IN THE APPELLATE TRIBUNAL INLAND REVENUE, LAHROE

ITA No.765/LB/2014
(Tax year 2012)

M/s. TCL Labour Hire Company (Pvt) Ltd, Kot Lakhpat, Lahore. — Appellant

Versus

The Commissioner Inland Revenue, Withholding Tax Zone, RTO-II, Lahore. — Respondent

Applicant by	:	Mr. Shabbir Ahmad, FCA
Responded by	:	None.
Date of hearing	:	17.06.2014
Date of order	:	07.07.2014

ORDER OF APPEAL

CH. SHAHID IQBAL DHILLON (JUDICIAL MEMBER)

The captioned appeal has been directed against Order-in-Appeal No.12 dated 11.04.2014 passed by the learned Commissioner Inland Revenue (Appeals-II) Lahore. The facts leading to the filing of present appeal are that during the course of proceedings u/s 161/205 the appellant provided certain details and documents to the Officer Inland Revenue, which were examined by him and it was inferred that the appellant had failed to deduct tax on payments made on account of salaries at Rs.204,981,001. Accordingly, the Officer Inland Revenue treated the appellant as taxpayer in default and tax u/s 161 alongwith default surcharge u/s 205 was charged as under:

Tax u/s 161	Rs.3,249,806
Default surcharge u/s 205	Rs. 644,263

2. Being aggrieved by the said order, the appellant filed appeal before the learned Commissioner (Appeals), Zone-II, Lahore who

upheld the treatment meted out by the Officer Inland Revenue.

3. We have heard the learned counsel for the appellant and have also gone through relevant orders and case laws cited. The learned A.R has vehemently pleaded the case and contended that the Officer Inland Revenue as well as the learned Commissioner (Appeals) erred in law while passing the impugned orders. To support his contention with regard to the issue of taxpayer in default, the learned A.R. stated that the impugned order u/s 161/205 as well as the appellate order have been passed without appreciating the true aspects of the case. He stated that the payments against which the appellant was held as taxpayer in default were never made by him. Rather all the payments against salaries were made by the principal companies of the appellant. As per internal arrangements amongst the group companies the role of the appellant is to hire skilled, unskilled and semi-skilled human resources for other group companies.

4. While explaining the nature of appellant's business, the learned AR stated that appellant company is a wholly owned subsidiary of the Treet Corporation Limited (TCL). The appellant company hires all kinds of skilled, unskilled and semi skilled personnel for highly specialized jobs as ordered and required by the group companies. As per agreement executed between the appellant company and the customers/group companies, though the expenses had to be paid out of the resources of the company, but in order to streamline the affairs, it was decided that the group companies which have to pay the

wages/salaries directly to such workers/staff after discharging their obligations as a withholding agent during the year under-consideration. The learned AR provided the copies of agreements so executed with the other group companies and stated that the said companies have deducted and deposited tax u/s 149 before making payments to appellant company's employees. The learned AR provided the list of employees of the appellant company showing names, location of customers/group companies where he was deputed, NTN, taxable salary, rate of tax deduction applicable, amount of tax deducted and number of CPR's through which tax was deposited into government exchequer as well as sample copies of CPRs. The learned AR contents on the strength of the above narrated facts that the impugned demand is not maintainable for the following reasons:

- Tax has duly been deducted and deposited on the payments against which the appellant is treated as taxpayer in default by the other group companies. Therefore, demand is not maintainable. Necessary details are made available to this Tribunal.

- The Officer Inland Revenue has failed to identify the parties against whom the alleged default of non-deduction of tax u/s 149 was committed by the appellant. Hence the demand is not maintainable in view of the following case laws:

  - 2013 PDS 79
  - (2014) 109 TAX 1 (Trib)
  - **2012 PTD (Trib) 122 = PTCL 2012 CL 14**
  - 109 TAX 187
  - 105 Tax 489 (Trib.)

- The demand is based on misapprehension of the facts of the case. The tax deduction challans were duly produced before

the learned Officer Inland Revenue. However, after seeing that the deduction authority was someone else and not the appellant company he panicked and held the taxpayer in default.

- Without prejudice to the above, the provisions of section 161(1B) of the Income Tax Ordinance 2001 are applicable in the present case. All the employees against whom the tax deduction made are NTN holders. Therefore, section 161(1) was not applicable. All the taxable employees stand paid their tax liability under the Ordinance therefore appellant cannot be held taxpayer- in- default.

- Without prejudice to the above, the learned AR argued that the default surcharge levied u/s 205 on hypothetical basis is not maintainable in the light of the case law reported as 109 Tax 385 (Trib.).

5. Nobody is present on behalf of the department, nor any request for adjournment of the case has been received. Hence the department is proceeded exparte.

6. We have heard the learned representative for both the parties and also perused orders of both the authorities below and other available record of the case.

7. Before dilating upon the issue, it would be apt to reproduce the relevant provisions of sections 161(1) and 149 of the Income Tax Ordinance 2001 as under:-

> ***"149. Salary.*** *— (1) Every employer paying salary to an employee shall, at the time of payment, deduct tax from the amount paid at the employee's average rate of tax computed at the rates specified in Division I of Part I of the First Schedule on the estimated income of the employee chargeable under the head —Salary// for the tax year in which the payment is made after making adjustment of tax withheld from employee under*

other heads and tax credit admissible under section 61, 62, 63 and 64 during the tax year after obtaining documentary evidence], as may be necessary, for "

"161. Failure to pay tax collected or deducted.— *(1) Where a person –*

(a) fails to collect tax as required under Division II of this Part I or Chapter XII or deduct tax from a payment as required under Division III of this Part or Chapter XII or as required under section 50 of the repealed Ordinance; or

(b) having collected tax under Division II of this Part 4[or Chapter XII] or deducted tax under Division III of this Part or Chapter XII fails to pay the tax to the Commissioner as required under section 160, or having collected tax under section 50 of the repealed Ordinance pay to the credit of the Federal Government as required under sub-section (8) of section 50 of the repealed Ordinance,

the person shall be personally liable to pay the amount of tax to the Commissioner who may pass an order to that effect and proceed to recover the same."

8. From the combined reading of both the provisions of law i.e. sections 149 and161 of the Ordinance, as reproduced supra, we have arrived at the conclusion that these sections reflect that the advance tax, at the time of making of payment at a specified rate, is liable to deduction, by a person responsible for making payment to another, on account of salaries. His failure to deduct or collect or failure to pay tax so collected or short collection of tax entail penal consequence of declaring him, taxpayer-in-default. However, in the present case, the learned authorized representative of the appellant has successfully established with documentary evidence that the

appellant had not paid even a single penny under the head salaries. It is the group companies which had made the payments on behalf of the appellant company and the said group companies had discharged their liabilities as a withholding agent. The learned AR produced the copies of agreements with the said companies and complete details of the employees along with copies of challans. For invoking provisions of section 161, it was the responsibility of the Officer Inland Revenue to identify the particular transactions/payments on which the appellant had failed to deduct tax as envisaged under the law. In this context, reliance is placed on the following case laws:

(2004) 84 TAX 430 (Trib)

"In the case before us, the assessment order reveals that the assessing officer failed to point out or specify the payments made by the assessee company being a payer to person being a recipient which were liable to deduction of tax u/s 50(4) of the Ordinance. The assessing officer charged tax u/s 52 on the amount of purchases worked out by him on the basis of assumptions and guess work..... In the case before us, the assessing officer failed to point out any such payment liable to deduction of tax u/s 50(4) of the Ordinance,. Under the circumstances, we are not inclined to interfere on behalf of the revenue."

2008 PTD 787 (Trib)

""Income Tax Ordinance, 2001 – Section 161, 205- Whether default has been determined by taxation officer on basis of presumption and stock phrase and not single instance of payments has been specifically pointed out – Held yes – Whether CIT (A) has rightly vacated orders passed u/s 161/205 - - Held yes"

9. Furthermore, as per the details furnished by the learned AR, all the recipients are NTN holders and thus provisions of section 161(1B) are also applicable in the case of the appellant.

10. So much so, the OIR made no efforts to identify the party names and straightaway charged the tax on the gross salaries. The challans produced by the appellant before the Officer Inland Revenue were not taken into consideration as the deducting authority was not the appellant. This Tribunal as well as the higher appellate forums have held in number of cases that the action u/s 161 without identifying the parties is not maintainable. In this context, the learned AR cited certain case laws, ratio of which is fully applicable in the appellant's case. We would like to produce the relevant extract of the case law reported as **2013 PTS 79:**

> *"We have noted that the action of the Taxation Officer is without identifying the parties from whom and how much tax was required to be deducted. Thelogical conclusion is that no tax liability is to be created against taxpayer in default. The original and alternate liability to pay taxis of the recipient and the responsibility of the deducting or collecting the advance tax is saddled on the payer, We further noted that this Tribunal in so many case has held that "without identifying names and addresses of the parties of persons from whom and how much tax was to be deducted, provisions of S. 161 of Income Tax Ordinance, 2001 could not be invoked Taxation Officer could not appreciate that the tax referred to be deducted under S. 161of the Income Tax Ordinance, 2001 had to be of some identified taxpayer/registered person and a taxpayer could be declared personality liable only after establishing that he was a withholding agent, who failed to withhold the tax from transaction, liable to such tax---Taxation Officer had misunderstood the spirit of S. 161 of the Income Tax Ordinance, 2001, as he himself had observed in his order under S.161 that proceedings were initiated to ascertain the compliance level; he could only see whether withholdings, as per return and statutory statement was made or not and that any transaction, liable to withholding, deduction under S.161 of Income Tax Ordinance, 2001 unless the taxpayer was awithholding agent that a particular transaction was liable to deduction / withholding and that a specified tax of a specific person was to be withheld, who could take credit of the tax recoverable under S.161 of Income Tax Ordinance, 2001." Reliance in this respect is placed on the cases reported as 2012 PTD (Trib) 122 and 2013 PTD (Trib) 246. So, we feel*

inclined to accept the appeal of the appellant to the extent by declaring that the action of the Taxation Officer in holding the appellant as taxpayer in default is illegal and uncalled for. So, liability upon appellant is vacated."

11. The logical conclusion of the above discussion is that the impugned order u/s 161/205 being inflicted with certain legal and factual lacunas and is based on misinterpretation of the facts and law prevailing in the case of the present appellant cannot be sustained and hence declared null and void as in such circumstances, prevailing in the appellant's case, no tax liability u/s 161/205 is to be created.

12. For the foregoing discussion and in view of all aspects, the appeal is disposed of as above.

Sd/-
(Ch. Shahid Iqbal Dhillon)
Judicial Member

Sd/-
(Muhammad Akram Tahir)
Accountant Member