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A Brief on Tax Laws (Third Amendment) Ordinance, 2021

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Preamble

On 15th September 2021, the Tax Laws (Third Amendment) Ordinance, 2021 [**Amendment Ordinance**] was promulgated with a view to bring in certain enforcement measures to broaden the tax base, enforce tax compliance and enhance documentation of economy by making it mandatory for companies to make payment through digital means only. The Amendment Ordinance further provides certain powers to NADRA to support FBR in achieving these ends, though the probability of litigation of some of these powers cannot be ruled out.

The main features of the Amendment Ordinance are the enforcement measures including enhanced penalties and disconnection of utilities for non-filers of income tax return as well as Tier-I retailers who are not integrated with FBR's real time computerized system. The Amendment Ordinance also makes it mandatory for all companies, irrespective of their size, to make payment through 'digital means' only in order for their expenses to qualify for tax admissibility. This implies that it will no more suffice to pay through a cheque or pay-order. This provision raised alarm in corporate circles as no time had been provided to adapt to this amendment. However, in a recent press release issued by FBR, we understand that 40 days grace period will be allowed to companies to adopt digital means.

In principle, the Amendment Ordinance is effective from 15th September 2021. Amendments brought through Amendment Ordinance are required to be approved by the Parliament within 120 days unless it is passed by the Parliament before that period or is extended only once for a similar period by parliament otherwise it will expire. It will die even before the end of its 120 days or 240 days' life the moment it will be disapproved by either House.

This paper contains our comments in brief on significant amendments brought through the Amendment Ordinance. We advise that before considering application of the Amendment Ordinance to any specific case, the text of the Amendment Ordinance and the ITO, 2001 be considered with respect to the facts of the case.

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Income Tax

Certain business expenditure payments through digital means made mandatory for claiming deductibility in case of companies

Previously, any expenditure for a transaction under a single account head which in aggregate exceeded Rs. 250,000, made otherwise through banking channels, including credit card, was not tax admissible. However, there were certain exceptions to this rule whereby cash payments could be considered as admissible deduction with respect to the following payments:

- Expenditure not exceeding Rs. 25,000.
- Payment of utility bills, freight charges, travel fare, postage and taxes, duties fee, fine or any other statutory obligations.

The Amendment Ordinance has restricted the above provision of law to non-corporate taxpayers only. For companies, a new section 21(la) has been inserted in the Ordinance, 2001 whereby it has been made mandatory to make payments through 'digital means' through the 'business bank account notified to FBR under section 114A of the Ordinance and not just through banking channels.

It is pertinent to mention that Finance Act, 2021 had inserted a new definition of "business bank account" to mean a bank account utilized by the taxpayer for business transactions and which is declared to the Commissioner through registration form prescribed under section 181.

The term "digital means" has not been defined and can be considered to exclude all traditional paper-based means including cross cheques, pay orders etc., which may lead to litigation. As a result, there is a need to clarify the term "digital means".

As per the Amendment Ordinance, this provision applies at once, however we understand that its application is likely to be deferred by FBR for the time being to allow time to the Companies for adapting to the new requirement.

Option provided for Salary payments by all persons through digital means

Salary payments exceeding Rs. 25,000 per month were required to be paid through cross cheque or direct transfer to the employees' bank account in order to be considered as tax admissible.

The Amendment Ordinance has inserted the term "digital means" in section 21(m) to align the said section with section 21(la) and providing additional option to all persons for making salary payment through digital means apart from cross cheque or direct transfer as stated above.

Incoming foreign remittances other than through schedule banks clarified to also enjoy immunity

In terms of section 111(4) of the Ordinance, 2001, any amount of foreign exchange remitted from outside Pakistan through normal banking channels not exceeding Rs. 5 million in a tax year that is encashed into rupees by a scheduled bank and a certificate from such bank is produced to that effect, enjoys immunity from income tax probe with the added benefit of non-obligation to disclose the source.

Practically, taxpayers were receiving foreign remittances through various Money Services Businesses (MSBs), Exchange Companies (ECs), and Money Transfer Operators (MTOs) and claiming exemption under section 111 whereas FBR was of a rigid stance that exemption was only on remittances which were received in a scheduled bank and not through MSB, EC and MTO. This led to considerable litigation where-after FBR took up the matter with the State Bank of Pakistan (SBP) which issued a Memorandum No. EPD 30-04-2021-97865 dated 7 May 2021 stating that remittances received through MSB, EC and MTO satisfied the criteria of section 111. In response, FBR also issued Circular No. 5 of 2021 dated 30 August 2021 directing the field formations to take a lenient interpretation of section 111 and to withdraw litigation which involved similar controversies.

In view of the above circular and SBP memorandum, the Amendment Ordinance has

inserted an explanation to section 111(4) on the same footing as clarified through the aforesaid circular of FBR in order to resolve the controversy once and for all. Being an explanation, it appears that the same will have retrospective effect. For the sake of ready reference this explanation is reproduced below.

“Explanation- For removal of doubt, it is clarified that the remittance through Money Service Bureaus (MCBs), Exchange Companies (ECs) and Money Transfer Operators (MTOs) such as Western Union, Money Gram and Ria Finance or other like entities shall be deemed to constitute foreign exchange remitted from outside Pakistan through normal Banking channels as delineated under this sub-section”.

Powers to enforce filing of return by blocking certain amenities

The Amendment Ordinance has introduced section 114B in the Ordinance, 2001 empowering FBR to block any or all of the following amenities by issuing Income Tax General Order in respect of persons who are not appearing on ATL but are liable to file return of income:

- (a) Disabling of Mobile Phones or Mobile Phone Sims;
- (b) Discontinuance of electricity connection; and
- (c) Discontinuance of gas connection.

The FBR or the Commissioner having jurisdiction over the person mentioned in the Income Tax General Order may order restoration of mobile phones, mobile phone sims and connection of electricity and gas where it is satisfied that:

- (a) The return has been filed, or
- (b) Person was not liable to file return under the provisions of the Ordinance.

Following are the conditions on the basis of which a person shall be included in the Income Tax General Order.

- Notice under section 114(4) has been issued;
- Date of compliance of the notice under section 114(4) has elapsed; and
- The person has not filed the return.

These provisions of section 114B are non-obstinate provisions, having overriding effect over the rest of the provisions of the Ordinance, 2001. Beside this, action taken under the aforesaid section shall not preclude any other action provided under Ordinance, 2001.

This is a positive move to broaden the tax base through aforesaid enforcement measures under section 114B.

Tax Broadening measures through National Database and Registration Authority [NADRA]

The Amendment Ordinance has inserted a new section 175B, whereby, NADRA shall share the records and any other information with FBR for broadening of the tax base or carrying out the purpose of Amendment Ordinance on its own motion or upon application by FBR.

The salient features of section 175B are as follows:

- (i) NADRA may submit the proposals and information to the FBR with a view to broaden the tax base;
- (ii) Identify in relation to any person whether a taxpayer or not:
 - (a) income, receipts, assets, properties, liabilities, expenditures, or transactions that have escaped assessment or are under-assessed or have been assessed at a low rate, or have been subjected to excessive relief or refund or have been under-declared or mis-classified under a particular head of income or otherwise;
 - (b) the value of anything mentioned in sub-clause (a), if such value differs with the value notified by FBR or the District Authorities, as the case may be, or if no

such value has been notified the true or market value.

- (iii) enter into a memorandum of understanding with FBR for a secure exchange and utilization of a person's information.
- (iv) FBR may use and utilize any information and forward such information to an Income Tax authority having jurisdiction in relation to the subject matter regarding the information, who may utilize the information for the purposes of Amendment Ordinance.
- (v) NADRA may compute indicative income and tax liability by use of artificial intelligence, mathematical or statistical modeling or any other modern device or calculation method.
- (vi) FBR shall notify such indicative income and tax liability to the person in respect of whom such indicative income and tax liability has been determined, who shall have the option to pay the determined amount on such terms, conditions, installments, discounts, reprieves pertaining to penalty and default surcharge, and time limits that may be prescribed by FBR.
- (vii) In case of default of payment of tax liability within the time prescribed, FBR shall take action under the Amendment Ordinance.
- (viii) Payment of tax liability shall be construed to be an amended assessment order under section 120 or 122(1) or 122(4) as the case may be.
- (ix) FBR may prescribe the extent of installments, reprieves pertaining to penalty and default surcharge, and time limits.

The purpose of enacting section 175B is to enhance the tax base. However, it appears that NADRA will step into FBR's shoes in terms of determination of indicative taxable income and tax thereon which may lead to litigation. We note that the construction of the said section is such that it will impact taxpayers and non-taxpayers alike. Where NADRA determines taxable income and tax liability, FBR will notify the same to the said person

with the option to pay the liability, failing which, action under the Ordinance, 2001 will be taken by FBR which may include invoking section 120 or 122, as is appropriate in the circumstances. Appeals rights thereon, will accrue to the person depending on the course of action taken by FBR.

Certain offences and penalties amended

The Amendment Ordinance has made following changes in provisions of section 182 relating to penalties:

Serial Entry	Offence	Substitution
1	Late filing of the income tax return under section 114.	Such person shall pay a penalty equal to higher of <ul style="list-style-type: none"> a) 0.1% of the tax payable in respect of that tax year for each day of default; or b) Rs. 1,000 for each day of default; Provided that minimum penalty shall be <ul style="list-style-type: none"> a) Rs. 10,000 in case of individual having seventy-five percent or more income from salary; or b) Rs. 50,000 in all other cases; Provided further that maximum penalty shall not exceed 200% of tax payable by the person in a tax year; Provided also that the amount of penalty shall be reduced by 75%, 50% and 25% if the return is filed within one, two and three months respectively after the due date or extended due date of filing of return as prescribed under the law; Explanation: For the purposes of this entry, it is declared that the

Serial Entry	Offence	Substitution
		expression "tax payable" means tax chargeable on the taxable income on the basis of assessment made or treated to have been made under section 120, 121, 122 or 122D.
14	Any person who contravenes any of the provision of this Ordinance for which no penalty has, specifically been provided in this section.	Omitted and shall always be deemed to have been so omitted since the commencement of the Ordinance, 2001.

Prosecution for unauthorized disclosure of information by public servant

The Amendment Ordinance has omitted section 198 dealing with penalties in case of unauthorized disclosure of information by a public servant.

Collection of additional tax through electricity bills from non-filer professionals using domestic electricity connection

Section 235 of the Ordinance, 2001 deals with collection of tax on electricity bills of an industrial, commercial or domestic consumer. However, no tax shall be collected on electricity bill of domestic consumer if appearing in ATL.

The Amendment Ordinance, in addition to above, has now provided for collection of additional tax from professionals not appearing on ATL and operating from residential premises having domestic connection from DISCOS in the manner as provided in section 235 read with Division IV of Part IV of the First Schedule to the Ordinance, 2001 at the following rates:

Serial No.	Description	Rate of additional tax (%)
1	Bill upto Rs. 10,000	5
2	Bill exceeds Rs 10,000 but not exceed Rs. 20,000	10
3	Bill exceeds Rs 20,000 but not exceed Rs. 30,000	15
4	Bill exceeds Rs 30,000 but not exceed Rs. 40,000	20
5	Bill exceeds Rs 40,000 but not exceed Rs. 50,000	25
6	Bill exceeds Rs 50,000 but not exceed Rs. 75,000	30
7	Bill exceeds Rs 75,000	35

The Amendment Ordinance defines the term professionals to include Accountants, Lawyers, Doctors, Dentists, Health Professionals, Engineers, Architects, IT Professionals, Tutors, Trainers and other persons engaged in provision of services.

Exemption from levy of minimum tax for mobile phone manufacturers

Clause (11A) of Part IV to the Second Schedule to the Ordinance, 2001 provides for exemption from payment of minimum tax to certain taxpayers / businesses. The Amendment Ordinance has inserted "mobile phone manufacturers engaged in the local manufacturing of mobile phones" in the exemption list.

Reduced rate of withholding tax and minimum tax extended to steel sector distributors and retailers

A reduced rate of withholding tax and minimum tax of 0.25% is prescribed for distributors and retailers of various sectors under clause (24C) and 24(D) respectively of Part II of the Second Schedule to the Ordinance, 2001. The Amendment Ordinance

has made an insertion to the said clause, whereby, steel sector distributors and retailers are now also eligible to reduced rate provided that

- they are appearing on the ATL under the Ordinance, 2001 and Sales Tax Act, 1990 (STA, 1990): and
- retailers are integrated and configured with FBR's computerized system.

Tax credit allowed to donors for donation to specified entities

Presently, a person is entitled to claim tax credit on donation paid or property given as donation to entities as mentioned in section 61 and the Thirteen Schedule to the Ordinance, 2001.

Entities mentioned in Table 1 of clause (66) of Part I of the Second Schedule to the Ordinance, 2001 are now being included in the Thirteen Schedule, enabling the donor to claim tax credit on donation to these entities as well.

Further, Pakistan mortgage refinance company limited has also now been added to clause (66) exempting it from income tax.

Sales Tax

Anomaly between the empowering section and the schedule regarding “online marketplace” removed

Finance Act, 2021 introduced a definition of “online marketplace” and made amendment to the Eleventh Schedule to the STA, 1990, whereby, the online marketplace operator was to withhold sales tax at 2% against supplies made by a person not appearing on the active taxpayer list.

Due to the absence of the term “online marketplace” as a withholding agent in the empowering section 3(7), there was an anomaly between the section and the Schedule which has now been removed by adding a proviso in section 3(7) through the Amendment Ordinance.

Integration of point of sale invoicing machines of retailers with FBR’s Computerized System and penalty for non-compliance

The Amendment Ordinance has inserted new sub section (10) under section 3 of the STA, 1990, granting FBR powers to require any person or class of persons to integrate their point of sale invoicing machines with FBR’s Computerized System for real time reporting of sales.

Following penalty has also been introduced by inserting a new entry in Table under section 33 on a person who is required to integrate his business with FBR’s Computerized System but fails to get himself registered, and if registered, fails to integrate his system:

Default	Penalty (Rs.)
First Default.	500,000
Second default after fifteen days of an order for first default.	1,000,000
Third default after fifteen days of an order for second default.	2,000,000
Fourth default after fifteen days of an order for third default.	3,000,000

In case of failure to integrate the business within fifteen days of fourth default, the business premises of the taxpayer shall be sealed till he integrates his business.

Furthermore, if the taxpayer integrates his system within 15 days of first default, the amount of penalty relating thereto shall be waived by the Commissioner.

Disconnection of gas and electricity in certain cases

The Amendment Ordinance has granted power to FBR to direct the gas and electricity distribution companies for disconnecting utility connections of following persons through issuance of Sales Tax General Order:

- (i) any person, including tier-1 retailers, who fails to register for sales tax purpose, or
- (ii) notified tier-1 retailers registered but not integrated with FBR’s Computerized System.

However, FBR shall notify the restoration of gas or electricity connection through Sales Tax General Order upon registration and / or integration, as the case may be, for the said persons.

Zero rating also allowed to fat filled milk sold in retail packing under a brand name or a trademark

Through Finance Act, 2021, fat filled milk (excluding that sold in retail packing under a brand name or a trademark) was subject to zero rating under the Fifth Schedule to the STA, 1990.

The Amendment Ordinance has also included fat filled milk sold in retail packing under a brand name or a trademark in the zero-rating regime.

Exemptions under the Sixth Schedule

Fruits imported from Afghanistan were previously exempt from sales tax under Serial No. 15 of the Sixth Schedule to the STA, 1990. Such exemption has now been withdrawn.

The exemption from sales tax on import of auto disable syringes, either with or without needles, had lapsed on 30th June 2021. Through Amendment Ordinance, this exemption is being extended till 31 December 2021.

Similar extension has been granted to the manufacturers of auto disable syringes on the import of tubular metal needles and rubber gaskets as raw materials.

Exemption is being allowed to registered manufacturers of auto disabled syringes on the import of following raw material;

- Printing paper
- Polypropylene,
- Propylene copolymers,
- Plasticized,
- Epoxide Resins,
- Bioaxially Oriented Polypropylene (BOPP) film laminated).

This exemption is subject to a quota determined by IOCO and a NOC from Ministry of National Health Services Regulation and Coordination.

Finance Act, 2021 granted exemption on import of POS machines imported for installation on retail outlets as are integrated with FBR's computerized system for real-time reporting of sales. This exemption is now being extended to credit / debit cards terminals and retailer cash registers.

Reduced Rate of Sales Tax under Eighth Schedule

The Amendment Ordinance has prescribed reduced rate of sales tax in following cases:

- Supplies excluding those specified in S. No. 66 (i.e. finished fabric, and locally manufactured finished articles of textile and textile made-ups and leather and artificial leather) as made from retail outlets integrated with FBR's

Computerized System for real time reporting of sales shall be subject to Sales Tax at a rate of 16% if payment is made through digital mode.

- Import of re-meltable scrap is taxable at the rate of 14%, if such import is made by steel melters.
- Import of electric vehicles in CBU condition is taxable at the rate of 5%.
- Business to business transactions specified by FBR shall be taxable at the rate of 16.9% if the payment is made through digital mode.

Customs

Change in authority of appeal against the order of Director General Valuation

Recently the Finance Act, 2021 made changes to section 25D of the Customs Act, 1969 (CA, 1969) whereby the Director General Valuation was empowered to rescind or determine the value of goods imported or exported. The right to appeal against such an order lay with the Appellate Tribunal.

The Amendment Ordinance has now designated that the appeal against such order would lie with the Member Customs (Policy). The order of the Member Customs (Policy) can be further contested before the High Court.

Extension of time in checking of goods declaration by Customs

The Amendment Ordinance has amended section 80 to have overriding effect over the other provisions of the CA, 1969 and enabled the Customs Authorities to reassess duty, taxes and other charges on goods at the time of checking of goods declaration or within three years of clearance of such goods.

Determination of provisional liability

Currently, provisional determination of liability is performed in some circumstances and the importer is required to furnish bank guarantee for the additional amount of duty determined.

Now the Amendment Ordinance has enhanced the scope of such guarantee to include corporate guarantee. Simultaneously, a new restriction has been imposed where no provisional determination of value will be performed where valuation ruling is in force irrespective as to whether a review or revision against such valuation ruling is pending.



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