Bashir Ahmad Ansari & Company

Advocates High Court

Income Tax, Wealth Tax Customs & Sales Tax Practitioners, Commercial and Company Law Advisors.

Bashir Ahmad Ansari

Advocate High Court

HEAD OFFICE:
Opp. Old Municipal Corporation Building Chowk Ghanta Ghar Multan. Ph: Off: 061-4584744
0301-7494221 0321-6319038
BRANCHES:
Burewala 067-3354818 Vehari 63541

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Mr. President, Members of the Exective Committee and Honourable members of Multan Tax Bar Assosication Multan

It is a matter of immense pleasure for me and I really feel honoured and privileged in addressing this august house on the subject relating to section 161/162 & 205 of income tax Ordinance 2001 which has much importance with regard the performance of our professional duties efficiently as a tax consultant. Today discussion will certainly help us in preparing our briefs before the assessing authorities as well as appellate forums. Though it a matter of pride for a person having very poor knowledge like me to say some thing before a gathering of highly skilled and having perfound knowledge on the subject like all of you the honourable members of the Bar. My position in the presence of my learnered colleagues is like a student. Without any hesitation it is submitted that I have not contributed any thing on my part but have only consolidated the relevant provision of law on the subject and time to time development through various judgments of appellate authorities.

Before discussing section 161 & 162 it would be advantageous to have a glance on scheme of statute from where it stems. This section has been placed in Division-IV of Part-V to Chapter-X which deals with "ADVANCE PAYMENT OF TAX OR THE DEDUCTION OF TAX AT SOURCE" . Section 161 is reproduced here as ready reference:

*"**161----------Failure to pay tax collected or deducted.-***

***(1)** Where a person –*

(a) Fails to collect tax as required under Division II of this par [or Chapter XII] or deduct tax from a payment as required under section 50 of the repealed Ordinance; or

(b) Having collected tax under Division II of this part[or chapter XII] or deducted tax udder 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to pay the tax to the Commissioner as required under section 160, [or having collected tax under section 50 of the repealed Ordinance pay to the credit of Federal Government as required under sub-section (8) of section 50of the repealed Ordinance,]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.]

[(1A) No recovery under sub-section (1) shall be made provided with an opportunity of being heard.

(1B) where at the time of recovery of tax under sub-section (1) it is established that the tax that was to be deducted from the payment made to a person or collected from a person has meanwhile been paid by that

person no recovery shall be made from the person who had failed to collect or deduct the tax but the said person shall be liable to pay [default surcharge] at the rate of eighteen percent per annum from the date he failed to clllect or deduct the tax to the date the tax was paid.]

(2) A person personally liable for an amount of tax under sub-section (1) as a result of failing to collect or deduct the tax shall be entitled to recover the tax from the person from whom the tax should have been collected or deducted.

A plain reading of section 161 reveals that this section provides a recovery procedure from a person who fails to collect tax or having collected fails to pay the tax to the commissioner as required U/S 160 of income tax Ord.2001 or collected under section 50 of the repealed Ordinance. From the reading of this section it is also evident that tax collected/deducted U/S 160/161 is ADVANCE TAX in nature and what is advance tax has been disclosed under sub-section (7) and (8) of section 147 of income tax Ord.2001, same is reproduced as under:

"*147(7)* *The provisions of this Ordinance shall apply to any advance tax due under this section as if the amount due were tax due under an assessment order.*

(8) *A taxpayer who has paid advance tax under this section for a tax year shall be allowed a tax credit for that in computing the tax due by the taxpayer on the taxable income of the taxpayer for that year.*"

Under lined part of sub-section (7) says that "advance tax" shall be "taken as tax due" under an assessment order, where as the underline portion of sub-section (8) discloses its nature that the person who has paid advance tax shall be allowed tax credit while computing tax due on is taxable income for that year. Essence of advance tax is that it is collected before determination of income and its credit is allowed against the taxable income so determined. The concept of advance tax is known since inception of income tax, purpose of which is collection of tax in advance and its adjustment at later stage but not charging or levy of tax. Keeping in mind that this kind of collection tax is admittedly a advance tax. For collection of this advance tax certain person are obliged by the statute to collect and deposit the same in treasury and these persons are called withholding agents/ "prescribed persons" as defined under section 153 (7) of Income Tax Ord..2001. these persons prescribed under the statute to withhold or deduct tax of another person is infect is a agent of the state if he fails to comply with the statutory obligation, such tax can be recovered from him under section 161 of the Ordinance. The Law enshrined in section 161 has been thoroughly discussed/ adjudicated from various angels and the appellate authorities has determined that the proceedings under section 161 can only be initiated within the limits and conditions imposed by the appeal authorities. For reference the following two judgments are of very much important and relevant with the proceedings U/S 161.

(2001) 83 TAX 227 (trib) in this case Khawaja Farooq Saeed learnered judicial member or ITAT has defined the scope of section 52 of the repealed Ordinance which was a substitution of section 161 of Income Tax Ord… 2001 in he following words.

"whether section 52 by no means was charging provision but was only mod of ensuring collection of taxes before assessment, which lather was to be adjusted against income of said person on whose behalf it was deducted- Held yes – whether department could be allowed to use section 52 as substitute of normal assessment or new source of revenue - Held no"

2012 PTD (trib.) 122 in this case titled as C.I.R. VS NAM INTERNATIONAL (PVT) LIMITED

The ITAT has determined the following three elements as per requisite for proceeding U/S 161 the relevant para is as under

" He misunderstood the spirit of section 161 of Income Tax Ord…2001 as he himself has observed, in his order U/S161, that proceeding were initiated to ascertain the compliance Level. He could only see whether withholdings, as per return and statutory statements, was made or not and that any transaction, liable to withholding, has not escaped taxation. It is reiterated that no transaction can be held to have escape deduction U/S 161 unless it is established that-

(i) Tax payer is a withholding agent,
(ii) A particular transaction is liable to deduction/ withholding,
(iii) That is specific tax of a specific person was to be withheld, who could take credit of the tax recoverable U/S 161

In this judgment the author of the judgment has also answered a very important and necessary question that who shall get credit of the tax imposed by order U/S 161 in the following manner:
"Had department intended to look into the affairs of respondent taxpayer, to check vilosty of declaration, it should have resorted to the provisions of section 177 i.e through audit."
Which means that proceeding under 161 are confined only to the statements filed by the taxpayer, other record can not be called for during the proceeding U/S 161 but only through an audit U/S 177 and that too after selection of case for audit U/S 214-C.

2015 PTD (trib.) 654 in this case the honourable ITAT has held that invoking of section 161 without audit U/S 177 of Income Tax Ord..2001 is not sustainable. The relevant para is reproduced as under

" 10. We are also inclined to agree with the arguments of the learned AR that composite reading of section 161, 177,120 and 122C clearly revels that these sections are inter collected. The direct invoking of section 161 with out audit U/S 177 constitutes fishing and roving inquires and have the effect of increasing the taxable income assessed under section 120, being violation of overriding effect of section 120(1) and (1A) of the Ordinance and hence action under section 161/ 205 is not sustainable. In order to reach this conclusion, support has a sought from the reported judgment cited as 2012 PTD (trib) 1815, 2012 PTD (trib) 122, PLD 1993 S.C 473 and PLD 2003 S.C 979"

It is necessary to mention here that proceeding U/S 161 are not meant for to generate revenue rather it provides a procedure fro smooth running of withholding tax system. Sub-section (1B) of section 161 is of much important which clarifies the concept of advance tax by saying that "no recovery shell be made if it is established that the tax that was to be deducted from the payment made to person or collected from a person has mean while been paid by that person." The provision of sub-section (1B) also clarifies that proceeding under 161 are just to give a reminder for prescribed persons/ withholding agents for their duty imposed by the statute to collect and deposit the tax but unfortunately section 161 is being used by the department as a tool of coercion which definitely comes within the meanings of mal-administration.

Section 162 is also a part of the scheme of advance payment of tax and deduction of tax at source. Before commenting on this provision of Law section162 is being reproduced as ready reference

*162---------- **Recovery of tax from the person from whom tax was not collected or deducted.-***

(1) Where a person fails to collect tax as required under Division II of this part [or Chapter XII] or deduct tax from a payment as required under Division III of this part [or Chapter XII,] the commissioner may [pass an order to that effect and] recover the amount not collected or deducted from the person from whom the tax should have been collected or to whom the payment was made.
(2) The recovery of tax under sub-section (1) does not absolve the person who failed to deduct tax as required under Division III of this part [or Chapter XII] from any other legal action in relation to the failure, or from a charge of [default action in relation to the failure or from a charge of [[default

surcharge] or the disallowance of a deduction for the expense to which the failure relates, as provided for under this Ordinance.

The difference between section 161 and 162 is firstly that section 161 provides a machinery for recovery of tax collected and not deposited from a person who fails to **collect tax** and having collected tax fails to pay the tax to the commissioner as required U/S 160 of Income Tax Ord..2001 or U/S 50 of the repealed Ordinance, whereas section 162 deals with the recovery of tax directly from the person form whom the tax should have been collected or to whom the payment was made. Secondly section 161 can only be invoked during the tax year and after the close of year the provision of section 162 come into play.
The ratio decided by the ITAT mentioned supra in case sighted as 2015 PTD 654 by the honourable ITAT has been fortified through a judgment of Lahore High Court reported as 2015 PTD 863. The relevant para is given as under

"14. Accordingly we have no hesitation in annulling the orders of the authorities below being without jurisdiction. The orders of both the authorities are therefore, vacated and it is held that no enhancement of income, be that a nature of deemed income, could be made without following the recourse provided for in the statute for amendment of income. No amendment of income could be done U/S 162 of Income Tax Ord. 2001. Ordered accordingly"

With reference to proceedings U/S 162 it is worth mentioning that this section cannot be invoked after completion of assessment, when tax payable for a tax year is determined and paid. The reason behind is that after completion of assessment the tax due is determined and the liability of tax is fulfill. As the "advance tax recoverable" and "tax due recoverable" are two distinct species and are dealt separately under the Ordinance. therefore after determination of "tax due" , advance tax cannot be recovered under any provision of Law in this context both the assessments deemed to be made under section 120 (1) and U/S 169(3) are covered while proceeding under section 162.

Now coming to section 205 which deals with default surcharge and with reference to proceeding under section 161 and 162 relevant sub-section (3) of section 205 is given as under

"(3) a person who fails to collect tax as required under Division II of part V of this chapter or chapter XII or deduct tax as required under division third of the part V of this chapter or chapter XII or fails to pay an amount of tax collected or deducted as required U/S 160 on or before the due date for payment shell be liable for default surcharge @ equal to eighteen present per annum on the amount unpaid computed for the period commencing on the date the amount was required to be collected or deducted and ending on the date on which it was paid to the commissioner."
Necessary clarifications regarding this section is that the term **default surcharge** was substituted for **additional tax** through Finance Act 2010 and eighteen present per annum was substituted for "KIBOR" plus three present per quarter through Finance Act 2012.

Regarding imposition of penalty or default surcharge or any other surcharge the honourable Lahore High Court in a case reported as (2001) 83 TAX 254 has given a guide line for the assessing authorities that despite use of expression "shall" a discretion was vested in the adjudicating officers to levy are not levy sales tax even in the event of failure of a person to pay the sales tax keeping in view the facts and circumstances of the case and reasons for non payment and "Additional tax or penalty should not be imposed only for the reason that it is legally permissible to do so"

Following the verdict mentioned above the honourable ITAT has announced the principles and statues of collection agents with reference proceeding U/S 205 of Income Tax Ord.. 2001 in the landmark judgment reported as **(2003) 88 TAX 1(trib)** in the following words-

" needless to say that the assessee is performing the functions which should normally have been performed by he department. It is collecting the tax for the department and is also helping the department to plug any evasion of tax. There dose not appear to be any compensation or appreciation for such assessee who is a deducting or collection agent on behalf of the department. To say that this is a thankless job would a gross under statement. It may also be emphasized that provisions of law for penalty can only be meant as deterrent against tax evasion and to enforce compliance and not for revenue generation. In these circumstances the department should not take a harsh view of any such lapse which are not deliberate."

The same principle has been adopted by the ITAT in case reported as **2010 PTD 1199**."

" purpose of levying the penalty is to deter the assessee from repeating the default in future and it can not be made a resource of mobilization/ revenue generation measure".

In this regard it must be kept in mind that the levy of default surcharge on hypothetical basis and without establishing will full default on the part of tax payer is illegal and nullity in the eye of law as held in 1992 PTD 342, 2006 SCMR 626 and PLD 1991 963

According to sub-section 3 the default surcharge will be computed for the period commencing on the date the amount was required to be collected or deducted and ending on the date on which it was paid to the commissioner.

As per Law the default surcharge is a tax therefore it can not be levied in absence of a assessment order by the assessing authority

BASHIR AHMAD ANSARI
ADVOCATE HIGH COURT.