Tax Review/Taxation

Daily Alert Service

Huzaima & Ikram
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This issue contains:

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No end to tax amnesties

by
Huzaima Bukhari & Dr. Ikramul Haq

Pakistan is a unique country where the governments—military and civilian alike—have been frequently introducing amnesty schemes allowing whitening of dirty money. In other words, both the Legislature and Executive are keen in sponsoring and patronising criminal activities of not only tax evaders, but also in extending facilities to terrorists, drug barons, and such others to decriminalise their funds. In the presence of obnoxious laws protecting dirty money, the only hope is the Apex Court to take suo moto action under Article 184(3) of the Constitution. If it is not done, the criminals engaged in tax evasion, terrorist financing, corruption, money laundering will continue to play havoc with the State.

The question that baffles sane minds is that why do elected members of Parliament approve and/or pass such undesirable laws/schemes? For the last many decades, Pakistan is victim of terrorism, tax evasion, corruption, reverse capital flows and capital flights, all due to policies of appeasement by successive governments and laws that protect the perpetrators of these crimes.

On November 28, 2016, the Standing Committee on Finance and Revenue of the National Assembly considered yet another amnesty scheme facilitating dirty money in real estate sector, despite protest and walk-out by the Opposition. Possessors of dirty and untaxed money have been accommodated as usual. This state-backed protection of dirty money is unprecedented! **Besides the bona fide investment in real estate in Pakistan, this sector has been the most attractive shelter for dirty money as well as generating further unprecedented untaxed profits. It is reported that the government has decided to extend yet another amnesty for owners of dirty money by amending section 111(4) of the Ordinance giving them facility to pay 3% of difference of valuation as per FBR's rate and that of local authorities <u>and no question would be asked about the source of money!</u>**

Since November 1990, when Muhammad Nawaz Sharif became Prime Minister of Pakistan for the first time, the culture of loot, plunder, corruption, tax evasion and money laundering has been legalized and promoted through an obnoxious law namely, Protection of Economic Reforms Act, 1992 giving a free hand to criminals that no question would be asked by tax officials and functionaries of Federal Investigative Agency (FIA) for acquiring and using dirty money. His three stints as Prime Minister and years as minister and chief minister in the Punjab can safely be labeled as "rule of a trader" whose heart is infested with the insatiable greed of amassing wealth, expanding a mediocre family-owned business into a flourishing empire at the expense of the national exchequer, other business houses and the public at large. This fact was also noted by a judge of High Court in a reported case, details of which are summarised below.

In *Messrs Pak Ocean and Others v Government of Pakistan through Secretary, Ministry of Finance, Central Secretariat, Islamabad and others* 2002 PTD 2850, the petitioners challenged the imposition of regulatory duty on re-meltable iron scrap, excluding bundled and shredded scrap and the reduction in the rate of duty on bundled and shredded scrap as unlawful, arbitrary, unreasonable and ultra vires Articles 4, 18, 24 and 25 of the Constitution. They contended that the said imposition of regulation duty through Statutory Regulatory Order (SRO) was aimed at making their imported scrap very expensive as compared to the imports by big businessmen in the form of bundled and shredded scrap. According to petitioners, the adverse SROs were issued "to solely benefit the owners of the furnaces who are large imported of shredded scrap". In the judgement, there is a direct indictment against the House of Sharifs, contained in Para 50 that reads as under:

> **Mr. Khalid Anwar has mainly placed reliance on the judgment in the case of *Ittefaq Foundry v. Federation of Pakistan* PLD 1990 Lahore 121. In the cited case it was contended that the petitioner was producer of billets and that there were other producers, producing ingots, the end-product whereof was same. In order to economically ruin the petitioner in the cited case, duty structure was changed in the year 1989 without reasonable justification and the change in the duty structure was against the rights guaranteed in Articles 4, 18 and 25 of the Constitution. The contention of the petitioner was accepted and the relief was allowed. <u>However, with the change in fortunes, the persons were feeling the pinch of oppression in the case of *Ittefaq Foundry v. Federation of Pakistan*, became the rulers and thereafter, they very easily and conveniently managed to forge the treatment given to them and got the duty structure changed through notification assailed in these petitions, thereby deriving huge undue benefit at the cost of total destruction of the small importers and traders of the scrap in loose form</u>.**

The above paragraph confirms beyond any doubt how traders as rulers play havoc with the national exchequer and mint billions through tax concessions secured vide SROs thus destroying their competitors. Yet in the presence of these undeniable facts and court ruling State agencies/institutions like FBR, FIA, ECP, NAB etc plead helplessness claiming "lack of evidence" to proceed against tax evaders and plunderers of national wealth.

In two articles, '**Trail of hidden wealth**', *Business Recorder*, May 6, 2016 and '**Tough times for PM**', *Business Recorder*, May 13, 2016, incontrovertible evidence was produced to show abuse of Protection of Economic Reforms Act, 1992 to legalise ill-gotten wealth, blatant violations of tax laws by the family of the Prime Minister and wrong declarations made by him in papers submitted before the Elections Commission of Pakistan (ECP) in 2013 as well as false/misdeclarations in returns submitted to the Federal Board of Revenue (FBR). Astonishingly, the National Accountability Bureau (NAB) still claims that "no evidence" is available to initiate proceedings against the rulers of the day.

House of Sharif has a proven track record of destroying competitive business houses but appeasing traders that politically back them and pose no threat to their empire. They have been passing laws to protect tax evaders and were also beneficiaries of the same. Obviously, tax compliance does not suit the huge business empire of Nawaz/Shahbaz and family. It is not surprising that Nawaz Sharif, during his third term as Prime Minister has already announced four tax amnesty schemes and now another is in the offing. In 2013, 2015 and 2016, he approved tax amnesties for tax evaders, which failed to mop up untaxed money.

On the very first day of 2016, Premier Nawaz took pride in announcing a tax amnesty scheme and publically revealed that he had been asking his Finance Minister to come up with something "worthwhile" that could be "acceptable" to the traders who had not been filing tax returns!! Lamentably, as Prime Minister he openly vowed to protect the accumulation of untaxed (black) money. He never minces words for announcing criminal and unconstitutional schemes patronising tax evaders and encouraging plunder of national wealth. This supports the allegations of the Opposition that he and his own family are guilty of these crimes as well, so he wants amnesty and immunities for all.

Nawaz Sharif has reportedly always been keen to launch tax amnesty schemes knowing that his 2013 tax amnesty shockingly fetched a negligible amount of Rs. 88 million from about 3000 persons! Much-publicised and negotiated with consensus (sic) Voluntary Tax Amnesty for traders, the deadline for which was extended many times, could not lure them and only 3205 got registered against the agreed target of one million new filers!!

According to FBR's own study, the contribution of traders in income tax is just 0.5% and in sales tax about 1%. Like powerful absentee landlords, the traders pay meagre income tax. However, they successfully keep revenue authorities at bay due to powerful political influence they wield. The history of income tax law is fraught with provisions that were amended and/or re-amended on account of the traders' shutter-down threats or violent demonstrations, causing legislators to get cold feet and succumbing to their demands. The governments—civil and military alike—have been extending amnesty schemes to tax evaders to whiten their undeclared incomes and ill-gotten wealth—for example Ayub

Khan's Tax Amnesty Scheme of 1958, 1969 Tax Amnesty of Yahya Khan, Zulfikar Ali Bhutto's Tax Amnesty, Self-Assessment Schemes of the 1970s, Special National Fund Bonds or Simplified Self-Assessment Scheme of the 1980s, Foreign Currency Accounts or Foreign Exchange Bearer Certificates of the 1990s, Amnesty Scheme of 2008 by PPP government, three amnesty schemes of Nawaz-Dar since 2013, various other millennium immunity schemes and the perpetual scheme in the form of the infamous section 111(4) of the Income Tax Ordinance, 2001.

Non-compliance of tax obligation is a grim reality of Pakistan. The State has failed to fulfill its basic obligations—protection of life and property, health, education, housing and transport etc. Tax defiance and corruption in Pakistan are closely linked with rulers-cum-traders—who are unscrupulous and their greed is unbound. Plato aptly said in the *Republic* that ruin comes for a country when traders whose hearts are filled with greed become rulers. This is what we are witnessing in today's Pakistan.

France

France mulls diverted profits tax

The French National Assembly is considering a proposal to introduce a new diverted profits tax.

Put forward by Socialist French Senator Yann Galut, the proposal is based on the same levy introduced in the UK to ensure that profits are not shifted out of France through artificial arrangements.

The provisions would reportedly ensure that arrangements to avoid establishing a tax presence or liability in France would be subject to a prohibitively high tax rate, above the present corporate tax rate of 33.33 percent.

Whether the levy is adopted may depend on the outcome of the ongoing presidential election rate, with the French Socialist Party behind in the running. The DPT is proposed to be in place by 2018. – *Courtesy tax-news.com*

Australia

Australia to legislate for diverted profits tax

The Australian Government has released draft legislation for the implementation of the proposed Diverted Profits Tax (DPT).

The policy was originally announced at the 2016-17 Budget. If passed, the legislation would impose a 40 percent penalty tax on profits that have been "artificially diverted" from Australia by multinationals.

The DPT is intended to target entities with annual global income of AUD1bn (USD748.5m) or more that shift profits to offshore associates where:

- The resulting increase in the foreign tax liability is less than 80 percent of the corresponding decrease in the Australian tax liability;
- There is insufficient economic substance; and
- One of the "principal purposes" is to obtain a tax benefit.

If the DPT applies to a scheme, the Commissioner of Taxation may issue a DPT assessment to the taxpayer in question. Once an assessment is issued, the taxpayer will have 21 days to pay the amount stipulated.

The taxpayer will be able to provide the Commissioner with further information disclosing reasons why the DPT assessment should be reduced during the period of review (generally 12 months after notice is given of the DPT assessment). If at the end of the review period the taxpayer is dissatisfied with the DPT assessment, or amended DPT assessment, they will have 30 days to appeal to the Federal Court of Australia.

The DPT will not apply if it is reasonable to conclude that one of the following tests applies to the relevant taxpayer:

- The AUD25m turnover test – this will apply if, broadly, the sum of the Australian turnover of the relevant taxpayer and the Australian turnover of any other Australian entities that are part of the same global group does not exceed AUD25m;
- The sufficient foreign tax test – this will apply if, broadly, the increase in the foreign entities resulting from the scheme is 80 percent or more of the reduction in the Australian tax liability of the relevant taxpayer; or
- The sufficient substance test – this will apply if, broadly, the income derived, received, or made as a result of the scheme by each entity that entered into or carried out the scheme, or is otherwise connected to it, reasonably reflects the economic substance of the entity's activities in connection with the scheme.

The DPT will commence on July 1, 2017. The Government expects it to raise AUD200m over the next four years. – *Courtesy tax-news.com*

Hong Kong

Hong Kong explains new tax appeal process

Hong Kong's Inland Revenue Department (IRD) has updated Interpretation and Practice Note No. 6 to reflect legislative changes to the rights of appeal against tax assessments, which began to be applied from April 1 this year.

Since that date, a taxpayer who disputes an assessment may apply directly to a court of first instance for leave to appeal against the IRD's decision on a matter of law. If the court grants leave to appeal, it will hear and determine the substantive issue of the appeal. If the court refuses to grant leave to appeal, the appellant may make a further application to the Court of Appeal.

Those cases delivered before April 1 will continue to be processed under the previous practice, which required an appellant or the Commissioner to make an application requiring the Board of Review to present the case to the lower court. – *Courtesy tax-news.com*

OECD

OECD recommends cuts to Irish USC

The OECD has voiced support for the Irish Government's pledge to reduce the Universal Social Charge (USC).

The recommendation that the burden of the USC be lowered was made in the OECD's latest economic forecast for Ireland. It argued that "structural reforms should prioritize making economic growth more inclusive by getting more people back into work and revamping the tax and benefit system."

The 2017 Budget allocated EUR335m (USD355.1m) to reducing each of the three lower USC rates by 0.5 percent and increasing the ceiling of the band on which the reduced 2.5 percent rate is payable. The USC is paid in addition to individual income tax.

These reforms were less dramatic than the one percent cut to the main 5.5 percent USC rate pledged in the Fine Gael manifesto. The Programme for Government, drawn up by the minority Fine Gael administration in conjunction with the opposition parties, commits the Government to phasing out the USC over the life of the current five-year parliament.

The OECD said: "Economic growth is projected to moderate gradually. The economy, particularly exports and investment, is already being slowed by the prospect of Brexit. Nonetheless, the Irish economy will continue to expand on the back of solid domestic demand and strong employment and wage growth."

It explained that Ireland "is the country that could be the most affected by the Brexit negotiations and the outcome of the process." The UK accounts for 15 percent of Irish exports, and the OECD predicted that the sharp depreciation of sterling will also present a challenge for Irish firms. – *Courtesy tax-news.com*

Canada

Report: Canada must improve tax competitiveness

The tendency of Canada's federal and provincial governments to hike taxes on businesses means that the country is beginning to lose its competitive edge, according to a new report by the School of Public Policy at the University of Calgary.

The School's 2015 Tax-Competitiveness Report, authored by Philip Bazel and Jack Mintz, explained that Canada's effective corporate tax rate on new investment has risen from 17.5 percent in 2012 to 20 percent in 2015. The report attributed this increase primarily to higher provincial corporate income tax rates, the British Columbian Government's reversal of previous goods and services tax reforms, and reductions in tax preferences at federal and provincial levels. Reforms introduced in the federal 2016 Budget will see the effective rate increase to 20.1 percent.

The School found that Canada now has the sixth-highest marginal effective tax rate (METR) in the G7, and the 13th-highest in both the G20- and the OECD-country groupings.

Among Canada's provinces, the report noted that Newfoundland and Labrador increased its corporate income tax rates to deal with their deficits, while New Brunswick increased its corporate tax from 10 percent to 14 percent in 2014-16. An increase in Alberta's corporate tax in 2015 pushed up its effective tax rate by 2.3 percent to 19.3 percent, above that of Ontario and Quebec.

"With the US election of Donald Trump and a Republican Congress promising to reduce corporate income tax rates, as well as the recent affirmation by the Prime Minister May to lower the UK corporate income tax rate to 17 percent, the pressure will be to reduce, not to increase corporate income taxes in the next several years," the School said.

The Government should use the revenues that will be generated from its review of tax expenditures to cut the corporate income tax rate, the report recommended.

"For example, the federal rate could be reduced from 15 to 13 percent by scaling back accelerated depreciation and other tax preferences at the federal level on a revenue-neutral basis. Provinces could adopt a single corporate income tax rate on all businesses that would also be fiscally neutral. This would simplify the business tax structure as well as make it more efficient and neutral," the report suggested. – *Courtesy tax-news.com*

European Union

MEPs back auto exchange of anti-money laundering data

The European Parliament has voted in favor of proposals to require the automatic exchange of information held by authorities responsible for the prevention of money laundering.

MEPs agreed to update Directive 2011/16/EU by 590 votes to 32, with 64 abstentions. Member states must implement the amended directive before the end of 2017.

The new rules will enable and oblige tax authorities with anti-money laundering responsibilities in any EU country to automatically share information such as bank account balances, interest income, and dividends with their counterparts in other EU member states.

Where a financial account holder is an intermediary structure, financial institutions are required by EU Directive 2014/107/EU to report the entity's beneficial ownership. Applying that provision relies on information held by authorities responsible for the prevention of money laundering, pursuant to Directive 2015/849/EU. – *Courtesy tax-news.com*

Customs values on import of yarn revised

The Directorate General of Customs Valuation Karachi has revised customs values on the import of different specifications of polyester spun yarn and viscose spun yarn for assessment of duties and taxes from China, Thailand, Indonesia, India and Vietnam origin.

According to the valuation ruling number 983 of 2016 issued here on Tuesday, customs values of various counts of polyester spun yarn, viscose spun yarn and their different blended yarn of China, Thailand, Indonesia, India and other origins (manufactured from polyester staple fibre and viscose staple fibre respectively) have been determined.

The ruling said that Chairman All Pakistan Textile Mills Association (APTMA) wrote to Director General Customs Valuation, stating that subject yarn items are being rampantly under-invoiced and consequently, financially damaging local manufacturers directly. In this context, APTMA requested the Directorate General of Customs Valuation Karachi to determine customs values of subject items as per prevailing international prices. All-Pakistan Textile Mills Association (APTMA) vide letter Number PO/chair-38/2016/0462 dated 25th of July 2016 also lodged a complaint regarding the aspect of under-invoicing in import of polyester and viscose spun yarn (HS-Code 5509.5100) before Chairman Federal Board of Revenue, Islamabad. This prompted the initiation of a detailed exercise for determination of value of said items under section 25A of the Customs Act, 1969.

The Director Valuation took up this matter and wrote to the President KCCI, APTMA and PYMA inviting stakeholders to provide input on valuation of subject goods. After analysing available information/ data, the Director, Directorate General on 25th August 2016 held first meeting in this context. Initial deliberations took place and it was decided that both APTMA and PYMA shall submit agreed formulas/proposals to derive at subject values, the same were to be securitised by this Directorate. Thereafter, every single aspect of the polyester/viscose chain was thrashed out starting from raw-material prices up to the subject and products. Representatives of Pakistan Yarn Merchant Association (PYMA) and representatives of All Pakistan Textile Mills Association (APTMA) and their technical teams duly assisted the Directorate General and put forth in detail, their respective points of view regarding the conversion costs and the import value of subject items.

It is pertinent to mention here that both PYMA and the APTMA are reputable trade associations and it is a fact that both have conflicting interests with regard to import value of subject items, therefore, it was decided that contentions of each of the associations shall be accorded due weightage. All aspects were thrashed out and their conflicting views were heard (concerning the polyester and viscose chain items, starting from raw material and going up to the finished form of subject goods), by the Directorate General.

There had no valuation ruling in field for polyester and viscose spun yarn, therefore, care was exercised to derive at assessable values of various counts and blends of subject goods. After many stages of deliberations, four contentious issues were identified for further elaborations. These issues are determination of raw material values (ie polyester staple fibre and viscose staple fibre), conversion cost to convert staple fiber (of polyester and viscose) into spun yarns, of different counts that are being imported, conversion cost to convert staple fibre (of polyester and viscose) into blended yarns, of different counts that are being imported and conversion cost of converting staple fibre (of polyester and viscose) into double or multiple yarns of different counts that are being imported, ruling said.

Despite the fact that both parties had strong views regarding their own contentions in terms of import values of subject goods, however, finally vide separate letters from PYMA and from APTMA (jointly signed by both parties), both (APTMA and PYMA) mutually agreed on a manner I formulae for determining prices of different types of the Spun yarn counts, their various blends and of double or multiple yarn, under Chapter 55 keeping in view the ring spinning machines, rotor spinning machines and vortex/jet spinning machines (MJS or MVS) and their conversion rates / costs.

After detailed discussion the valuation method stipulated vide Section 25 of the Custom Act, 1969 was applied to arrive at fair value of subject spun yarn types and categories. Transaction value method provided in section 25 (1) was found inapplicable because requisite information was not available as per law. Identical/similar goods value methods provided in See 25(5) and (6) were sequentially examined for applicability to valuation issue in instant case, the same provided some important reference values but they could not be exclusively and solely relied upon.

Thereafter, market inquiry as envisaged under Section 25(7) of the Customs Act, 1969, was conducted. The prices of different types, counts etc of Spun Yarn in open market varied significantly and were heavily depended on quality of the Yarn and location of the selling Point or shops throughout the country. Hence, this tool for determining value could not be solely relied upon. Furthermore, online value was also checked. The computed value method as provided in Section 25 (8) of the custom Act, 1969 could not be applied solely either as conversion cost from constituent material at country of export were provided by industry experts and not by the manufacturing factories in China themselves. All information gathered above was utilized, evaluated and analyzed for purpose of determination of customs values. Consequently, customs values of spun yarn of polyester, viscose and their blends of different specification have been determined under section 25 (9) of the Customs Act 1969, directorate said.

In cases where declared/transaction values are higher than the Customs values determined in this Ruling, the assessing officers shall apply those values in terms of Sub Section (1) of Section 25 of the Customs Act, 1969. In case of consignments imported by air, the assessing officer shall take into account the differential between air freight and sea freight while applying the Customs values determined in this Ruling. Clearance Collectorates are requested to be vigilant during assessment and examination, with special emphasis on count, description and specification of yarn imported, directorate added.

The values determined vide this ruling shall be the applicable customs value for assessment of subject imported goods until and unless it is rescinded or revised by the competent authority in terms of Section 25-A of the Customs Act, 1969. In case imported spun yarn does not specifically fall under any of the above descriptions and its value is not determinable, the same may be referred to the Directorate General for necessary action at this end. – *Courtesy Business Recorder*

Rs 43 billion irregularity in FBR audit: PAC chief forced to refer matter to DAC for reconsideration

The audit paras for 2013-14, which pointed out Rs 43 billion loss to the national kitty, forced the chairman Public Accounts Committee (PAC) to refer the matter to departmental accounts committee (DAC) for reconsideration after officials from both Federal Board of

Revenue (FBR) and Auditor General of Pakistan (AGP) came down hard on each other.

Concessions in duty, exemptions and zero rating of tax notified under statutory regulatory orders (SROs) caused a loss of Rs 5.8 billion to the national exchequer, but the audit officials contradict the claim made by the FBR officials. The committee, which met here in the chair of Syed Khursheed Ahmed Shah, turned into a fish market after officials both from FBR and AGP, especially women, verbally attacked each other. The PAC members Sheikh Rasheed Ahmed, Mehmood Khan Achakzai, and others took stock of audit paras of 2013-14 for Ministry for Finance and the Ministry for Law and Justice.

“Both AGP and FBR are respectable organisations and I don’t allow you to fight each other, so let me send the audit paras back to DAC for reconsideration, so that we can easily sort them out and report back by December 7,” remarked Shah. The audit officials plainly told the top parliamentary watchdog that FBR did not make recoveries, and in 2013-14, over Rs 6 billion customs duties were waived off.

Another shocking revelation which further exposed the FBR, according to audit officials, was that the board suffered a massive revenue loss of Rs 5.8 billion on account of non-recovery of inadmissible concessions and exemptions and wrong tax concessions granted by tax officials to different sectors/industries during 2013-14. The audit officials said the massive irregularity was identified in 2013, but nothing had been done on it so far. However, the FBR officials came with an interesting reply saying some Rs 3.1 million recoveries had been made while efforts were under way to recover remaining amount of Rs 395 million.

In another twist to the massive Rs 5.8 billion irregularity, the FBR officials had nothing substantive to say except declaring the audit objection “controversial.” The only justification for the massive tax exemption, which the FBR officials completely relied on to burry the issue under the carpet forever, was that defence machinery worth millions of rupees were imported on which lump sum tax was paid.

The FBR officials tried their level best and kept explaining the different sections of Customs Act, 1969, and said that machinery related to defence could not be taxed due to security reasons. However, the committee member including its chairman did not move an inch despite lengthy clarifications given by FBR officials who moved from pillar to post to settle the audit objection once for all, and referred the issue back to DAC with directives to report back on December 07.

Rashid Godel, a member of the committee raised objection over supplementary grant to the FBR, saying: "You people are the kings of the ring and simply damn care where to spend the money...at least follow the laid down rules to spend this money." Chairman FBR Nisar Muhammad Khan, a career customs officer, stated that there was no post of CFO in FBR, which forced the PAC chairman to reprimand the top chap, saying: "Come prepared next time [and] it looks as if you have no idea what we are asking from you."

The FBR chairman said that some Rs 300-400 billion could not be recovered due to litigations, adding the issue which the FBR facing was that the Board could not hire a lawyer having fee more than Rs 1 million. "Ten Model Custom Collectorates (MCCs) extended the benefit of exemptions and concessions of duties and taxes under certain SROs without fulfillment of requisite conditions which resulted in non-realisation of Rs 5.8 billion revenue," the report said.

Defending these exemptions, FBR Chairman Nisar Mohammad Khan said a sizeable amount related to the defence imports, adding due to the security reasons, neither the forces disclosed any details about their import nor the customs authorities could check items in the consignment meant for the defence forces; therefore, the FBR could charge certain amount of taxes on the defence imports.

"There is a system based on mutual understanding under which a lump sum amount is imposed on the defence import as tax," he explained. However, he said since the policy related to issuance of SROs by FBR had been abolished; therefore, it was not possible for the revenue board to offer such concessions in future. Audit officials on the other hand argued that the stance of the FBR was rather ambiguous.

They said FBR under the SROs exempted tax for the import of tables, chairs and other items which were produced locally whereas under the government's policy it could not offer any concession for the import of such products as it would discourage the indigenous manufacturing. – *Courtesy Business Recorder*

2016 TRI 556 (Trib. Ind.)

INCOME TAX APPELLATE TRIBUNAL
MUMBAI "A" BENCH, MUMBAI

R.C. Sharma, Accountant Member and Ravish Sood, Judicial Member

FACTS/HELD

S. 50C: If the difference between the sale consideration of the property shown by the assessee and the FMV determined by the DVO u/s 50C(2) is less than 10%, the AO is not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee. Unregistered sale agreements prior to 01.10.2009 are not subject to s. 50C as per CBDT Circular No.5/10 dated 03.06.2010

(i) The assessee sold certain flats during the year under consideration and also executed sale agreements for the same. The sale agreements were not registered, therefore, it was not possible to determine the stamp duty value as per provisions of Section 50C. However, the AO referred the matter to the DVO, who valued the four flats at Rs.2,07,51,130/- against declared sale consideration of Rs.1,96,,60,000/- by the assessee. Thus, there was a difference of Rs.10,91,130/- which amounts to approximately 5.5% of the amount actually declared as the sale consideration.

(ii) Circular No.5/10 dated 03/06/2010 reads as under:–

> *"The existing provisions of section 50C provide that where the consideration received or accruing as a result of the transfer of a capital asset, being land or building or both, is less than the value adopted or assessed by an authority of a State Government (stamp valuation authority) for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall be deemed to be the full value of consideration received or accruing as a result of such transfer for computing capital gain. However, the present scope of the provisions does not include transactions which are not registered with stamp duty valuation authority, and executed through agreement to sell or power of attorney."*

(iii) Thus, these amendments have been made applicable with effect from 1st October, 2009 and will accordingly apply in relation to transactions undertaken on or after such date. In the instant case, the transactions were entered during the financial year 2006-2007 i.e., 1st April 2006 to 31st March 2007 which is prior to 01/10/2009. Therefore, as per CBDT, circular provisions of Section 50C are not applicable in so far as sales deed so executed were not registered with the Stamp Duty Violation Authority.

(iii) We are also inclined to agree with learned AR Mr. Shashank Dandu that in view of the decision of Co-ordinate Bench in case of Rahul Constructions vs. DCIT (Pune) (Trib.) 38 DTR 19 (2010) ITA No.1543/Pn/2007 since the difference between the sale consideration of the property shown by the assessee and the FMV determined by the DVO under Section 50C(2) being less than 10 per cent, AO was not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee.

(iv) We are also in agreement with learned AR that decision of Madras High Court in case of Sugantha Ravindran 353 ITR 488 is squarely applicable to the facts of the instant case where it has been held that since transfer was made prior to the amendment of Section 50C w.e.f. 1/10/2009, the provisions of section 50C would not be applicable.

(v) It was also argued by learned AR that the unregistered property was sold on 07/08/2006 which means, since the unregistered property was sold before the clarification was issued under Circular No.5/2010 dated 03/06/2010 where it clearly states that the scope of the provisions do not include transactions which are not registered with stamp duty valuation authority, and executed through agreement to sell or power of attorney and hence the provisions of Section 50C will not be attracted since the sale is before 01/10/2009, which is the date on which the circular becomes applicable.

Appeal allowed.

ITA No.5402/Mum/2014 (Assessment Year :2007-08).

Heard on: 27th October, 2016.

Decided on: 23rd November, 2016.

Present at hearing: Sashank Dandu, for Appellant. A. Ramachandran, for Respondent.

JUDGMENT

Per R.C. Sharma:– (Accountant Member)

This is an appeal filed by the assessee against the order of CIT(A) for the assessment year 2007-08 in the matter of order passed u/s. 143(3) of the I.T. Act.

2. The grievance of assessee relates to upholding addition of Rs.10,91,130/- being the difference in valuation of property arrived at by DVO.

3. Rival contentions have been heard and record perused.

4. Facts in brief are that assessee is engaged in the business of construction and sale of flats. During the year under consideration, the Assessee had sold 4 flats on 07/08/2006 for a sale consideration of Rs.1,96,60,000/-. On requiring the assessee to submit the sale agreements, it was submitted that the sale agreements were not registered and that it was not possible to determine the stamp duty value as per the provisions of Section 50C of the Income Tax Act, 1961.

5. Not convinced with assessee's reply, the AO referred the valuation of these flats to the District Valuation Officer (DVO), for the determination of the Fair Value of the property sold, who had declared the value to be Rs. 2,07,51,130/-. Difference in the valuation was added by the AO in assessee's income u/s.50C. By the impugned order, CIT(A) confirmed the action of the AO against which assessee is in further appeal before us.

6. Mr. Shashank Dandu, learned AR of the assessee vehemently argued that the total addition is only a small percentage of 5.5%(Approx) on the total amount of sale consideration declared by the Assessee being less than 10%, which may be ignored for the purposes of computing Long Term Capital Gains. In support of the proposition that where difference between the value declared by assessee vis-a-vis valuation arrived at by the DVO is only 5.5%, the same can be ignored, reliance was placed on the decision of *Rahul Constructions vs. DCIT (Pune)* (Trib.) 38 DTR 19 (2010) ITA No.1543/Pn/2007

7. It was further argued by Mr. Shashank Dandu learned AR that provisions of Section 50C are not applicable to the facts of case in the A.Y.2007-08 under consideration. He invited our attention to the fact that unregistered property was sold on 07/08/2006 which means, since the unregistered property was sold before the clarification was issued under Circular No.5/2010 dated 03/06/2010 where it was clearly stated that the scope of the provisions do not include transactions which are not registered with stamp duty valuation authority, and executed through agreement to sell or power of attorney and hence the provisions of Section

50C will not be attracted since the sale is before 01/10/2009, which is the date on which the circular becomes applicable.

8. Our attention was invited to the CBDT circular No. 5/2010 dated 03/06/2010, 324 ITR 319 and the decision of Madras High Court in the case of *CIT vs Sugantha Ravindran* 2013 352 ITR 488 (Mad).

9. On the other hand, learned DR Shri A. Ramachandran relied on the order of the lower authorities and contended that the AO altered the sale consideration value of the property, which was subject to transfer, based on report offered from District Valuation Officer. Thus, it is established that the market value determined of the said property is determined by an expert person i.e., DVO who is authorised to do the same as per his qualification. Accordingly it was argued that the addition so made by AO to Long Term Capital Gain of Rs.10,91,130/- is justified and correct. Accordingly, the addition so made by AO and confirmed by the CIT(A) should be upheld.

10. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also carefully gone through the Circular No.5/10 dated 03/06/2010 as cited by learned AR. We had also deliberated on the judicial pronouncements cited by learned AR during the course of hearing before us in the context of factual matrix of the instant case. From the record we found that assessee had sold certain flats during the year under consideration and also executed sale agreements for the same. The sale agreements were not registered, therefore, it was not possible to determine the stamp duty value as per provisions of Section 50C. However, the AO referred the matter to the DVO, who valued the four flats at Rs.2,07,51,130/- against declared sale consideration of Rs.1,96,,60,000/- by the assessee. Thus, there was a difference of Rs.10,91,130/- which amounts to approximately 5.5% of the amount actually declared as the sale consideration. Circular No.5/10 dated 03/06/2010 reads as under:–

> *"The existing provisions of section SOC provide that where the consideration received or accruing as a result of the transfer of a capital asset, being land or building or both, is less than the value adopted or assessed by an authority of a State Government (stamp valuation authority) for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall be deemed to be the full value of consideration received or accruing as a result of such transfer for computing capital gain. However, the present scope of the provisions does not include transactions which are not registered with stamp duty valuation authority, and executed through agreement to sell or power of attorney."*

11. Thus, these amendments have been made applicable with effect from 1" October, 2009 and will accordingly apply in relation to

transactions undertaken on or after such date. In the instant case, the transactions were entered during the financial year 2006-2007 i.e., 1st April 2006 to 31st March 2007 which is prior to 01/10/2009. Therefore, as per CBDT, circular provisions of Section 50C are not applicable in so far as sales deed so executed were not registered with the Stamp Duty Violation Authority. We are also inclined to agree with learned AR Mr. Shashank Dandu that in view of the decision of Co-ordinate Bench in case of Rahul Construction (supra) since the difference between the sale consideration of the property shown by the assessee and the FMV determined by the DVO under Section 50C(2) being less than 10 per cent, AO was not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee.

12. We are also in agreement with learned AR that decision of Madras High Court in case of Sugantha Ravindran 353 ITR 488 is squarely applicable to the facts of the instant case where it has been held that since transfer was made prior to the amendment of Section 50C w.e.f. 1/10/2009, the provisions of section 50C would not be applicable.

13. It was also argued by learned AR that the unregistered property was sold on 07/08/2006 which means, since the unregistered property was sold before the clarification was issued under Circular No.5/2010 dated 03/06/2010 where it clearly states that the scope of the provisions do not include transactions which are not registered with stamp duty valuation authority, and executed through agreement to sell or power of attorney and hence the provisions of Section 50C will not be attracted since the sale is before 01/10/2009, which is the date on which the circular becomes applicable.

14. In view of the above discussion, we set aside the order of the lower authorities and allow the appeal in favour of the assessee.

15. **In the result, appeal of the assessee is allowed.**

Order pronounced in the open court on this **23/11/2016**.