OPINION AND IMPACTS OF WITHDRAWAL OF SRO 1125 AND SALES TAX SPECIAL PROCEDURE RULES ON RELATED INCOME TAX PROVISIONS

PROLOGUE
Since last night, a document no. F.501/2019-Law-I dated 29-08-2019 titled ‘Office Memorandum’ has been circulating in social media/communication mobile application. The document contains opinion on application of S. No. 1 and 3 of Part II of the First Schedule to the Income Tax Ordinance, 2001 (“ITO”) after abolition of SRO 1125(I)/2011 and SRO 480(I)/2007. The below are our comments/interpretations and impacts of such opinion on other amendments brought into ITO vide Finance Act, 2019.

COMMENTS
The opinion has been divided into two parts. First part deals with impact of withdrawal of SRO 1125 on manufacturers and importers covered under SRO 1125 and importing items covered in SRO 1125. Second part deals with impact of withdrawal of SRO 480 on steel melters and composite units paying advance tax at Rs. 1 per unit of electricity consumed under section 235B of ITO. We shall comment on both parts one by one as under:

PART I
Section 148 read with Part II of the First Schedule to ITO prescribes that tax at the rate of 5.5% and 6% shall be collected at import stage from companies and other persons, respectively. Aside from normal rates of collection, part II of the First Schedule to ITO also prescribes reduced rates for certain persons. Two of such instances are as under:

<table>
<thead>
<tr>
<th>Persons</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturers covered under SRO 1125 and importing items covered under SRO 1125</td>
<td>1%</td>
</tr>
<tr>
<td>Commercial Importers covered under SRO 1125 and importing items covered under SRO 1125</td>
<td>3%</td>
</tr>
</tbody>
</table>

The query emphasized that since the above reduced rates are available to persons and items covered under SRO 1125, which is non-existent after 30th June 2019, whether the reduced rates are still applicable?

The opinion states that the above concessions will still be available as the reference to SRO 1125 is only for the purpose of a convenient identification of a class of persons enjoying the concession and withdrawal of referenced SRO will have no bearing on the available concession.

The opinion also placed reliance upon judgment of Honorable Islamabad High Court Ehsan Ullah Qureshi v. United Bank Limited 2015 CLD 899, wherein at p.910D it has been observed that where any reference of a law is provided in any specific law, the withdrawal or amendment of the law which is referred does not affect the provisions in which the reference of such law is incorporated.

Relevant excerpt is provided as follows:

“Moreover, as laid down by the Hon’ble Supreme Court of Pakistan in the referred case-law where there is specific legislation by reference any amendment or repeal of the borrowed statute/provision does not affect the provisions/ statute in which the same are incorporated.”

PART II
Section 235B of ITO provides that steel melters and composite units, registered for the purpose of Chapter XI of Sales Tax Special Procedure Rules, 2007, shall pay advance tax at Rs. 1 per unit of electricity consumed by them (Sales Tax Special Procedure Rule, 2007 were specified vide SRO 480). Such payment of advance tax relieved steel melters and composite units from withholding of
advance tax under section 153(1)(a) from payments of local purchase of iron scrap.

The query emphasized that since SRO 480 has been withdrawn, whether the concession to steel melters and composite units will still be available to them?

The opinion states that steel melters and composite units registered for the purpose of Chapter XI of Sales Tax Special Procedure Rules, 2007 prior to 26-06-2019, i.e. date of withdrawal of SRO 480, derive a vested right and will continue to enjoy the concession.

The opinion also referred following case laws establish authority over doctrine of vested rights:

- **Al-Samrez v. FOP 1986 SCMR 1917**

  Honorable Supreme Court held that where a right is created in favor of a person, the same cannot be withdrawn by an executive order to act retrospectively and destroy the right. Relevant excerpt is reproduced hereunder:
  
  "...It will be inequitable and unjust to deprive a person who acts upon such assurance of the right to exemption and expose him to unforeseen loss in the business transaction by suddenly withdrawing the exemption after he has made legal commitments. It is in this perspective that a right is created in his favor and a subsequent withdrawal of exemption cannot be given retrospective operation by an executive act to destroy this right."

- **Al-Tech Engineers v. FOP 2017 SCMR 673**

  Honorable Supreme Court held that in case where foreign customer of an exporter has established sight letter of credit and has mandated obligation of shipment, vested right has been established. Relevant excerpt of the Judgment is reproduced hereunder:
  
  "In the facts on record of this case, we consider that where the foreign importer of goods manufactured by the appellant has established a sight letter of credit prior to 16.01.1996 mandating a shipment date within six months of its date of issuance, then the benefit under the first notification [SRO 5(I)/1992 dated 06.01.1992] shall constitute a vested right of the appellant. ..."

The opinion also stated that the vested rights cannot be defeated by executive orders and placed reliance upon CST v. Kruddsons PLD 1974 SC 180. Relevant excerpt is reproduced hereunder:

"It is well settled proposition that a notification by the Provincial Government cannot operate retrospectively to impair an existing right or to nullify the effect of a final judgment of a competent Court even if the notification be, expressly so designed."

**IMPACT OF THE OPINION**

Following two principals have been discussed in the opinion:

1. Any amendment or repeal of the borrowed statute/provision does not affect the provisions/statute in which the same are incorporated; and
2. Doctrine of vested rights

In our opinion, following provisions will also continue to be applicable in light of first principle:

a. Reduced rate of withholding tax under clause 45A of Part IV of Second Schedule to ITO;

b. Exemption of advance Income Tax with utility bills of zero-rated sector under clause 66 of Part IV of Second Schedule to ITO;

Following amendments vide Finance Act will not be applied retrospectively in light of doctrine of vested rights:

a. Extension in time of holding period of immovable property, under section 37, for the purpose of exemption of capital gain for persons who have acquired immovable properties prior to 30th June 2019. For example, capital gain tax on a property held for three years or more as on 30th June 2019 will be zero, in our opinion. Likewise, capital gain on any property acquired before 30th June 2019 will be charged as per regime applicable prior to 1st July 2019;
b. With respect to change in definition of residents, under section 82, the count of four years, for the purpose of calculation of 365 days, will begin from tax year 2020. For example, a person whose stay in Pakistan during tax years 2016-2019 is more than 365 days, however, if during tax year 2020, his stay is for less than 182 days, he will not be treated as resident, in our opinion. This is due to the reason that during tax years 2016-2019, the person was under impression that he is required to be out of Pakistan for only 183 days during a year and he is not required to bother about cumulative number of days in any number of years;

c. The restriction of time period of investment and installation, for the purpose of tax credit under 65B, from 2021 to 2019, will not be applicable to the cases where financial obligations have been incurred before 30th June 2019 for investment and installation of plant and equipment, in our opinion. The taxpayers have made contracts and incurred financial obligations on pretext that they had time until 30th June 2021 to make investments and to install equipment. These contracts and financial obligations created vested rights.

d. The reduction in rate of tax credit under section 65B from 10% to 5% will also not be applicable in our opinion. The decision for investments were made on the basis that there will be tax credit available at the rate of 10%. This concession cannot be reduced subsequently by an executive act.

DISCLAIMER
These comments are based on the laws as of date unless otherwise specified and other information publicly available. Tax laws are subject to changes from time to time and as such any changes may affect the advice contained in our opinion. We bear no responsibility to update our advice for events and circumstances occurring on or after the date of this opinion, unless specifically requested by you. The tax advice is a matter of interpretation of law and is based on our judgments and experience, therefore, it cannot be said with certainty that the opinion expressed above would be accepted or agreed by the tax authorities. Furthermore, we are not extending any sort of guarantee, financial or otherwise, for the acceptance of this opinion by any authority.