Daily Tax News (DTN)

Huzaima & Ikram
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  I.T.A. No. 397/RJT/2009
  (Assessment year 2006-07)

Kind regards

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FBR & rule of mafia

by
Huzaima Bukhari & Dr. Ikramul Haq

The Federal Board of Revenue (FBR, according to all indicators and now even admissions by its own officers, symbolizes an institution wrought with corruption, inefficiency, sleaze and wastefulness. The recurrent occurrences of mega scams—fake refunds, flying invoices, under invoicing, excessive payments of export rebates, just to mention a few—confirm the existence of a strong mafia—as unholy alliance between corrupt tax officials and unscrupulous elements—that is depriving the nation of billions of rupees and criminally shifting the incidence of taxes onto the poor.

Since the start of World Bank funded Tax Administration Reforms Programme (TARP), FBR has been making tall claims about its automation efforts. All the chairmen of FBR, who headed the apex revenue authority for the last 10 years, have been assuring the public from time to time that after introduction of automated procedures in all the departments, the possibilities of tax fraud had been effectively countered. But the facts and figures show that since 2005 when computerized processes were introduced, the incidences of tax frauds increased substantially as compared to the days when manual procedures were in vogue. This means that before going for automation, neither system analyses were properly conducted nor quality and training of human resource employed was assured. The number of tax scams surfaced since 2005 and huge quantum involved testify to the fact that there is a complete failure on the part of FBR to implement preemptive measures against tax frauds.

A report published in ***Business Recorder*** on December 10, 20120 revealed that Mr. Sajjad Akbar Khan, Additional Commissioner of Large Taxpayer Unit (LTU), Karachi, sent a letter to the Chairman FBR, accusing "14 officers of processing and sanctioning bogus refunds worth Rs77.5 million despite the issuance of the red alerts by the intelligence and investigation of Inland Revenue Service (IRS)". According to him "a well-organised mafia has colluded with the top guns of the tax machinery to execute multibillion rupees of refunds to the bogus business enterprises". This is a serious allegation and its leakage to the Press should be a serious cause of concern for the higher echelons of FBR—it indicates total collapse of the command system within the organisation as well. According to the complaining officer, fake business enterprises were registered and declared to be located in the areas inaccessible—addresses of these units are in Baldia Town, Sher Shah, Orangi Town, etc. These fake units, he alleges, either do not exist at all or in some cases are in rented premises with some junk/scrap machineries—these businesses are not even registered with any utility company like gas or electricity and

the racketeers use fake or stolen computerised national identity cards to show ownership of a typical ghost factory.

The FBR officer, who according to Press reports, demonstrated unprecedented courage to expose mafia asserted, "The mafia has strong influence in hiring, posting, transferring, and firing of the tax officials in RTO Karachi, FBR Headquarter, Investigation and Intelligence wing of Inland Revenue (IR) and any other office". He further alleged that any unwanted officer is sent to "Legal/IP Division or TFD, which are infamous as the eternal dumping grounds for unwanted officers". The officer said that "though earlier the mafia was working indiscreetly, now they have become powerful to threaten the officials openly".

While FBR officials are now at war with each other and mafia's presence and rule is a reality, Transparency International Pakistan has demanded recovery of taxes of billions. In its letter of December 8, 2012, it demanded recovery of Rs 119.6203 billion from Malik Riaz, Dr Arsalan Iftikhar and Ahmed Khalil on account of alleged tax evasion determined by Federal Tax Ombudsman (FTO)[1].

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[1] 8th December 2012,
Mr. Ali Arshad Hakeem,
Chairman,
Federal Board of Revenue,
Government of Pakistan,
Islamabad.

Sub: Recovery of Rs 119.4682 Billion from Mr. Malik Riaz, Dr Arsalan Iftikhar and Mr. Ahmed Khalil on account of tax evasion determined by FTO.

Dear Sir,

Transparency International Pakistan refers to its letters dated 4th September 2010, (**Annex-A),** on the news published on 1st September 2010, with following request;

> *"TIP request the Chairman FBR to provide information to TIP on the total value of assets of Malik Riaz as assessed by FBR in accordance with Income Tax Ordinance 2001, including the Income tax and Capital Value Tax paid in 2009 on assets worth over Rs 225 Billion (US 3 Billion). In case these assets have not been declared to the FBR in 2009-2010 returns of Mr. Malik Riaz, TIP request FBR to take action according to the law. TI Pakistan is working for FBR to become a "Zero Tolerance against Corruption" organization*

Even after 7 reminders sent to the Chairman FBR, TIP was not informed about the tax collected on the publically declared assets of Rs 225 billion by Mr. Malik Riaz himself.

According to the FTO inquiry commission report submitted in the Supreme Court of Pakistan on 6th December 2012, in the matter of Malik Riaz Hussain, Dr. Arsalan Iftikhar and others, tax evasion of Rs 119.4682 Billion has been determined.

Following is the extracts from newspaper report.

> *It is left for the competent forums to investigate and decide as the court order did not pass any direction with regard to the commission's following allegations of serious nature:*
> *2- Tax evasion of Rs119.4 billion by Malik Riaz Hussain.*
> *8- Detection of undeclared bank accounts in the name of Ahmed Khalil showing deposits of Rs306m. Without any declared income, Ahmed Khalil has been found owner of assets worth Rs677m. Income tax implications on these assets come to Rs169m.*

The Chairman FBR is requested to take immediate measures in accordance with the rules and regulations to recover Rs 119.4682 billion from Mr. Malik Riaz, Dr Arsalan Iftikhar and Mr. Ahmed Khalil on account of tax evasion determined by FTO.

The officer who has lodged a written complaint with Chairman FBR of what he calls 'fraudulent tax refunds' was amongst the 13 officers who refused to serve in the National Accountability Bureau (NAB) on deputation[1]. According to experts, tax frauds recently surfaced and reported in Press are only a tip of the iceberg. The actual number of tax frauds is yet to be determined. These experts claim that the present Chairman FBR (considered very close to Asif Ali Zardari) and the team he has brought with him is responsible for the protection of refund mafia. They say the present situation is the same as when Abdullah Yousaf was Chairman FBR (he was also very close to Pervez Musharraf and filed affidavit against Chief Justice Iftikhar Muhammad Chaudhry in the

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It is also requested that action may be taken against the officers who did not act under the FBR rules, and caused loss to the exchequer by not recovering the amount even after TIP had in right time informed FBR in September 2010 about this major tax evasion.
TI Pakistan is striving to have transparency in procedures and Rule of Law in Pakistan, which is the only way to eliminate corruption and have good governance in country.

Yours Sincerely,

Syed Adil Gilani
Chairman

Copy forwarded for action under the rules regulations o
1. Chairman Public Accounts Committee, Islamabad
2. Federal Tax Ombudsman, Islamabad
3. Dr Abdul Hafeez Shaikh, Federal Minister of Finance, Islamabad
4. Auditor General Pakistan, Islamabad
5. Registrar, Supreme Court of Pakistan, Islamabad

[1] NAB sent a request to the FBR for a panel of 13 officers from Karachi, Islamabad/Rawalpindi, Quetta, Peshawar and Lahore to be posted but all refused to join except one officer Amer Ilyas, who was serving as Deputy Commissioner, Large Taxpayers Unit (LTU) Islamabad. The officers who refused to join NAB included Sajjad Akbar Khan, Additional Commissioner of Inland Revenue, Karachi, Dr. Shams-ul-Hadi, Additional Commissioner Karachi, Nosherwan Khan, Additional Commissioner, Karachi, Mehbooba Razaq, Director Withholding Tax, FBR Headquarters, Ehsan Ullah Khan, Deputy Commissioner of RTO, Rawalpindi, Muhammad Arif, Deputy Commissioner of RTO, Quetta, Salah Uddin, IRS, Quetta, Tariq Arbab, Deputy Commissioner of RTO, Peshawar, Haroon Masood, Secretary, FBR, Noureen Ahmed Tarar, Deputy Director of PCS, Lahore, Saad Waqas, Deputy Director of Intelligence and Investigation (I&I) IR Lahore and Nayyar Shafiq, Deputy Director of I&I IR Lahore. These officers refused to join NAB citing growing politicisation and the lack of professionalism—according to them NAB has virtually turned into job employment bureau for retired army officers who, most of the time, spent energies to stick to the Standard Operating Procedures (SOPs) instead of focusing on energies to unearth white collar crime. The officials said that NAB had failed to recover even a penny on account of organised tax evasion. The cited the case of Bhawan Shah in which NAB failed to recover a penny during the last six years. This case was referred to NAB in 2006 in which one individual caused a loss of over Rs. 20 billion to the national exchequer by establishing fake companies for securing refunds. They raised a question that when NAB could not solve a simple case of fake sales tax invoices, how could it unveil hidden hands in a complex mega scam of missing ISAF/NATO containers? Even the Supreme Court has showed annoyance over investigation conducted by NAB in the matter of ISAF/NATO containers scam. Lutuf Ullah Khan Virk, the then Director General of Customs and Mohammad Sadiq, the then Additional Director of Customs Intelligence, unearthed the ISAF/NATO containers scam but they were neither allowed to be part of investigation nor summoned by the Supreme Court in the suo moto case.

presidential reference]. They say that these crimes are not possible if the head of the organisation and his top team is vigilant. It is high time, they argue, that the Parliament constitutes a committee to thoroughly probe the record of the last ten years of all concerned tax departments and unearth all cases of tax frauds. The retrieval of public money through this process would substantially increase tax collection for the current year.

The following summary of major tax frauds, reported in the Press since 2005, establishes beyond any doubt the criminal culpability of the staff and high-ups of FBR:

- On December 10, 2012, FBR appointed two inquiry committees to probe multibillion rupees refund scams and the loss of up to Rs1190 million in revenues. According to Press reports, Chairman FBR Ali Arshad Hakeem took note of a letter written by Additional Commissioner Large Taxpayer Unit (LTU) Karachi, Sajjad Akbar Khan in this regard. These committees will be headed by FBR's Member Legal, Mr. Aqil Usman and Member Training, Mrs. Yasmin Saud.
- FBR's data shows that fake input adjustments and illegal refunds caused Rs. 537 billion in losses to the national exchequer and in the first five months of the current fiscal year, the revenue stood at Rs. 200 to Rs. 250 billion.
- Recently, Commissioner Inland Revenue (Appeals-II) Karachi, Bashrat Ahmed Qureshi, sent a message to Chairman Ali Arshad Hakeem, alleging that a senior FBR official had given incentive to two fertilizer companies of the same group causing a loss of Rs. 690 million and Rs500 million to the national exchequer.
- In November 2012, 52 companies in Karachi alone were blacklisted, while registration of 10 was suspended/blocked after their alleged involvement in what tax authorities termed as a 'daylight dacoity'. The blacklisted companies provided fake input adjustment invoices resulting into fake refunds of Rs. 40-45 billion.
- Tax gap of FBR, according to various studies, was not less than 70 to 85 percent during 2008 to 2011.
- In August 2012, Federal Tax Ombudsman (FTO), Muhammad Shoaib Suddle, instructed the FBR to restructure the Pakistan Revenue Automation Ltd (PRAL) and Investigation & Intelligence with a view to transforming them into proactive agents of sales tax fraud prevention and detection. The FTO gave these instructions on a decision on a complaint filed by Advocate, Waheed Shahzad Butt. According to the complaint, tax fraud taking place on such a large scale could not be perpetrated without insider information and support.

- In July 2012, Rs. 47 billion tax scam involving five cellular companies surfaced when NAB barred the FBR from granting what it termed unjust relief through a Statutory Regulatory Order (SRO) giving waiver in respect of tax chargeable on interconnection service to these companies.
- In April 2012, while the imbroglio surrounding one of the country's biggest scam of missing containers was still lingering on, another 785 boxes belonging to Afghan Transit Trade went missing. They were not de-sealed at the customs border check posts. This raised a big question mark about the performance of the customs authorities because disappearance of boxes from computer screen at any stage raised controversies, difficult to be substantiated when it came to investigation or litigation[1].
- In March 2012, sales tax scandals amounting to Rs159 billion were unearthed involving multinational companies and large industrial groups. Large Taxpayer Unit in Karachi detected sales tax fraud amounting to Rs. 25 billion. Islamabad's Large Taxpayer Unit, which detected Rs.10 billion worth of sales tax fraud and Lahore's Large Taxpayer Unit, pointed out unlawful adjustments in sales taxes to the tune of Rs. 8 billion.
- In April 2011, the Directorate of Intelligence arrested two persons involved in issuance of fake sales tax invoices for generating illegal input tax adjustment or refund. Both were wanted in a tax fraud case of Rs 7.5 billion.
- In 2010, the Directorate General of Intelligence and Investigation detected 166 cases of tax evasion, involving duty and taxes amounting to Rs. 2,828 million in the first six months (July-Dec) of 2009-10.
- In 2009, 59 cases of duty and tax evasion amounting to Rs. 1,603 million were detected.
- On 14 January, 2008, Directorate-General of Intelligence and Investigation detected "an organised tax fraud in Punjab

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[1] So far there has been no clear cut outcome of all the probes and findings by different bodies including Federal Tax Ombudsman (FTO) about the missing containers. The FBR also carried out many internal probes but all have contradictory findings. In some places they even negated each other factually and mathematically. None of these investigation reports suggest how to control future pilferage of ATT and NATO/ISAF containers. Most of these reports only concentrate on time-line and number of missing containers related to different years. According to the FTO findings submitted to the Supreme Court of Pakistan, it was not possible for ATT containers to complete a round trip from Karachi to Torkhum or Chaman and back to Karachi in eight days. Based on these criteria, the FTO reported that during the period from January 1, 2007 to October 15, 2010, as many as 7,922 containers had completed the said round trip in eight or less than eight days. The FTO concluded that the imported goods never crossed Pakistan-Afghan border and were pilfered within Pakistan. The revenue loss on these 7,922 containers as estimated by the FTO was worth Rs. 19 billion. Based on the benchmark of ten days haulage period the number of missing containers, the FTO stated in its report, worked out to be 15,314 and the revenue loss at around Rs. 37 billion.

involving a gang of income tax officials, who issued fraudulent refunds to the fake government contractors". According to details "the nature of this tax fraud was entirely different from the modus operandi of the income tax gangs recently busted in Enforcement Zone, Companies-IV, Karachi and Lahore".

- On 5 January 2008, a report was published in the leading newspapers disclosing that FBR unearthed a scam in Lahore involving a senior income tax official (Grade-20), who allegedly issued bogus refunds of over Rs 103 million in 39 cases on forged documents during 2003-2007. Earlier a similar scam was reported in Karachi.
- On 22 October 2007, Directorate-General of Intelligence, Customs and Excise, instituted criminal proceedings against 14 industrial units of Punjab for claiming illegal sales tax refunds by filing bogus invoices. The fraud took place two years ago when many commercial exporters had claimed illegal refunds on the basis of fake documents (FBR took two years to take notice of the crime!). Obviously the beneficiaries were giving huge bribes to concerned officials, who are still working without any fear of accountability.
- On 2 June 2007, FBR issued notices to pay phone companies for recovery of Rs 370 million falsely claimed refunds. The Board launched adjudication proceedings against these companies involved in obtaining illegal excise duty refund. In this connection, formal notices have been served to these companies.
- On 14 May 14 2006, the apex court rejected the bail application of one Raja Zaraat, "who was wielding far larger financial clout than originally estimated" in getting billions of rupees as tax refund on forged documents [says a Press release of FBR!). The FBR disclosed that although the first complaint against the accused was received by it in December 2005 yet no action was taken till 4 May 2006 when the accused was arrested in Islamabad. It is obvious that this colossal tax fraud was not possible without the connivance of tax officials[1].

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[1] BR itself admitted that in numerous cases refunds were issued to the 'commercial exporters' without obtaining prior approval of additional collectors. This was a clear violation of the FBR Sales Tax Wing's directive that approval of additional collector was required for sanctioning refund claim exceeding rupees one million to the commercial exporters. The sanctioning authorities also ignored important FBR's instructions on procedure for overruling system objections for issuance of sales tax refunds. Investigation showed that the sales tax officials did not carry out profile analysis of the 'suppliers' in cases of refund claims sanctioned to commercial exporters under Refund Rules 2006 (SRO.555(I)/2006). Glaring system errors were also detected in STARR refund automation programme whereby goods exported were recorded in the system only till the filing of shipping bills. This resulted in inaccurate as well as incomplete data of export consignments. It was noticed that certain unscrupulous exporters filed claims without making actual exports. There was need to capture data of the shipping lines to ensure authenticity of export documents used for claiming rebate, which was never done. Although FBR noticed cases of claiming sales tax refunds against fake and tampered

- A scam in Lahore involving a senior income tax official (Grade-20), who allegedly issued bogus refunds of over Rs 103 million in 39 cases on forged documents during 2003-2007, was unearthed. FBR sources in the Directorate General of Intelligence and Investigation revealed that the official not only tampered the tax record in certain cases, but also grossly violated rules and regulations, particularly Income Tax Ordinance 2001 to facilitate the illegal refunds. Tax fraud in the Companies Zone, Lahore, appeared to be committed on the same pattern as Companies Zone, Enforcement Zone-B Karachi. The astonishing part of the story was that the corrupt official was appointed to work as Member Tribunal to settle income tax-related disputes of the taxpayers. He also issued illegal refunds during his appointment on other positions in Lahore, showing serious loopholes in the system to check the wrongdoings of senior tax officials in the field formations.
- During 2003-2007, one tax official used different techniques to issue illegal refunds in several cases without any check by any agency. It was found that the accused official during his appointment as Commissioner Income Tax (CIT), Companies Zone-II, Lahore was involved in corruption. Details collected by an intelligence agency revealed that the official deliberately issued bogus refunds of Rs 19.211 millions to an electronic company in 2003, 2004 and 2005 despite the fact that tax record was tampered by changing figures/important documents. The examination of record also showed concealment of basic facts of the case and flouting of statutory provisions and legal requirements. The official deliberately drafted wrong cases showing misstatements to give legal backing to the bogus refunds. In another case, the official issued bogus refund of Rs 33.99 million to a company for the tax year 2004. The objections raised by the lower income tax officials were ignored to issue bogus refunds. According to sources, the accused official was also given additional charge of Commissioner of Income Tax

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shipping bills, no concrete efforts were made to counter these. In many cases, unscrupulous exporters with the connivance of staff successfully obtained refund by circumventing the STARR system because it had not put enough checks to verify the shipping bills. During scrutiny of STARR programme in 2006, it was found that the refunds were even issued in cases where the computer programme had detected discrepancies in the documents submitted by exporters. The inquiry of illegal refund to pay phone companies is still lingering on. These companies according to FBR's own admission were not entitled to the refund for the reasons that they were exempt from payment of excise duty on the services provided by them for the period up to July 1, 2005. Why action was not taken at the time of payment of refund. The start of inquiry after "illegal" payment shows the presence of certain "hidden hands", which are still not exposed. In the Income Tax Department, according to reports issued by the FBR, fake refunds of millions of rupees have been issued recently. It is strange that on the one hand tall claims about improvements in integrity levels under the on-going reforms have been made and on the other blatant acts of fraudulent refunds issuance have increased manifold.

Zone-A, Lahore for 2-3 weeks in June, 2007. During this period, illegal refunds were issued in 37 cases involving over Rs 50 million by committing serious violations of law. In all 37 cases, violations in interpretation of law were so blatantly committed that they were clearly visible even on initial scrutiny of documents. The Board initiated disciplinary proceedings against the official under the Removal from Services (Special Powers) Ordinance 2000, but he not only survived but got promotion in Grade 21!

- FBR suspended three senior income tax officials of Karachi, who sanctioned Rs 138.460 million fake refunds on bogus tax deduction certificates issued by some stock exchange members. FBR constituted a high-level committee headed by Mukhtar Ahmed Gondal, Director General, Large Taxpayer Unit (LTU) Karachi, to probe this mega tax fraud. The Director General Intelligence and Investigation recommended to the Board that immediate action be taken against a former commissioner of Income Tax, Companies Zone-IV, Karachi; ex-Additional Commissioner Companies Zone-IV, Karachi and Ex-DCIT, Companies Zone-IV, Karachi. The FBR was also obtain tax record from Regional Tax Office (RTO), Karachi, for fixing responsibility on PRAL, stock exchanges and identification of banks. On the findings of the DG Intelligence, the FBR initiated disciplinary proceedings against the suspected income tax officials. The DG Intelligence apprehended that Board's immediate attention was needed in this regard, otherwise its negative fallout might cause irreparable loss in meeting the revenue target. FBR found that the former officials of Enforcement Zone, Companies-IV Karachi used illegal 'tax deduction certificates' issued to some stock exchange brokers for claiming refund. The Vigilance Wing of DG Intelligence detected that the three ex-income tax officials of Companies Zone-IV caused huge loss to the exchequer by issuing bogus income tax refunds to hundreds of individuals during 2006-07. The involved officials issued illegal refunds to individuals who were out of the Companies Zone-IV, Karachi, jurisdiction. FBR sources said the illegal refunds were issued in such a manner that all the ingredients of an organised tax fraud were properly managed. The DG Intelligence had detected that refunds were issued on the basis of certificates u/s 164 of Income Tax Ordinance, 2001 to selected brokers/individuals for trading in shares. Under the law, members of the stock exchanges were not authorised to issue such certificates. The individuals whom refunds had been issued did not fall under Enforcement Jurisdiction of Companies Zone-IV, Karachi. The National Tax Numbers (NTNs) of these individuals were in serialised sequence, pattern of tax years was identical, refund cheque numbers were in serialised sequence,

dates of refunds were identical, whereas members/brokers issued unauthorised certificates to individuals/brokers under section 164. Interestingly, refunds were issued to individuals, who were residents of other cities/stations and their particulars do not match with the NTN Master Index.

The above list is not exhaustive but is just a tip of the iceberg. The increased numbers of refund scams and unfettered tax evasion confirm that nothing has changed in FBR even after taking loans worth millions of dollars for reforms (sic). It is a sad reflection on FBR's top management. The corrupt and resourceful are still holding key posts and are issuing refunds on forged documents. They are still encouraging the profit-hungry and unscrupulous businessmen not to pay taxes but just give them their due "share" and then whiten their untaxed assets through amnesty schemes by just paying 1 to 1.5 percent. In the morning many officers sit in offices and in the evening render "professional" services [on *muk-muka* (settlement) basis] at their homes. It is beyond any doubt that the prevalent mass-scale evasion of taxes is not possible without the connivance of tax administrators.

The tax-evaders and dishonest tax officials together constitute a mafia that has made Pakistan a haven for tax dodgers and plunderers of national wealth. The tax officials holding key posts are posted on the recommendations of their political masters and not on merit. The unholy alliance between the tax evaders and tax officials design and implement policies for "mutually-beneficial" relations. The outcome is a total destruction of our socio-economic system (we are witnessing ever-increasing rich-poor divided, chaos and lawlessness).

Pakistan is controlled and ruled by *ashrafiya* (elites)—comprising indomitable military-civil bureaucratic complex, higher judiciary, landed aristocracy and its cronies, industrialist-turned politicians, clergy, and spiritual leaders (*pirs*), media tycoons and their powerful employees, and unscrupulous businessmen. Flouting the rule of law with shameless impunity is the hallmark of *ashrafiya*. They are not paying taxes due from them and FBR being their handmaid prepare tax amnesty schemes for them. The tax evaders, plunderers of national wealth, the corrupt, drug barons and extortionists have hijacked all the state institution. In these circumstances, tax scams can only be countered through a permanent commission, representing the people of Pakistan, which should probe the cases and release its reports in the Press on monthly basis.

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Distortions in VAT regime: FBR to withdraw zero-rating from certain items

Federal Board of Revenue (FBR) Chairman Ali Arshad Hakim has said that the FBR has decided to withdraw sales tax zero-rating from certain items to remove distortions in the existing Value-Added Tax (VAT) regime for generating additional revenue in 2012-13.

Talking to here on Tuesday at the FBR House, FBR Chairman said the Board is reviewing the entire zero-rating regime to withdraw sales tax zero-rating from some items. Hence, the FBR will constitute a committee to examine the entire zero-rating scheme.

The government wanted to generate additional revenue for which distortions in the VAT regime would be removed, Ali Arshad Hakim added. When contacted, a tax expert said that the FBR is legally empowered to withdraw zero-rating facility from different items under section 50 of the Sales Tax Act 1990. However, zero-rating facility available under Fifth Schedule of the Sales Tax Act 1990 could only be taken away through approval of the Parliament.

The FBR is expected to delete mostly zero-rating items from the SRO549(I)/2008. SRO549(I)/ 2008 - the most important notification which would be revised following Board"s decision to withdraw zero-rating facility. This notification is related to the zero-rating on certain goods subject to certain condition. The zero-rated items included dairy products, stationary, exercise books, writing, drawing and marking ink, pens and pencil etc sewing machine household type, cotton seed, oil cake and other sold residues. Other items mentioned in the said notification included bicycles, wheel chairs, energy savers and constructions material for Gwadar Export Processing Zone (EPZ). Zero-rating is also available on plant, machinery and equipment (whether or not manufactured locally), including parts thereof and plant, machinery and equipment, whether locally manufactured or imported.

Zero-rating is also applicable re-meltable scrap, dedicated CNG buses and all other buses meant for transportation of forty or more passengers whether in CBU or CKD condition, trucks and dumpers with g.v.w. exceeding 5 tonnes, bicycles, trailers and semi-trailers for the transport of goods having specifications duly approved by the Engineering Development Board and road tractors for semi-trailers, prime movers and road tractors for trailers whether in CBU condition or in kit form. Zero-rating is

also available on raw materials, components, sub-components and parts if purchased from authorised vendors by a recognised manufacturer of tractors for use in the manufacturing of such tractors under SRO549(I)/2008.

Zero-rating has been applicable to raw materials, components, sub-components and parts in case imported or purchased locally for use in the manufacturing of such plant and machinery as is chargeable to sales tax at the rate of zero percent. Under existing zero-rating regime, SRO1125(I)/2011 deals with the zero-rating for five export-oriented sectors including textile, leather, carpets, sports and surgical goods.

SRO863(I)/2007 is related to zero-rating on certain goods subject to certain condition (raw material and local purchase for manufacturing of zero rated goods declared in SRO 549). SRO769(I)/2009 deals with the zero-rating on import and supply of polypropylene for manufacturer of mono filament yarn and net cloth. SR0423(I)/2009 has granted zero rating on all product, services and equipment for execution of work for kararo-wadh section of national highway supplied to M/s. Taisei Corp Ltd.

Under the Fifth Schedule of the Sales Tax Act, zero-rating has been granted to US Aid programme. As per Fifth Schedule of the Sales Tax Act, zero-rating is available on supply to diplomats, diplomatic mission and privileged person and organisation under various acts and regulations. In accordance with the Fifth Schedule of the Sales Tax Act, zero-rating is applicable on supplies of locally made plant and machinery to EPZ and to petroleum and gas sector exploration and production. – *Courtesy Business Recorder*

Tax evasion: FTO to move against Malik Riaz, Arsalan

Federal Tax Ombudsman has decided to take action against real estate tycoon Malik Riaz and Chief Justice of Pakistan's son Dr Arsalan Iftikhar for alleged tax evasion. The Suddle Commission in its report had revealed that Malik Riaz evaded taxes worth Rs 119 billion and Arsalan Iftikhar evaded Rs 50 million taxes.

Regarding this, the Federal Tax Ombudsman said the issue of tax evasion could not be left unattended. Federal Tax Ombudsman has also decided to call in the Federal Board of Revenue to take necessary action into the matter. – *Courtesy Business Recorder*

Transfers and postings in FBR

FBR has transferred and posted five officers of the Inland Revenue Service (BS-17-19) with immediate effect.

Dr Abdul Sattar Abbasi (Inland Revenue Service/BS-19) has been transferred from Additional Commissioner, Regional Tax Office, Karachi to Additional Commissioner Inland Revenue, Regional Tax Office III, Karachi; Abdur Razzaq Khan (Inland Revenue Service/BS-18) from Secretary, (Inland Revenue Wing) Federal Board of Revenue (Hq), Islamabad to Deputy Commissioner, Inland Revenue Regional Tax Office, Rawalpindi; Waqas Ahmed Bajwa (Inland Revenue Service/BS-18) from Secretary, (Inland Revenue Wing) Federal Board of Revenue (Hq), Islamabad to Deputy Commissioner, Inland Revenue, Large Taxpayers Unit, Lahore; Amanullah (Inland Revenue Service/BS-18) from Deputy Commissioner, Regional Tax Office, Faisalabad to Deputy Director, Directorate General of Training & Research (Inland Revenue), Lahore; Muhammad Rafique (Inland Revenue Service/BS-17) from Assistant Commissioner, Regional Tax Office, Sargodha to Assistant Commissioner Inland Revenue, Data Processing Unit (Income Tax), Faisalabad. – *Courtesy Business Recorder*

Bogus refund claim: 'Red Alert' issued to Karachi RTO

The Directorate General Intelligence and Investigation Inland Revenue (IR) Federal Board of Revenue (FBR) has issued a Red Alert to Regional Tax Office (RTO) Karachi to stop a bogus sales tax refund claim filed by a unit and directed initiation of criminal proceedings against unit along with the tax officials involved in the fraud.

Sources told here on Tuesday that the agency has issued the Red Alert against the unit falling within the jurisdiction of RTO Karachi. The refund claim was processed in haste by the RTO officers but timely stopped by the agency to once again save valuable revenue. The increasing number of “Red Alters” within the jurisdiction of RTO Karachi speaks itself about number of claims checked by the directorate of intelligence IR.

The directorate is of definite view that the claim of aggregated refund of Rs 6236930/- for the tax periods July and August 2012 is based on fake/flying invoices and it is crystal clear that the major portion of input tax of subject unit is fake, which shows that the

whole activity is an engineered affair aimed at issuing illegal sales tax refund.

In the presence of sizable number of auditors and senior auditors why concerned Zone of the RTO Karachi has failed to identify the aforesaid discrepancies which could be traced through a cursory desk audit, Directorate questioned Chief Commissioner RTO Karachi. The record shows that the subject unit has been purchasing variety of goods/raw material and then making zero-rated supplies to various buyers, directorate of intelligence IR said.

The data shows that the subject unit has been purchasing variety of goods/raw materials and then making zero rated supplies to various buyers. The majority of the goods/raw material are not zero rated, therefore, creation of refunds on the basis of zero rated supplies of non zero rated goods/raw material is an illegal act which needs careful examination and, apparently the refund processing officers/staff have not done it as evident from the hasty sanction of refunds.

According to the Red Alert, the RTO may like to develop its internal control mechanism so as to identify all such cases within its respective jurisdiction. The RTO must initiate criminal proceeding against the subject unit as well as its departmental God fathers. Directorate General I&I-IR has conducted discreet intelligence check about the genuineness of the refund claim of the said unit and it is found that the subject unit has been claiming dubious/illegal input from various suppliers. An aggregated amount of refund of Rs 6, 236,930/- for the tax periods July and August 2012 has been claimed by the subject unit which is sanctioned accordingly on December 4, 2012. – *Courtesy Business Recorder*

Sale of Swat-made cosmetics: FBR asked to respond to nearly Rs 6 billion fraud in CED/FED

Federal Tax Ombudsman Secretariat has sent a notice to the Secretary, Revenue Division/Federal Board of Revenue (FBR) to forward comments on a complaint filed by Transparency International Pakistan against FBR relating to a fraud of approximately six billion rupees in CED/FED.

This has resulted due to allegations of collusion between officers of FBR and 16 manufacturing units operating in district Swat under an annual agreement between the group of companies and member

FBR. FBR Chairman Ali Arshad Hakeem was informed by TI-Pakistan through a letter sent to him on November 23 that it had received a complaint pointing to the fraud and informing him about the law of FBR which was that the sale of cosmetics made in Swat and sold in Swat were tax free, but if sold outside Swat and in Pakistan, 10 percent CED is to be charged from public and deposited with FBR.

The complainant had reported following violations:

1. That during the period July 1992 to June 2007, approximately Rs 6 billion fraud in CED/FED has occurred due to the allegation of collusion between officers of FBR and 16 manufacturing units operating in district Swat, under an illegal annual agreement between the group of cosmetics manufacturers' of tariff zone, and an ex-member FBR.

2. That the SRO 649 (1)/2005 dated 01-07-2005, which confirms that CED was payable at the rate of 10 percent on cosmetics on retail value.

3. That 16 manufacturing units were collecting FBR Revenue, Federal Excise Duty from public on their products at the prescribed rates of 10 percent and 7.5 percent, and some are charging sales tax (ST) at 16.5 percent since 1992. That the 16 manufacturing units are not depositing with FBR the revenue collected by them at 10 percent and 7.5 percent, which is estimated to be around Rs 450 million to 500 million per year, but under an illegal arrangement with a an ex-FBR member sales tax and federal excise, without any SRO being issued, based only on minutes of a meeting of June 13, 2006, are paying to the Government on fixed-basis, Rs 130 million/year.

4. That by using the illegal "agreement" as a vehicle to evade taxes, and claiming additional amount of excise duty, these firms are declaring the savings as their miscellaneous income in the audited statements of accounts in the income tax returns/assessments as Royalty Income, license fee, share of advertising expenses and additional receipts on account of their operation at Mingora, Swat.

5. Closure of any member unit of the group does not affect on the agreed amount/ payment of CED/FED for the year. However, the group has claimed partial waiver of FED for the calendar year 2009 at the time when actual army operation was taking place in the area because other units have not affected as they simply closed down and were not required to pay FED on fixed basis.

Actually the agreement expired on June 2007 and was not renewed for the years onward. However, member units of the group enjoyed payments of FED on fixed basis during 2007-8, 2008-9 and 2009-10, which could be verified from the audited accounts of the members.

6. That instead of taking action against the group and recovering over Rs 6 billion from them, and other cosmetics' manufacturers evading revenues at least 80 percent of their production and sales, which are luxurious items not a life saving drug and a potential sector to generate huge revenues, FBR fraudulently exempted cosmetics and toiletries from application of CED/FED. FBR SRO 598 (1)/2012, dated June 1, 2012 had omitted cosmetics, toiletries etc from levying of FED.

7. That these 16 firms have availed tax amnesty scheme of 2008, and as an example only one member unit had whitened their bounty of Rs 400 million in ITS-2008. This fact could be verified from FBR records.

8. Tax evasion scam was been reported in newspapers in July 2012, and serious criticism had been made on FBR for abolishing the taxes. Adil Gilani had requested Chairman FBR to investigate this alleged fraud, and find out under what authority, FBR has not been collecting CED/FED since 1992 from these 16 firms as per law at 10 percent, and why in 2012 FBR had exempted cosmetics and toiletries from application of CED/FED when the Government needed to increase its Tax-GDP ratio from nine percent to 18 percent.

Transparency International Pakistan is striving for across the board application of Rule of Law, which is the only way to stop corruption. Copies of the letter were forwarded for the information and action under the authority vested in their respective jurisdictions to: Chairman, Public Accounts Committee, Islamabad; Chairman, NAB, Islamabad; Minister Finance, Islamabad; Federal Tax Ombudsman, Islamabad, and Registrar, Supreme Court of Pakistan, Islamabad. – *Courtesy Business Recorder*

F.No.1(5)Jurisdiction/2010-Vol-II/157081-R

Islamabad, the 7th December, 2012

ORDER

In exercise of the powers conferred by Sub-Section (1) of Section 209 of the Income Tax Ordinance, 2001, Sections 30 and 31 of the Sales Tax Act, 1990 and Section 29 of the Federal Excise Act, 2005, Federal Board of Revenue is pleased to transfer the jurisdiction over the case of M/s United Agencies, Balal Associates, Balal Transport and Trucking Stations (NTN 0156606-7) from Chief Commissioner Inland Revenue, RTO-II, Lahore to Chief Commissioner Inland Revenue, LTU, Karachi.

2. This order shall take immediate effect.

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2012 PTR 2029 (Trib. Ind.)

INCOME TAX APPELLATE TRIBUNAL
RAJKOT SPECIAL BENCH, RAJKOT

G.C. Gupta, Vice President, D.K. Tyagi, Judicial Member and A.K. Garodia, Accountant Member

FACTS/HELD

1. **Section 10A: Condition that ROI should be filed within due date is mandatory**

2. For AY 2006-07, the assessee filed a ROI on 31.1.2007 when the due date was 31.12.2006. The assessee claimed s. 10A deduction. The AO & CIT(A) rejected the claim by relying on the Proviso to s. 10A(1A). The Special Bench had to consider whether the Proviso to s. 10A(1A) was mandatory or directory and whether s. 10A deduction could be allowed even to a belated return. HELD by the Special Bench:

> The Proviso to s. 10A(1A) provides that "no deduction under this section shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified u/s 139(1)". The assessee's argument that the said Proviso is merely directory and not mandatory is not acceptable. The Proviso is one of the several consequences (such as interest u/s 234A) that befall an assessee if he fails to file a ROI on the due date. As the other consequences for not filing the ROI on the due date are mandatory the consequence in the Proviso cannot be held to be directory (Shivanand Electronics 209 ITR 63 (Bom) & other judgements distinguished).

Appeal dismissed.

I.T.A. No. 397/RJT/2009 (Assessment year 2006-07).

Heard on: 10th September, 2012.

Decided on: 30th November, 2012.

Present at hearing: Sanjay P. Shah & Vimal Desai, CAs, for Appellant. Ankur Garg, DR, for Respondent.

JUDGMENT

Per A.K. Garodia:– (Accountant Member)

This special bench has been constituted by Hon'ble President, ITAT u/s 255(3) of the Income tax Act, 1961 to consider and decide the following questions, which relate to the solitary issue arising out of the appeal filed by the assessee for the assessment year 2006-07 being I.T.A.No. 397/RJT/2009:–

> "a) Whether the proviso to Sec.l0A(lA) of the Income Tax Act, which says that no deduction under Sec.10A shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under sec.139(l), is mandatory or merely directory?
>
> b) Whether, on a proper interpretation of the said proviso, it is permissible for the Tribunal to hold it to be merely directory and on that basis to hold that even if the return of income is not filed within the timelimit set by sec.139(l) the assessee cannot be denied the deduction u/s.l0A?
>
> c) If the answer to question (b) is in the affirmative, would it not amount to conferring a power on the Tribunal to extend the time-limit for filing the return u/s.139(1) or to condone the delay in filing the same, when no such power is expressly conferred upon it by the Act?"

2. The assessee is a partnership firm. The assessee filed return of income declaring total income of Rs.2,72,730/- on 31.01.2007 which was processed u/s 143(1) of the Income tax Act, 1961. Thereafter, the case was selected for scrutiny and notice u/s 143(2) of the Income tax Act, 1961 was issued and served on 23.01.2008. The assessee had claimed deduction u/s 10A of the Income tax Act, 1961. When asked to explain this claim, the assessee submitted before the A.O. that it derived profit from export of articles produced in SEZ and the sale proceeds were brought in India in convertible foreign exchange and, therefore, deduction u/s 10A of the Income tax Act, 1961 is allowable to it. Thereafter, it is noted by the A.O. in the assessment order that the assessee had filed its return of income on 31.01.2007 and the extended due date for filing return of income for the assessee's, being a firm, as per the provisions of Section 139(1) of the Act was 31.12.2006. The A.O. also observed that the assessee failed to file its return of income on or before the due date specified under sub-section (1) of Section 139 of the Income tax Act, 1961. He further noted that as per the newly inserted proviso appended to section 10A of the Income tax Act, 1961, no deduction should be allowed to an assessee who does not furnish return of income on or before the due date specified under sub – section (1) of Section 139 of the Income tax Act, 1961. He also noted that the proviso was introduced by the Finance Act 2005 which came into effect from 01.04.2006. The A.O. held that this proviso is applicable to the

case of the assessee and hence, the assessee's claim for deduction u/s 10A of the Income tax Act, 1961 is to be disallowed. In this manner, the A.O. disallowed the claim of the assessee for deduction u/s 10A of the Income tax Act, 1961. Being aggrieved, the assessee carried the matter in appeal before Ld. CIT(A) but without success and hence, the assessee is in further appeal before the Tribunal.

3. The questions referred to the special bench are already reproduced above. The first question is that the proviso to Section 10A(1A) is mandatory or merely directory. Further two questions are interrelated to question No.1.

4. In the course of hearing before us, both the sides agreed that there is no dispute about the facts because, admittedly, due date for filing the return of income in the present case was 31.12.2006 and the return of income was filed by the assessee on 31.01.2007. It was submitted by the Ld. A.R. before us that the audit report was filed within the due date allowed u/s 139(1) of the Income tax Act, 1961. He placed reliance on the following judicial pronouncements, copies of which are given in paper book III:–

a) *CIT vs Hardeodas Agarwala Trust* 198 ITR 511

b) *Church's Auxiliary for Social Action and Anr vs DGIT (Exemption) & Ors* 325 ITR 362

c) *CIT vs Gujarat Oil & Allied Industries* 201 ITR 325

d) *CIT vs. Shivanand Electronics* (supra) 209 ITR 63

e) *ITO vs VXL India Ltd.* 312 ITR 187

f) *Bajaj Tempo Ltd.* 196 ITR 188

4.1 Synopsis of contentions of the assessee was also filed and the same was also duly considered.

5. As against this, it was submitted by the Ld. D.R. that the fourth proviso to section 139(1) is specific which shall prevail on general provisions. He also placed reliance on the judgement of Hon'ble Apex Court rendered in the case of *Prakash Nath Khanna vs CIT* as reported in 266 ITR 01 (S.C.). Reliance was also placed on the Tribunal decision rendered in the case of *Balkishan Dhawan HUF vs ITO* as reported in 50 SOT 49 (ASR)(URO)/18 Taxman.com 234 (ASR). He also submitted that remedy lies with the Board and not before the Appellate Authorities. He also submitted that there is difference between the provisions of Section 139(1) and Section 139(4) and, therefore, the proviso to section 139(1) should prevail.

5.1 Written submissions were filed by the Ld. D.R. and the same were also duly considered.

6. In the rejoinder, it was submitted by the Ld. A.R. that the judgement cited by the Ld. D.R. are not applicable in the present case

because in those cases, the dispute was regarding substantial aspect and not to the procedural aspect. He also placed reliance on the judgement of Hon'ble Bombay High court rendered in the case of *CIT vs Shivanand Electronics* as reported in 209 ITR 63 and submitted that this judgement supports the case of the assessee. He also submitted that relevant explanatory note on the provisions of Finance Act 2005 Circular No.3/2006 dated 27.02.2006 is available on page 47A of the paper book III filed by the assessee and as per the same, this provision was inserted with a view to widen the tax base and hence, it is a procedural provision and not substantive provision.

7. Regarding the reliance placed by the Ld. D.R. on the judgement of Hon'ble Apex Court rendered in the case of Prakash Nath Khanna (supra), it was submitted that this judgement is not applicable in the present case because in that case, the issue involved was with regard to offences and prosecution u/s 276CC and, therefore, the facts are different in the present case. Regarding the Tribunal decision rendered in the case of *Balkishan Dhawan HUF vs ITO* (supra), it was submitted that this is a division bench decision and, therefore, not binding on the Special Bench.

8. We have considered the rival submissions and have gone through the judgements cited by both the sides. In our considered opinion, we have to decide regarding proviso to section 10A (1A) and hence, it should be reproduced. The proviso to Section 10A(1A) is reproduced below:

> "[(1A) Notwithstanding anything contained in sub-section (1), the deduction, in computing the total income of an undertaking, which begins to manufacture or produce articles or things or computer software during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2003, in any special economic zone, shall be,–
>
> (i) hundred per cent of profits and gains derived from the export of such articles or things or computer software for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, and thereafter, fifty per cent of such profits and gains for further two consecutive assessment years, and thereafter;
>
> (ii) for the next three consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Special Economic Zone Re-investment Allowance Reserve Account") to be created and utilised for the purposes of the business of the assessee in the manner laid down in sub-section (1B):

Provided that no deduction under this section shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under sub-section (1) of section 139."

9. We are also required to consider Section 139(1) and the 4th proviso to Section 139(1) of the Income tax Act, 1961 which read as under:–

Section 139(1)

"Every Person – (a) being a company or a firm or

b) being a person other than a company or a firm, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income tax,

shall, on or before the due date, furnish a return of his income o the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed."

4th Proviso;

Provided also that every person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, whether incorporated or not, or an artificial juridical person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year, without giving effect to the provisions of section 10A or section 10B or section 10BA or Chapter VI-A exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed."

10. When, we go through the provisions of Section 10A(1A) and its proviso along with the provisions of Section 139(1) and its 4th proviso, we find that the case of the revenue is this that as a consequence of assessee's failure to file the return of income within the time prescribed u/s 139(1), deduction is not allowable to the assessee u/s 10A of the Act.

11. The 1st question raised before us is this as to whether this proviso to Section 10A(1A) of the Income tax Act, 1961, is mandatory or merely directory. In order to decide this issue, we feel that we have to consider the whole scheme of the Act. The assessee is required to file the return of income within the prescribed time as per the provisions of Section 139(1). This provision of Section 139(1) is applicable to all companies and firms irrespective of the fact as to whether they are earning taxable income or not for the current year i.e. from 01.04.2006. In respect of other persons such as individual, HUF, AOP or BOI and Artificial Judicial Person, the

requirement is this that if such a person is having taxable income before giving effect to the provisions of Section 10A, then also, he is required to file return of income before the due date even if this person is not having taxable income after giving effect to the provisions of Section 10A. We find that the provisions of the proviso to Section 10A(1A) is nothing but a consequence of failure of the assessee to file the return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961. For such a failure of the assessee to file his return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961, this is not the only consequence. One consequence of such failure is prescribed in Section 234A of the Income tax Act, 1961 also as per which, the assessee is liable to pay interest on the tax payable by him after reducing advance tax and TDS/TCS if any paid by him apart from some other reductions. Such interest is payable from the date immediately following the due date for filing return of income and is payable up to the date on which such return of income was furnished by the assessee and if the assessee has not furnished any return of income then the interest is payable till the date of completion of the assessment u/s 144. In our considered opinion, this is also one of the consequences of not filing return of income by the assessee within the due date. One may raise this argument that interest u/s 234A is payable only if the assessee has not paid his advance tax and, therefore, this is interest for the failure of the assessee to pay advance tax as per the requirement of the Act and not for the delay in filing return of income. But in our considered opinion, this is not so. For the failure of the assessee to pay advance tax as per the requirement o the Act, interest is chargeable u/s 234B of the Income tax Act, 1961 if such advance tax paid by the assessee is less than 90% of the assessed tax. Such interest u/s 234B is payable from the first day of April of the relevant assessment year till the date of determination of the total income either u/s 143(1) or u/s 143(3) of the Act. The interest u/s 234A is payable from a date after the due date for filing the return of income and is payable up to the date on which the return of income is furnished by the assessee and if no return is furnished by the assessee at all then only, the interest is payable till the date of completion of the assessment u/s 144 of the Act. Under this factual and legal position, we have no hesitation in holding that the interest payable by the assessee u/s 234A is for his failure to file the return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961. This is by now a settled position of law that charging of interest under various sections including u/s 234A of the Income tax Act, 1961, is mandatory. When one of the consequences for not filing return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961 is mandatory then, other consequence of the same failure of the assessee cannot be directory and the same is also mandatory. In our considered opinion and in view of our above discussion, the provisions of the proviso to Section 10A(1A) is mandatory and not directory and, therefore, question (a) referred to us is answered in

negative and it is held that this proviso to Section 10A(1A) of the Income tax Act, 1961 is mandatory.

12. We now examine and discuss other consequences also for the failure of the assessee to file the return of income within the due date as required u/s 139(1) of the Income tax Act, 1961. One of such consequence is the provisions of Section 276CC as per which if the assessee fails to file the return of income within the due date prescribed under sub-section (1) of Section 139 of the Act then he shall be punishable for rigorous imprisonment along with fine and the quantum of such imprisonment and fine is dependent on the amount of tax which would have been evaded if the failure had not been detected. This issue was examined by Hon'ble Apex Court in the case of Prakash Nath Khanna (supra) as cited by the learned DR and it was held by the Hon'ble Apex Court in that case that even if the return of income is filed in terms of sub-section (4) of Section 139 and it does not dilute infraction in not furnishing return in due time as prescribed u/s 139(1) of the Act. This judgement also supports the view taken by us while answering question NO.1 as per above paras. When even for the purpose of prosecution also, it was held by the Hon'ble Apex Court that even if the return of income furnished by the assessee within the time allowed u/s 139(4), it does not dilute infraction in not furnishing the return in due time as prescribed under sub-section(1) of Section 139, then it cannot be accepted that such furnishing of return of income within time allowed u/s 139(4) will dilute the provisions contained in the proviso to Section 10A(1A) of the Income tax Act, 1961.

13. Regarding various submissions of the Ld. A.R. and various judgements on which reliance has been placed by the Ld. A.R., we would like to observe that these submissions do not have merit in view of our above discussion. The first submission is this that the provision of Section 139(4) are considered as proviso to Section 139(1) and if the assessee has filed return of income u/s 139(4), the same should be considered as return filed u/s 139(1) of the Income tax Act, 1961. On this aspect, we have already seen the judgement of Hon'ble Apex Court cited by the Ld. D.R. having been rendered in the case of Prakash Nath Khanna (supra), where it was held by Hon'ble Apex Court that the filing of return of income within the time allowed u/s 139(4) of the Income tax Act, 1961 cannot dilute the infraction in not furnishing return in due time as prescribed u/s 139(1) of the Income tax Act, 1961. In view of this judgement of Hon'ble Apex Court in this regard, the judgments cited by the Ld. A.R. i.e. CIT Vs Jagariti Agrawal (supra) and Trustees of Tulsidas Gopalji Charitable & Chaleshwar Temple Trust (supra) are of no relevance because these judgements are of two different High Courts but this aspect of the matter is covered against the assessee by the judgement of Hon'ble Apex Court cited by the Ld. D.R.

14. The 2nd submission of the Ld. A.R. in the written submission is this that requirement of filing of return of income is procedural aspect

and, therefore, it should be considered as directory and not mandatory. In support of this contention also, reliance has been placed on various decisions submitted by the assessee in the paper book II and III. We do not find any merit in these submissions of the assessee also because when consequences of not filing the return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961 are so grave i.e. charging of interest u/s 234A, possibility of prosecution u/s 276CC and denial of various deductions u/s 10A, 10B, 10BA and various sections under Chapter VIA, it cannot be said that this requirement of filing return of income is a procedural aspect.

15. Regarding various judgments cited by the Ld. A.R. in this regard, we find that some of these judgments are rendered by the division bench of the Tribunal and hence not binding on us. Regarding other judgements of various High Courts and Hon'ble Apex Court, we find that the same are not in respect of failure of the assessee for filing the return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961 and hence not applicable. Still, we discuss, each of those judgments cited before us as under:

- The first judgement submitted in paper book II is the judgement of Hon'ble Apex Court rendered in the case of Director of Inspection of Income Tax Vs Pooran Mall & Sons (96 ITR 390). In that case, the issue involved was regarding the validity of the order passed by the A.O. u/s 132(5) for retaining the seized assets and hence, this judgement is not relevant in the present case.
- The 2nd judgement cited is the judgement of Hon'ble Madhya Pradesh High court rendered in the case of *CIT vs Panama Chemical Works* (113 Taxman 717). In that case, the issue involved was regarding filing of audit report in Form 10CCB. The same was required to be filed along with the return of income filed by the assessee but in that case, the same was filed during assessment proceedings. Under these facts, it was held that the claim of the assessee regarding deduction u/s 80-I cannot be rejected if the required report in Form 10CCB was filed in the course of assessment proceedings. In the present case, the dispute is not regarding filing of some report along with return of income but the dispute is regarding filing of return of income itself within due date and hence, this judgment is also not relevant in the present case.
- The 3rd judgement cited is the judgement of Hon'ble Delhi High court rendered in the case of *CIT vs Axis Computers (India) (P) Ltd.* (178 Taxman 143). In that case also, the dispute was regarding the requirement of filing of audit report along with return of income and not regarding filing of return of income

within the due date and hence, this judgement of Hon'ble Delhi High Court is also not applicable in the present case.

– The next judgement cited is the judgement of Hon'ble Apex Court rendered in the case of *CIT vs National Taj Traders* (2 Taxman 546). In that case, the dispute was regarding passing of order by CIT u/s 33B of 1922 Act corresponding to Section 263 of the present Act and hence, this judgement is also not relevant in the present case.

– The next judgement cited before us is the judgement of Hon'ble Delhi High court rendered in the case of *CIT vs Web Commerce (India) (P) Ltd.* (178 Taxman 310). The dispute in that case is also similar to the dispute in the earlier decision of Hon'ble Delhi High Court rendered in the case of *Axis Computers (India) (P) Ltd.* (supra) and for the same reasons, this judgement is also not applicable in the present case.

– The next judgement cited before us is the judgment of Hon'ble Apex Court rendered in the case of *Bajaj Tempo Ltd. vs CIT* (62 Taxman 480). In that case, the dispute before the Hon'ble Apex Court was regarding allowability of deduction u/s 15C of 1922 Act corresponding to Section 80J of Income tax Act, 1961 and the facts were that the industrial undertaking was established in a building taken on lese, which was used previously for other business. Under these facts, it was held that the assessee was entitled to deduction. Since the facts are different, this judgement of Hon'ble Apex Court is also not relevant in the present case.

– The next judgement cited before us is the judgement of Hon'ble Calcutta High court rendered in the case of *CIT vs Hardeodas Agarwala Trust* (198 ITR 511). In that case, the issue in dispute was regarding furnishing of audit report along with return of income for the purpose of claiming exemption u/s 11 of the Income tax Act, 1961 and not the dispute was not regarding filing of return of income u/s 139(1) of the Act and hence, this judgement of Hon'ble Calcutta High Court is also not applicable in the present case.

– The next judgement cited before us is the judgement of Hon'ble Delhi High Court rendered in the case of *Church's Auxiliary for Social Acton and Anr vs Director General of Income Tax (Exemption) & Others* (325 ITR 362). In that case, the dispute was regarding deduction u/s 80G of the Income tax Act, 1961 and as per the facts of that case, the objection was regarding failure of assessee in rendering accounts to the competent authority within the prescribed period and it was held that such a requirement is directory and not mandatory. In the present

case, the dispute is regarding filing of return of income itself within the due date and hence, this judgement of Hon'ble Delhi High Court is also not relevant in the present case.

– The next judgement cited before us is the judgment of Hon'ble Gujarat High Court rendered in the case of *CIT vs Gujarat Oil and Allied Industries* (201 ITR 325). In that case also, the dispute was regarding the requirement of filing of audit report as to whether the same is mandatory or directory and as discussed in above paras, this judgment is also not relevant in the present case.

– The next judgement cited before us is the judgement of Hon'ble Delhi High Court rendered in the case of *Continental Contraction Ltd. vs Union of India and others* (185 ITR 230). This judgement is also not applicable in the present case because in that case, the issue was this as to when CBDT had approved agreement for such a project for the purpose of Section 80 - O while in fact Section 80HHB was found applicable and it was held that assessee has to be given an opportunity for complying with the provisions of sub-section (3) of Section 80HHB. Since the facts are different, this judgement is also not relevant in the present case.

– The next judgement cited before us is the judgement of Hon'ble Bombay High court rendered in the case of *CIT vs. Shivanand Electronics* (209 ITR 63). Very strong reliance was placed by the learned AR on this judgment but we find that for the same reasons as discussed above in respect of various judgements, this judgement is also not applicable in the present case because in that case also, the issue in dispute was regarding requirement of filing of audit report along with return of income for deduction u/s 80J(via) and it was held that it is not mandatory in strict sense. In the present case, the dispute is regarding filing of return of income within due date prescribed u/s 139(1) of the Income tax Act, 1961 and hence, this judgement is also not relevant in the present case.

– The next judgment is the judgement of Hon'ble Gujarat High Court rendered in the case of *ITO vs VXL India Ltd.* (312 ITR 187). In that case also, dispute was regarding filing of audit report and hence, this judgement is also not relevant.

– The next judgement cited before us is the judgement of Hon'ble Calcutta High court rendered in the case of *Presidency Medical Centre (P) Ltd. vs CIT* (108 ITR 838). The conclusion as per this judgment is reproduced below from the Head notes:

> *"Loss return can be filed within time specified by s.139(4) and once that return is filed within time it would be deemed to be*

in accordance with law and loss had to be determined and carried forward."

In view of this conclusion in this judgment that loss return can be filed within time specified u/139(4), this judgement is also not applicable in the present case because in the present case, the dispute is regarding filing of return of income within time allowed u/s 139(1) of the Income tax Act, 1961 and not u/s 139(4) of the Income tax Act, 1961 and hence, this judgement is also not applicable in the present case.

16. We have discussed all the judgments which were cited by the Ld. A.R. in the synopsis as well as copies of which are submitted in the paper book II and III and we have seen that none of these judgments is relevant in the present case.

17. In view of our above discussion, we have no hesitation in holding that the provisions of proviso to Section 10A(1A) is mandatory and not merely directory.

18. Now, we examine the 2nd question (b). In our considered opinion, since we have answered the 1st question (a) against the assessee and held that the provisions of the proviso to Section 10A(1A) is mandatory and not merely directory, the 2nd question (b) is not required to be answered because the same would have been required to be answered if we would have found that those provisions are not mandatory but merely directory. Hence, we do not answer the 2nd question.

19. The 3rd (c) question is also not required to be answered by us because the same is to be required to be answered only if our reply to 2nd question would have been in affirmative. Since we have found that this question is not required to be answered in the facts of the present case as per which we have decided the first question against the assessee by holding that the provisions of the proviso to Section 10A(1A) is mandatory and not merely directory, the 3rd question is also not required to be answered by us.

20. The only issue raised in this appeal is the one which we have considered in the question No.(a). We have held that the provisions of the proviso to Section 10A(1A) are mandatory and not directory i.e. in favour of the revenue and against the assessee. Therefore, we find that the order of Ld. CIT(A) is just and in accordance with law and the ground raised by the assessee is liable to be dismissed.

21. As no other issue is involved, it is not necessary for us to send back the case to the Division Bench. We dispose of the appeal as such.

22. In the result, the appeal of the assessee is dismissed.

23. Order pronounced in the open court on the date mentioned hereinabove.
