira Mallya.* This was confirmed by the CIT (A) though the Tribunal allowed the claim on the ground that a similar issue had been allowed in the earlier years. On appeal by the department, HELD reversing the Tribunal:

> It is **not in public interest** to accept such a claim when there is no evidence of rendering any service by Blue Chip & Co to the assessee. The **sole object of diverting funds to Blue Chip & Co was to facilitate passing of funds as interest free loan to Vijay Mallya and Samira Mallya**. The agreement between the assesee and Blue Chip was found to be a "**sham transaction**" by the AO & CIT (A). The Tribunal committed grave error by recording the order as if it is a consent order though the DR had categorically defended the AO & CIT (A)'s order. Also, the earlier orders of the Tribunal had been challenged before the High Court. Therefore the findings of the Tribunal are wholly erroneous, cryptic, perverse, laconic and perfunctory.

Order accordingly.

ITA No. 217 of 2002.
Decided on: 17th April, 2012.
Present at hearing: Rajesh Katoch, Advocate, for Petitioner. Alok Mittal Advocate, for Respondent.

JUDGMENT

M.M. Kumar, J.–

1. This appeal under Section 260 A of the Income Tax Act, 1961 (for brevity 'the Act') is directed against order dated 14.2.2000 rendered by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (for brevity 'the Tribunal') in ITA No. 2176/ Chandi/ 1992 in respect of the assessment year 1989-90. The Revenue has claimed that following substantive questions of law would emerge for determination of this Court:

> "1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in allowing payment of Rs. 12,29,769/- made to M/s Blue Chip and Co., Faridabad and C & F Handling Charges ignoring the fact that there was no evidence to show that M/s Blue Chip & Co. had rendered any services to the Assessee- Company; and
>
> 2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal, was right in law in allowing payment of Rs. 38,02,950/- made to the Corporate Management Division of M/s United Breweries Ltd., Banglore ignoring the fact that there was no evidence to show that the Corporate Management Division of M/s United Breweries Ltd. had rendered any services to the Assessee Company already had a Technical Assistant Agreement with M/s United Breweries Ltd. regarding provisions to the assessee of know how for manufacturing Beer and for marketing and Distribution of Beer thereby exhaustively covering all aspects of Business."

2. Brief facts of the case may first be set out to put the controversy in its proper prospective. The assessee- respondent was engaged in the manufacture and sale of beer of different brands. It was a closely held Company and a subsidiary of United Breweries Ltd. For the assessment year 1989-90 the Assessing Officer made a large number of additions. On the aforesaid two issues, the additions made are on account of payment made by the assessee- Company to M/s Blue Chip and Company, New Delhi on account of C & F handling charges. The assessee- company had obtained L-1 license at Faridabad and M/s Blue Chip. It was supposed to look after the sale of Mc Dowell Company. The assessee- company had also secured L-1 license from Herbertson and Company Ltd. Bombay for Faridabad. The assessee company was selling both Mc Dowell and Herbertson products till the assessment year 1986-87 without the help of

any handling agent. It has opened a branch office at 674, Sector 16 A, Faridabad and had employed 8 persons for that office. For the first time, in respect of the assessment year 1987-88 the assessee company appointed M/s Blue Chip and Company as C & F handling agent for the purposes of sale of Mc Dowell products. In respect of the preceding assessment years i.e. 1987-88 and 1988-89, C & F handling charges claimed to have been paid to M/s Blue Chip & Company were disallowed. The Assessing Officer recorded various reasons in support of the view. One of the significant reason recorded by the Assessing Officer was that after close analysis of the evidence collected by the department and adduced by the assessee concerning services rendered by M/s Blue Chip & Company it was held that there was no material on record to show that any services were rendered by M/s Blue Chip and Company. It was also found that there was no evidence placed on record by the assessee to show that its sales were promoted by the appointment of the handling agent M/s Blue Chip and Company. From the various transactions between the Blue Chip & Company, Chairman and M.D. of United Breweries and others it was found that substantial part of the payment has been made to the Blue Chip & Company from the assessee- company as interest free loan to Shri Vijay Mallya and Smt. Samira Mallya. Agreement between the assessee company and M/s Blue Chip Company which forms the basis of C & F handling charges was found to be a sham transaction and a devise to reduce the assessee- company's taxable income as well as to create capital in the hands of Birinder Pal Singh, Proprietor of Blue Chip and Company and interest free liquidity in the hands of M/s United Breweries and Shri Vijay Mallya and his wife Smt. Samira Mallya. After the agreement, M/s Blue Chip and Company could not find any new buyer for the assessee and the sales of Mc Dowell products showed dramatic decline after the appointment as C & F handling agent. Therefore, the entire sum of Rs.12,29,769/- was added to the declared income of the assessee.

3. On the aforesaid issue, the assessee filed appeal before the CIT (A), Ludhiana and the findings recorded by the Assessing Officer were upheld in paras 6.7 and 6.8 which reads as under:

> "6.7 Considering the facts mentioned above and the reasons given by the ACIT and my order for the asstt. Year 1988-89 in appeal No. 41/IT/91-92/CII (A)(C) decided vide order dated 11.10.1991 the addition made is confirmed on the following grounds:
>
> i) Firstly that this L1 was earlier managed by the assessee company only and the results were much better at that time than when C & F has been given to Blue Chip and Co. and this has been forced upon the assessee by Mc Dowell and Co. at the instance of Chairman, Shri Vijaya Mallaya of U.B.

group of Industries who has benefited by giving this business to M/s Blue Chip & Co. as has been proved by the ACIT.

ii) Secondly, this is a sham transaction as the assessee's staff strength at Faridabad is not reduced by allotting the work to Blue Chip and Co. License fee for this L-I is also being paid by Punjab Breweries unlike in Ghaziabad Depot where License fee is collected from Max Trading Co. since the work was allotted to Blue Chip and Co. they have given interest free loans to Shri Vijaya Mallaya, his wife and director and other relations. It is not a genuine transaction but indirectly benefiting Mrs. Samira Mallaya wife of the Chairman and also Director of the company.

6.8 Considering the above facts the addition made is confirmed and the ground of appeal is dismissed."

4. Aggrieved by the aforesaid order of the CIT(A), the assesseerespondent filed an appeal and the Tribunal made a reference to the statement of the counsel for the parties stating that the Tribunal in the preceding years 1987-88 and 1988-89 had decided the issue in favour of the assessee- respondent. However, it appears that the departmental representative categorically supported the order of the CIT(A) and yet the Tribunal proceeded to delete the additions.

5. It is true that the principles of consistency as laid down by Hon'ble the Supreme Court in the cases of *Radha Soami Satsang vs. CIT* 1992 (193) ITR 321 and *Berger Paints India Ltd. vs. CIT* (2004) 266 ITR 99 (SC) would ordinarily create a bar if the revenue has not preferred an appeal on a question of law which had arisen earlier by accepting the order. The aforesaid principle, however, is not absolute.

In the case of *C.K.Gangadharan and another vs. CIT* (2008) 304 ITR 61, after accepting the earlier views of Hon'ble the Supreme Court rendered in the cases of Radha Soami Santsang (supra) and Berger Paints (supra), a 3 Judge Bench of Hon'ble the Supreme Court proceeded to hold that if the revenue has not preferred an appeal in one case it would not operate as a bar for the department to prefer an appeal in another case where there is a just cause for doing so or particularly if it is in public interest to do so or for a pronouncement by the higher court when divergent views are expressed by the Tribunals or the High Courts. Therefore, in the instant appeal we are not inclined to accept the view taken by the Tribunal which has decided the issue merely on the ground that in respect of assessment years 1987-88 and 1988-89 the Tribunal has accepted the claim of the assessee- respondent. It would not be in public interest to accept such a claim when there is no evidence of rendering any service by Blue Chip & Company to the assessee- company. The sole object of diverting funds to Blue Chip and Company was to facilitate

passing of funds as interest free loan to Shri Vijay Mallya and Smt. Samira Mallya. Agreement between the assesee- company and Blue Chip company has been found to be a sham transaction by the Assessing Officer as well as by the CIT (A). The Tribunal committed grave error by recording the impugned order as if it is a consent order whereas on the showing of the Tribunal itself, the department representative has categorically defended the order passed by the Assessing Officer as well as by the CIT(A). The aforesaid fact is clearly recorded by the Tribunal itself in paras 6 to 13 of the order which reads thus:

> "6. The ld. Counsel at the outset stated that the Tribunal in the preceding Ays had decided both the grounds in favour of the assessee and necessary directions be given to the AO to allow necessary relief in accordance with the earlier orders of the Tribunal. The ld. DR did not oppose the aforesaid request in the light of the earlier orders of the Tribunal but hastened to add that he would support the orders passed by the tax authorities.
>
> 7. In the light of the accepted facts above, the AO is directed to allow necessary relief to the assessee in respect of grounds aforesaid in line with the view taken by the Tribunal in the preceding Ays there being no change in facts or the position of law having been pointed out by the parties. The grounds are disposed of in terms as stated.
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> 8. Ground no.4 in assessee's appeal pertains to disallowance of Rs. 11982/- out of vehicle maintenance expenditure.
>
> 9. We have heard both the parties and have also perused the orders passed by the tax authorities. The AO rejected the claim on the following lines:
>
> > "During the period under consideration the assessee has purchased a Mercedes car for Rs. 15,00,000/-. This car being imported one no depreciation on it has been claimed and all allowed. However, the assessee has claimed expenses for its maintenance. Perusal of the evidence filed show that the car was registered with the Registering Authority at New Delhi. This car has been maintained at Bombay and it was at the disposal of Shri Vijaya Mallaya, Chairman and Managing Director of the U.B. Limited for his personal use. The assessee has not put forward any evidence to show that the vehicle was used for the purposes of the company. In these circumstances, the expenses relating to its maintenance are being disallowed. This would result in disallowance of Rs. 11,982/-."
>
> 10. On further appeal the CIT(A) has confirmed the view taken by the A.O. Before us the ld. counsel reiterated the arguments

advanced before the tax authorities but as was the position earlier no facts were placed on record to show that the car had been used for business purposes and the expenditure claimed thereto was incidental. The reliance on Tribunal decisions reported in 10 ITD 788 and 123 TTJ 54 are without merit. In this view of the matter the disallowance is confirmed.

11. The last ground in the appeal pertaining to levy of interest u/s 234 B is consequential as per assessee's counsel and he has prayed for necessary relief to be allowed on the part of the AO while giving appeal effect to the order of the Tribunal. The ld. DR did not oppose this request and we, therefore, direct the AO to allow consequential relief.

12. In the Revenue's appeal the following two grounds are raised:

"1. The Ld. CIT(A)(C) Ludhiana has erred both in law and on facts in deleting the disallowance of Rs.1733800/- made by the AO on account of commission paid to marketing agents.

2. The ld. CIT(A) has erred both in law and on facts in deleting the disallowance of Rs.899150/- made by the AO on account of commission/ service charges paid to Bombay Breweries."

13. Both the parties agreed and stated that the aforesaid grounds had been decided in favour of the assessee by the CIT (A) following her earlier orders which in turn had been confirmed by the Tribunal. The ld. DR hastened to sup;port the order passed by the AO."

6. We are further of the view that the orders of the Tribunal in the earlier assessment years have not gone un-challenged. In respect of assessment years 1987-88 and 1988-89, the Revenue has assailed the orders in Income Tax References. In that regard a reference has been made in para 5 of the memo of appeals and those are also pending before this Court. Therefore the findings recorded by the Tribunal are wholly erroneous, cryptic, perverse, laconic and perfunctory.

7. On the second question also regarding the payment of Rs.38,02,950/- made to the Corporate Management Division of M/s United Breweries Ltd. Banglore, the assessee- company claimed that the aforesaid amount was paid as its contribution to Corporate Management Division of M/s United Breweries, Banglore for the whole group of industries controlled by this group. The assessee was given an opportunity to explain and to provide evidence of the services rendered by the United Breweries Ltd., Banglore warranting payment of such a huge amount under the head Contribution to Corporate Management Division. The Assessing Officer recorded various reasons in para 8 of its order and

concluded that the expenditure is not wholly and exclusively for business purposes and even otherwise disallowable expenses, which is not allowable under the Act, the assessee could not be indirectly allowed to contribute to Corporate Management Division like entertainment or perks disallowable under Sections 37, 40A and 40(c) of the Act. Accordingly it has been held that expenditure under this head claimed to be Rs.38,02,950/- is disallowed and was added to the income of the assessee. The appeal to the CIT (A) on the aforesaid issue has been upheld. CIT(A) rejected the ground for allowing the aforesaid expenditure and proceeded to observe as under in para 9.6 which reads thus:

> "9.6. Actually these expenses are those expenses which are not allowable under the I.T. Act e.g. entertainment, Indian & Foreign Traveling, refreshment expenses, holiday play; giveaway (nature not known) and are clearly disallowable under the I.T. Act. Most of these expenditure is either perquisite or of executives & Directors & Chairman debited under various heads and not allowable. The facts of the case are similar to the last year where it was held that expenditure is clearly of disallowable nature and not wholly and exclusively for business where it is disallowed on the following grounds:
>
> i) Firstly, what the assessee means is expenditure in CMD is first incurred and then on the basis of man-hours spent on various companies it is distributed among the group of companies of U.B. Ltd. group; that means expenditure which is incurred need not be wholly and exclusively for business purposes or allowable expenditure and this is supported by details of expenditure that expenditure is neither wholly of exclusively for the business of the assessee company nor it is allowable u/s. 37 of the I.T. Act.
>
> ii) Secondly, the assessee or CMD has not given any information how many total man-hours were available and at what level i.e. of Directors and Executives. How much time (Man hours) were spent on this company.
>
> iii) Thirdly, it has not given the man-hours spent on this particular company- what services were rendered to this company.
>
> iv) Fourthly, whether the services are rendered and the expenditure incurred is wholly and exclusively for business purpose. This has not been proved.
>
> v) The expenditure contributed by the assessee company towards CMD is not proved to be the expenditure relating to this company. All sums are divided on same basis

which is not disclosed to the revenue and it is not proved that particular incurred by CMD has anything to do with the assessee company.

vi) Sixthly, the details of expenditure show that most of the expenditure is not allowable under the I.T. Act like entertainment liquor quota, expenditure for personal use of car or is in the nature of perquisite to the Managing Director, Directors and the company executives & this exp. is indirectly claimed by row thing it through CMD. In-land Travel is equivalent to salary bill; for what purposes foreign travel has been made?

vii) Last of all whatever the evidence the assessee furnished before the AO and CIT(A) at appellate stage in the nature of correspondence with the CMD it is covered by the Technical Assistance Agreement made with UB Ltd. for which separately ` 53,78,688/- has been paid and no other services have been rendered which is over and above this Technical Assistance Agreement. It is also held that the expenditure is not wholly and exclusively for business purposes. Even otherwise the disallowable expenditure which is not allowable under the I.T. Act the particular company cannot be indirectly allowed to CMD like entertainment or perks disallowable u/s. 37, 40A and 40(c).

The addition made of Rs. 38,02,950/- is fully confirmed and the ground of appeal is dismissed."

8. On appeal of the assessee, the Tribunal proceeded to skirt the issue by imputing the statement to the counsel for the Revenue that in the preceding assessment years 1987-88 and 1988-89 the aforesaid amount on appeal to the Tribunal was deleted and was not added to the income of the assessee- company. Despite the fact that in paras 6 and 13, the Tribunal has referred to the statement of the counsel for the Revenue that he supported the order of the CIT (A) and of the Assessing Officer. For the reasons which we have stated earlier for reversing the findings of the Tribunal on the first question of law, this question of law also deserves be decided likewise. The finding of the Tribunal even in respect of second question of law would therefore be unsustainable and is erroneous, cryptic, perverse laconic and perfunctory.

9. In view of the above, both the questions of law are answered in favour of the revenue and against the assessee- company. As a consequence, the order of the Tribunal is set aside and that of the CIT(A) is restored.
