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**Judgment Sheet**  
**IN THE LAHORE HIGH COURT, MULTAN BENCH MULTAN.**  
**JUDICIAL DEPARTMENT**

W.P. No.8466 of 2015.

M/S. Asia Poultry Feeds (Pvt.) Ltd.

Versus

Federal Board of Revenue etc.

S. No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of Parties or counsel, where necessary
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23.06.2015. Mr. Khurram Shehzad Butt, Advocate for the petitioner. Syed Khalid Javed Bukhari, Advocate / Legal Advisor for F.B.R.

Brief facts relevant for decision of this writ petition are that, petitioner furnished the return of total income for the Tax Years 2011, 2012 and 2013, all accompanied by audited accounts for the respective Tax Years. Respondent No. 3 / Deputy Commissioner Inland Revenue, Enforcement & Collection Unit-01, Range-I, Zone-II, Regional Tax Office, Multan, initiated proceedings against the petitioner under section 161 read with section 205 of the Income Tax Ordinance, 2001 (**Ordinance**) in respect of Tax Years 2011, 2012 and 2013 through issuance of show cause notices dated 04-05-2012, 18-01-2013 and 04-02-2014, respectively. The aforesaid proceedings under section 161 read with section 205 of the Ordinance were completed, for the Tax Year 2011, through order dated 30-06-2012 passed by respondent No. 3, and by respondent No. 4 / Deputy Commissioner, Inland Revenue, Unit-01, Withholding Zone, Multan in respect of Tax Years 2012 and 2013 vide separate orders dated 12-04-2013 and 17-02-2014, respectively. The completion of proceedings resulted into creation of demands against the petitioner in the following manner:-

Tax Year	Principal liability u/s 161	Default Surcharge u/s 161/205	Total
2011	312,183	45,545	357,728

2012	731,558	189,403	920,961
2013	539,051	72,573	611,624

The successor in office of respondent No. 4 has issued show cause notices dated 22-05-2015, 25-05-2015 and 18-05-2015 (**impugned notices**), respectively for the Tax Years 2011, 2012 and 2013 for which orders under section 161 read with section 205 of the Ordinance had already been passed by respondent No. 3 and predecessor of respondent No. 4. The said show cause notices have been impugned through this petition with the following prayer:-

*“Under the circumstances, it is respectfully prayed:*

- i. To hold the notices issued by **Respondent No. 4** in terms of Section 161/205 of the Ordinance in respect of **Tax years 2011, 2012 and 2013 (Annexures-F to F/2)** dated **22<sup>nd</sup> May, 2015, 25<sup>th</sup> May, 2015 and 18<sup>th</sup> May, 2015, respectively** are completely without jurisdiction.*
- ii. To declare the successor in office of Respondent No. 4 is coram-non-judice to initiate proceedings under section 161/205 of the Ordinance, admittedly in the presence of earlier orders passed under section 161/205 of the Income Tax Ordinance, 2001 in respect of the same Tax Years.*
- iii. During the pendency of the instant petition, proceedings initiated by Respondent No. 4 on the impugned notices may graciously be suspended.*

*Any other appropriate relief for which the Petitioner is entitled may also be allowed to the Petitioner with costs.”*

2. Respondent No. 1 filed parawise comments through Commissioner Inland Revenue, Withholding Taxes Zone, R.T.O. Multan, and prayed for dismissal of instant petition.

3. Learned counsel for the petitioner contends that it has been settled by superior forums that once an order under section 161 read with section 205 of the Ordinance is passed,

proceedings under section 161 read with section 205 of the Ordinance cannot be re-initiated in respect of the same Tax Year. In support of his contention, learned counsel has placed reliance on **2010 PTD (Trib.) 150**, **2012 PTD (Trib.) 188**, **2013 PTD (Trib.) 459** and **PTR No. 325 of 2010** dated 19<sup>th</sup> February, 2015. Learned counsel for the petitioner submits that the Division Bench of the Hon'ble Lahore High Court, Lahore in its judgment dated 19<sup>th</sup> February, 2015 passed in **PTR No. 325 of 2010** has upheld the order of the Appellate Tribunal Inland Revenue on the point that once proceedings under section 161 read with section 205 of the Ordinance are completed in respect of the particular Tax Year, second order for the same year is not sustainable.

4. On the question of maintainability of instant writ petition, learned counsel for the petitioner submits that the impugned notices are illegal, unlawful, malafide and without jurisdiction, therefore, instant petition is maintainable. In support of his contention, he has relied upon the judgments reported as Iqbal Hussain v. Federation of Pakistan through the Secretary, Revenue Division and 2 others (PTCL 2011 CL 98), Filters Pakistan (Pvt.) Ltd. v. Federal Board of Revenue and 2 others (PTCL 2011 CL 68), Pakistan Tobacco Co. Ltd. v. Pakistan through the Secretary, Ministry of Finance, Islamabad and 4 others (1991 PTD 359), Messrs Usmania Glass Sheet Factory Ltd, Chittagong vs. Sales Tax Officer, Chittagong (PLD 1971 SC 205).

5. Learned counsel for respondents submits that although proceedings under section 161 read with section 205 for Tax Years 2011 to 2013 have been already been completed, however, during scrutiny of record, it was observed that no details of commission agents / grower certificates were available on record as required vide

Circular No. 4 of 2011. Taxpayer has made huge payments for the purchase of raw material at Rs. 8,014,394,619/-, 5,499,925,336/- and 6,689,441,410/- respectively for the tax years 2011, 2012 and 2013, and was required to provide the grower certificates / details of commission agents during proceedings. Resultantly, order passed under section 161 read with section 205 of the Ordinance for the Tax Years 2011 to 2013 on above dates were silent on this issue. Moreover, taxpayer also failed to provide details / reconciliation of commission paid to the commission agents during these years. Therefore, notices under section 161 read with section 205 of the Ordinance for the Tax Years 2011 to 2013 were issued once again.

6. Learned counsel for respondents contends that bare reading of section 161 of the Ordinance makes it clear that proceedings under section 161 are related to recovery of withholding tax and transactions related to these proceedings are never “past, closed and barred by limitation”. He submits that taxpayer has itself admitted this stance in Ground No. 5 of the writ petition that order completed under section 161 read with section 205 is not an assessment order as defined under sub-section 5 of section 2 of the Ordinance, therefore, these proceedings are never “past, closed and barred by limitation”. He further submits that vide Circular No. 4/2011 dated April 2, 2011 issued by Federal Board of Revenue, withholding agent was restrained from deducting withholding tax on purchase of agricultural produce which was directly sold by a grower / cultivator of the produce. However, in such a situation withholding agent has to issue a certificate in triplicate in the format given in the Circular. He further argues that the instant writ petition is not maintainable against issuance of impugned notices. He also relies upon the judgments passed

by the Hon'ble Lahore High Court in Mughal-E-Azam Banquet Complex v. Federation of Pakistan and others (2011 PTD 2260), Northern Power Generation Company Ltd. v. Federation of Pakistan etc. (2015 LHC 3623).

7. Learned counsel for the respondents argues that Supreme Court of Pakistan has held that it is the responsibility of the assessee, who maintains the record, to show which payments were liable to withholding. He relied on judgment dated 25-02-2015 passed by the Hon'ble High Court in PTR No. 338 of 2013 titled "M/s. Islam Steel vs. CIR, Sialkot" to support his contention that the department is under an obligation to make a reference of the details of supplies and payments made and to point out that they are prima facie covered by section 161 of the Ordinance and it is then for that taxpayer to discharge the onus as to why deduction was not made.

8. Arguments heard and record perused.

9. The objection of the learned counsel for the respondents that the writ petition against impugned show cause notices was not maintainable, is not of much substance. Superior courts of the country have already held that if the liability in the show cause notice is palpably unlawful or show cause notice is ultra vires, without jurisdiction or with mala fide intent, such action is to be nipped in the bud. Reference, in this regard, can be made to Mughal-E-Azam Banquet Complex v. Federation of Pakistan and others (2011 PTD 2260), Northern Power Generation Company Ltd. v. Federation of Pakistan etc. (2015 LHC 3623). Even otherwise, if the dispute arises between the parties in respect fiscal right based upon a statutory instrument the same can be easily determined in writ jurisdiction, as held by the Hon'ble Supreme Court of Pakistan in Messrs Usmania Glass Sheet Factory Ltd.

Chittagong vs. Sales Tax Officer, Chittagong (PLD 1971 SC 205). I, therefore, overrule the objection of maintainability of petition raised by learned counsel for the respondents and hold the constitutional petition to be maintainable.

10. Perusal of record shows that earlier proceedings under section 161 read with section 205 of the Ordinance, initiated against the petitioner were finalized vide orders dated 30-06-2012 of the respondent No. 3, and orders dated 12-04-2013 and 17-02-2014 passed by respondent No. 4 for the Tax Years 2012 and 2013 respectively, and completion of earlier proceedings resulted into creation of demands against the petitioner as mentioned above. Perusal of detailed orders passed by respondent No. 3 and 4 in earlier proceedings under section 161 read with section 205 of the Ordinance, reveals that earlier orders were passed after consideration and examining of relevant record for the relevant period, therefore, there is no justification for initiation of fresh proceedings. In this case reference can be made to the judgment dated 19<sup>th</sup> February, 2015 passed by the Division Bench of the Hon'ble Lahore High Court, Lahore in **PTR No. 325 of 2010**.

11. It is observed that the issue on the basis of which the proceedings have been re-initiated by successor in office of respondent No. 4, has already been deliberated by respondents No. 3 and 4 in the light of prevalent circulars, and contentions of the petitioner have been accepted. Relevant portion of order dated 30-06-2012 of the respondent No. 3 for the Tax Year 2011 is as follows:-

**"PURCHASE OF LOCAL RAW MATERIAL**

*In his reply the taxpayer company declared purchase of local raw material and stated that purchases declared are totally agricultural produce which were exempt up to 31.12.2010. However, purchases were made from 01.01.2011 to 30.06.2011 which are agricultural produce of purchases through third party, only commission would be taxed. The taxpayer company has filed*

detail of purchase of grains upto 31.12.2010 and after 31.12.2010 to 30.06.2011 and disclosed the amount of commission paid and tax deducted thereon. The taxpayer company also disclosed own import of millet of Rs.69,151,319/- and tax u/s 148 @ 1% was not deducted, therefore the same is being taxed.

In his reply the taxpayer company has also disclosed local purchases of raw material from commercial importers for which undertaking was provided and exemption certificate u/s 153 was also provided against these purchases. The company has also furnished the copies of ledger account and purchase vouchers which reflect that purchases were made from the commercial importers which are exempt of the withholding tax u/s 153 vide clause 47A of Part IV of Second Schedule of the Income Tax Ordinance, 2001 and has provided undertaking in the case of L. Lysine, L. Threonine. DL. Methionine etc. The contention of the taxpayer company is partially verified and the remaining amounts were liable to tax u/s 153, as no exemption certificate was provided, therefore, the taxpayer company is being treated as an assessee in default and tax u/s 161 is as under:.....”

Relevant portion of order dated 12-04-2013 passed by respondent No. 4 for the Tax Year 2012 is as follows:-

**“MANUFACTURING / TRADING ACCOUNTS (INCLUDING FINAL / FIXED CHARGES) EXPENSES IN THE LIGHT OF DETAILS AS DECLARED IN INCOME TAX RETURN FOR TAX YEAR 2012 & ANNUAL AUDITED REPORT FOR THE FINANCIAL YEAR 2011-2012:**

**A. Sr. 16 of I. Tax return for tax year 2012 Local Raw Material Component Rs. 5,547,747,014/- :-**

The detail of local raw material is provided which is tabulated as under:-

Sr. No.	Description	Value	Remarks
01-	Maize	3,152,337,272/-	Exempt In The Light Of Para 5 Of Circular No. 10 Of 2011 Issued By The Federal Board Of Revenue Vide C.No.1(20)WHT/2011 Dated 27.08.2011. The tax of commission agent is deducted and deposited @10% of the commission in the light of the above mentioned circular; commodity wise cum party wise purchase ledger, party wise payment ledger and receipts issued by the commission agent is made part of the record.
02-	Wheat	217,431,196/-	
03-	Paddy	36,294,848/-	
04-	Millet	574,036,931/-	
05-	Peas	27,598,2258/-	
06-	Husk	44,297,457/-	
07-	Corn Gluten	1,768,630/-	Rafhan Mize Products Co. Ltd., Faisalabad, Exemption certificate produced and made part of record; the purchases made by the withholding agent were matched with the duration covered under exemption certificate; No adverse inference is drawn; Tax deducted and deposited on freight charges
08-	Sunflower Meal	289,212,451/-	List of suppliers produced, Exemption certificate produced and made part of record; the purchases made by the withholding agent were matched with the duration covered under exemption



			certificate; No adverse inference is drawn; Tax deducted and deposited of suppliers by the withholding agent where required; Tax deducted and deposited on freight charges
09-	Soyabean Meal	3,492,271/-	Supplies made by commercial importer; documentary evidence in support of deduction of tax of importer w.r.t. Section 148 produced; no adverse inference is drawn.
10-	Rape Seed Meal	88,303,412/-	List Of Suppliers Produced, Exemption Certificate Produced And Made Part Of Record; The purchases made by the withholding agent were matched with the duration covered under exemption certificate; No adverse inference is drawn; Tax deducted and deposited of suppliers by the withholding agent where required; Tax deducted and deposited on freight charges.
11-	Canola Meal	574,123,121/-	List Of Suppliers Produced, Exemption Certificate Produced And Made Part Of Record; Tax deducted and deposited of suppliers by the withholding agent where required; Tax deducted and deposited on freight charges.
12-	Guar Meal	234,670,669/-	List Of Suppliers Produced, Exemption Certificate Produced And Made Part Of Record; Tax deducted and deposited of suppliers by the withholding agent where required; Tax deducted and deposited on freight charges.
13-	Molases	22,833,308/-	List of suppliers produced, tax deducted and deposited of suppliers by the withholding agent; reconciliation made with the withholding statement; Tax deducted and deposited on freight charges

Relevant portion of order dated 17-02-2014 passed by respondent No. 4 for the Tax Year 2013 is as follows:-

**PURCHASE OF LOCAL RAW MATERIAL RS. 7,534,400,765/-**

The tax payer explained that the actual purchases during the year are Rs. 7837086773/- instead of Rs. 7,534,400,765/- the amount confronted through show cause notice is cost of material consumed.

The break up is given below:-

Balance at the beginning of the year	Rs. 230908453/-
Add purchases during the year	Rs. 7837086773/-
Less closing stock / Inter unit transfer	Rs. 533594461/-
Cost of raw material consumed	Rs. 7534400765/-

the tax payer has explained that income tax has properly been withheld against the payments where ever applicable. In his support he furnished proof of payments which have been examined and are available on record. Certain payments were made but tax was not withheld on the plea that the withholdee produced exemption certificates. The tax payer has furnished copies of exemption certificates which have been examined and are available on record. The tax payer also furnished details of products purchased during the year which is given below:-

Product name	Amount paid	Exempt amount	Taxable amount	Remarks
Maize	693638324		5693638324	The tax payer has explained that the commission



				amounting to Rs. 28266790/- was paid to the brokers against purchase of maize for consideration of Rs. 5693638324/- and tax @ 10% was withheld amounting to Rs. 2826679/-and deposited in to Govt. Treasury. The tax payer has furnished proof in this regard which has been examined and is available on record. As the tax payer has discharged its tax liability hence no adverse inference is drawn.
Wheat	271402511		271402511	The tax payer explained that purchases for consideration of Rs. 271402511/- was purchase from various parties and commission was paid amounting to Rs. 1181836/- against which tax @ 3.5% was withheld amounting to Rs.118184/- which was deposited in to Govt. Treasury. The tax payer has furnished proof in this regard which has been examined and is available on record. As the tax payer has discharged its tax liability hence no adverse inference is drawn.
Paddi	354162843		354162843	The tax payer has explained that purchases were made for consideration of Rs.249047479/- Against which commission was paid amounting to Rs. 2006820/-. The tax payer has withheld tax @ 10% amounting to Rs. 200682/- and furnished proof of tax deposited amounting to Rs. 178383/-. Balance amount of Tax Rs. 22299/- is recoverable from tax payer.
Millet	249047479		249047479	The tax payer explained that purchases for consideration of Rs. 249047479/- from various parties and commission was paid to the brokers amounting to Rs. 1223977/- against which tax @ 10% was withheld and deposited in to Govt. Treasury. The tax payer has furnished proof in this regard which has been examined and is available on record. The tax payer has discharged its tax liability hence no adverse inference is drawn.
Peas	22122661		22122661	The tax payer explained that payments against the purchases were made for consideration of Rs. 22122661/- and commission was paid to the brokers

				amounting to Rs. 108304/-. The tax payer explained that tax @ 10% was withheld Rs. 10830/- and was deposited in to Govt. Treasury. Proof in this regard has been provided which has been examined and is available on record. As the tax payer has discharged its tax liability hence no adverse inference is drawn.
Jawar	3108835		3108835	The tax payer explained that payments against the purchases were made for consideration of Rs. 3108835/- and commission was paid to the brokers amounting to Rs. 16831/-. The tax payer explained that tax @ 10% was withheld Rs. 1683/- and deposited in to Govt. Treasury. Proof in this regard has been provided which has been examined and is available on record. As the tax payer has discharged its tax liability hence no adverse inference is drawn.

So far as the issue of furnishing the grower certificates is concerned, admittedly the petitioner has claimed to purchase the agricultural produce during the relevant period through commission agents and the said version was accepted by the respondents No. 3 and 4 while passing orders under section 161 and 205 of the Ordinance. Even Circular No. 4 of 2011 dated 2<sup>nd</sup> April, 2011 clearly provides that if purchases are made through commission agents then grower certificates are not required, if tax is withheld on commission in terms of section 233 of the Ordinance.

12. If there was any mistake, deficiency or error in calculation of tax, it could have been rectified under section 221 of the Ordinance which is reproduced below for ready reference:

**“221. Rectification of mistakes.-** (1) The Commissioner, the Commissioner (Appeals) or the Appellate Tribunal may, by an order in writing, amend any order passed by them to rectify any mistake apparent from the record on their own motion or any mistake brought to their

notice by a taxpayer or, in the case of the Commissioner (Appeals) or the Appellate Tribunal, the Commissioner.”

When an assessment is made in respect of income of a taxpayer, any error or omission appearing therein can be rectified under section 221 of the Ordinance. Fresh assessment cannot be made in respect thereof because it will be a case of double assessment which is not permissible under law. With initiation of fresh proceedings under section 161 read with 205 by the respondent No. 4 in respect of the same tax years, in presence of final orders lawfully passed by a competent officers, same situation has arisen which cannot be allowed to be sustained. Views expressed by the learned Income-tax Appellate Tribunal in its judgment reported as **2010 PTD (Trib.) 150** appears to be in consonance with the provisions of section 161 read with section 205 and section 221 of the Ordinance. The impugned notices under section 161 read with section 205 of the Ordinance are, therefore, declared illegal, and without lawful authority.

13. In view of the aforesaid the impugned show cause notices are held to be illegal and without lawful authority and this writ petition is **allowed** in the above terms.

**(Muhammad Sajid Mehmood Sethi)**  
**Judge**

\*Mian Farrukh\*

Announced in open court on \_\_\_\_\_

**Judge**

Approved for reporting.