JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

PTR No.338 of 2013

Commissioner Inland Revenue
Versus
M/s Islam Steel Mills

J U D G M E N T

Date of Hearing.	25.02.2015
APPLICANT BY:	Mr. Saeed ur Rehman Dogar, Advocate.
RESPONDENTS BY:	Syed Abid Raza Kayani, Advocate.

Shahid Karim, J:- This is an application under section 133 of the Income Tax Ordinance, 2001 (**Ordinance**) by way of reference against order dated 28.08.2013, passed by the Appellate Tribunal, Inland Revenue, Lahore (**Tribunal**).

2. This reference application is being decided along with connected reference applications which involve common question of law, a list of which is appended as "Schedule A" with this judgment. Not only the impugned order in this reference application but the impugned orders in connected reference applications proceed to decide the appeals in the same language and terms. The operative part of the orders passed by the Tribunal in these reference applications is a *verbatim* reproduction in all these applications.

3. Though these reference applications raise four issues of law but the learned counsel for the applicants has confined his arguments to the

following issue of law, which is reproduced as under:

> *"Whether on the facts and in the circumstances of the case, the Tribunal has not erred in law by cancelling the order passed u/s 161/205 relying upon its earlier judgment reported as 2012 PTD (Trib) 122 which is in contravention to the judgment of the Hon'ble Supreme Court of Pakistan reported as 2002 PTD 1 wherein the Apex Court has categorically held that it is the responsibility of the assesse, who maintains the record to show which payments are liable to withholding or not?"*

4. It is not necessary to narrate the details of the facts in individual reference applications. The common factor is that in all these cases, the respondents/assessees were served with show cause notices as to why the assessees may not be treated as taxpayers in default under section 161 of the Ordinance. After hearings in the matters, an order under section 161/205 of the Ordinance was passed by the Inland Revenue Officer, Sialkot. Appeals were filed against the said order before the Commissioner Inland Revenue (Appeals), Gujranwala [**CIR (A)**] which were dismissed by CIR (A) on different dates and the order of the Taxation Officer was upheld. Second appeals were filed before the Tribunal and vide impugned orders, (passed on different dates) the orders passed by CIR (A) were vacated and consequently the orders passed under section 161/205 of the Ordinance were cancelled.

5. The learned counsel for the applicant has, as brought forth above, confined his arguments to the issue of law which has been framed and reproduced above. He submits that the impugned orders are in contravention to the judgment of the Supreme Court of Pakistan reported as *Messrs Bilz (Pvt.) Ltd. v. Deputy Commissioner of Income Tax, Multan and another* (**2002 PTD 1**) (**Bilz judgment**) and which judgment has not been noticed or followed by the Tribunal. He submits that the judgment being binding upon all judicial and executive functionaries under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, the Tribunal was bound to follow and implement the judgment. According to him, the Tribunal has erred in law by passing the impugned orders without referring to the judgment of the Supreme Court of Pakistan.

6. The learned counsel for the respondents does not deny that the respondents/taxpayers were withholding agents and were liable to deduct/withhold the amounts of tax from the payments made against supplies and purchases. However, he submits that the respondents were not in possession of the record relating to the said period in issue viz 01.07.2010 to 30.06.2011 for

which period the record was in the possession of the Deputy Director, Intelligence and Investigation, Gujranwala. According to him, it was the obligation of the Income Tax authorities to have specified the persons in respect of which deduction should have been made. He therefore relies entirely on the Tribunal's judgment as having been passed lawfully.

7. Before we proceed further, the relevant portion of the impugned order of the Tribunal is reproduced as under:

> *"After hearing both the parties, we are constrained to observe that the contention of the learned counsel is correct. Perusal of the order passed under section 161/205 of the Ordinance, shows that the legal formalities as required under the law have not been fulfilled. In a number of judgments it has been specified that no transaction can be held to have escaped deduction under section 161, unless it is established that: (i) taxpayer is withholding agent, (ii) a particular transaction is liable to be withheld, who could take credit of the tax recoverable under section 161. In this regard the judgment cited by the learned counsel for the taxpayer cited as 2012 PTD (Trib) 122 is on all fours to the case of the taxpayer. The relevant extract from the reported judgment is as under:*
>
> > *"I agree with his observation that without identifying names and addresses or persons from whom and how much tax was to be deducted, provisions of section 161 could not be invoked---.That no transaction can be held to have escaped deduction under section 161, unless it is established that: (i) taxpayer is withholding agent, (ii) a particular transaction is liable to be withheld, who could take credit of the tax recoverable under section 161."*

> *The said finding can also be fortified by subsections (1B) and (2) of Section 161 of the Ordinance."*

The above paragraph has been reproduced *verbatim* in the other impugned orders as well.

8. It will be seen that the Tribunal has proceeded on the basis that three elements must exist in order to empower the Income Tax authorities to proceed under section 161 of the Ordinance and that these elements were conspicuously missing in the present cases. According to the Tribunal, these elements are:

i. *taxpayer is a withholding agent;*

ii. *a particular transaction is liable to deduction/withholding; and*

iii. *that specific tax of a specific person was to be withheld who could take credit of the tax recoverable under section 161 of the Ordinance.*

9. Perhaps there is not much cavil to the proposition that these elements should generally exist before proceedings under section 161 of the Ordinance are initiated against a taxpayer and in order to culminate in holding him as taxpayer in default. However, in the present cases, the Tribunal has not drawn its attention to the facts of the case where it has not been denied that the respondents were withholding agents and that the

particular transactions which had been pointed out were liable to deduction of tax as these were supplies made to the respondents. The learned counsel for the respondents, during the arguments, did not deny these two facts. The only question, therefore, was whether the department had specified certain transactions with respect to which the tax had to be withheld by the respondents. Our attention has been drawn to the relevant portion of the notice dated 23.12.2011 served upon the respondents which is in the following terms:

> *"Being a prescribed person, you are under legal obligation to deduct Income Tax u/s 153(1)(a) of the Income Tax Ordinance, 2001 at the time of making payment for purchase of scrap and reagent. As per information available with this office you have made purchase at Rs.45,30,98,480/- during the period 01/07/2010 to 30/06/2011 but neither you have deducted Income Tax u/s 153 (1)(a) nor filed monthly Withholding Tax Statement u/s 165 regarding deduction of Income Tax u/s 153 (1)(a) of the Income Tax Ordinance, 2001, whereas, it was your statutory obligation to deduct tax u/s 153 (1)(a) of the Income Tax Ordinance, 2001 @ 3.5% on payments made on account of purchases and file statutory statement u/s 165 of the Income Tax Ordinance, 2001 by the due date."*

10. It is clear from the notice that it specifies the payments for purchases of scrap and reagent with regard to which the respondents were obliged to deduct tax under section 153 (1)(a) of the Ordinance. This aspect of the case was not noticed by the Tribunal and the Tribunal had

cursorily dealt with all these cases without adverting to the fact that the relevant purchases had been pointed out by the income tax authorities and with regard to which it was alleged that deduction had not been made. Moreover, the Tribunal did not take into consideration the Bilz judgment (supra) of the Supreme Court of Pakistan. This judgment is based on section 50 (4)(a) of the Income Tax Ordinance, 1979 (**repealed Ordinance**) which provision is similar in terms with section 161 of the Ordinance although with slight changes, which, in our opinion, do not substantially affect the applicability of the said judgment to the instant case. In fact, section 161 makes a reference to section 50 of the repealed Ordinance and obliges a person to collect or deduct tax under section 50 of the repealed Ordinance as well. Section 161 makes it obligatory on a person to collect tax as required under Division II or deduct tax from a payment as required under Division III and makes that person personally liable to pay the amount of tax in case of failure to collect or deduct the tax. It will be noticed that the three elements which have been mentioned by the Tribunal have not been specifically mentioned as necessary preconditions in the provisions of

section 161 of the Ordinance. These have been evolved by the courts over a period of time in order to protect the taxpayers against unnecessary harassment. However, it would be patently wrong to say that the entire onus to prove that a failure to collect or deduct tax on the part of the taxpayer has occurred, is placed on the income tax authorities. The only obligation for the income tax authorities to discharge, in our opinion, is for them to specify that payments have been made by the taxpayers on which they were obliged to deduct tax as required under Division III of Part V of the Ordinance. It goes without saying that such a notice will only be given once the department comes to the conclusion that the tax ought to have been deducted from the payments made by the taxpayer and that the taxpayer was thus a withholding agent. The onus then shifts to the taxpayer to bring forth evidence to show that it was not liable to deduct tax as a withholding agent and there was thus no failure on his part in terms of section 161 of the Ordinance. In this regard, the Supreme Court of Pakistan in Bilz judgment, referred to supra, observed as under:

> *"...A perusal of the show-cause notice, dated October 31, 1998 issued in respect of non-*

deduction of the tax for the year 1995-96 indicates that petitioner made ten payments. The amount of the payments has also been mentioned in the notice but the column of withheld tax indicates that it was not deducted and no reason in this behalf has been offered by the petitioner. Inasmuch as despite availing sufficient opportunities before he Deputy Commissioner Income-tax no details were furnished for not deducting the tax. Therefore, we are of the opinion that the petitioner having notice/knowledge that tax has to be deducted from the categories of the parties mentioned in the above noted provision of law itself has failed to fulfill its obligation, therefore, under these circumstances the petitioner shall be considered to be assessee in default for not deducting the tax from the parties to whom the supplies were made by it. In our opinion, there was no necessity for the Assessing Officer to identify the names of the parties to whom the supplies were made because the record is maintained by the supplier i.e. petitioner and it is the duty of the petitioner to maintain the record and show that as to why deductions were not made from different parties at the time of making supplies to them.

8. Learned counsel stated that the Assessing Officer after having gone through the registers should have pointed out the parties from whom the advance tax was liable to be deducted. We are afraid that the contention raised by the learned counsel has no force because as it has been observed hereinabove that it is the petitioner firm itself who made the supplies, therefore, no one else better than it would have knowledge that from whom the deduction is to be made. The department had successfully discharged its obligation by making reference of the details of the supplies, which were made under different heads as per the contents of the show-cause notice. It may be noted that according to the settled principle of law that a fiscal statute has to be construed in its true perspective and in respect of payment of income-tax, if it is found due against a party, then such statue cannot be interpreted liberally in order to make out a case in favour of an assessee who has failed to pay the tax. As such, we are of the opinion that in view of the clear provisions of section 50(4)(a) of the Ordinance, no law point requiring interpretation by the Lahore High Court as well as by this Court is made out. Therefore, it is held that an assessee who has failed to deduct the tax in terms of section 50(4)(a) of the Ordinance was rightly declared to be an assessee in default and cognizance of the matter was rightly taken by the Incomeo-tax Department within the meaning of section 52 read with section 86 of the Ordinance."

11. In order to comprehend the true impact of the judgment of the Supreme Court of Pakistan to

cases under section 161 of the Ordinance, it would be useful to juxtapose the two provisions viz. section 50(4) of the repealed Ordinance and section 161 of the Ordinance 2001:

> ***(Income Tax Ordinance, 1979)***
>
> *50.* ***Deduction of tax at source****.- (1) Any person responsible for paying any income chargeable under the head "Salary" shall, at the time of payment, deduct tax on the amount payable at the average rate of tax computed at the rates specified in the First Schedule on the estimated income of the assessee under this head for the financial year in which the payment is made after making such adjustment, as may be necessary, for any excess deduction or deficiency arising out of any previous deduction or failure to make such deduction during the said financial year.*
>
> *.....*
> *(4) Notwithstanding anything contained in this Ordinance,-*
>
> *(a) any person responsible for making any payment in full or in part (including a payment by way of an advance) to any person [,being resident,] (hereinafter referred to respectively as "payer" and "recipient"), on account of the supply of goods or for service rendered to, or the execution of a contract with the Government, or a local authority, or [a company] [or a registered firm,] or any foreign contractor or consultant or consortium shall, [ ] deduct advance tax, at the time of making such payment, at the rate specified in the First Schedule, and credit for the tax so deducted in any financial year shall, subject to the provisions of section 53, be given in computing the tax payable by the recipient for the assessment year commencing on the first day of July next following the said financial year, or in the case of an assessee to whom section 72 or section 81 applies, the assessment year, if any, in which the "said date", as referred to therein, falls, whichever is the later:*
>
> ***(Income Tax Ordinance, 2001)***
> ***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 [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 [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.]*
> *[(1A) No recovery under sub-section (1) shall be made unless the person referred to in sub-section (1) has been 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 collect or deduct the tax to the date the tax was paid.]*

12. Section 50(4) of the repealed Ordinance must be read with section 52 of that Ordinance and likewise section 161 must be read in conjunction with section 160, for these provisions, when read together complete the scheme envisaged by the Legislature. We have reproduced the provisions in order to establish a nexus of the Bilz judgment (supra) to the dispensation under the Ordinance. A reading of the two provisions does bring forth an ineluctable fact that they are similar in material particulars and are meant for the same purpose. The only difference is that section 161 makes a reference to Division II and III and Chapter XII of the Ordinance, 2001 and is thus more elaborate in its

application whereas section 50(4) is of self-contained and the payments in respect of which deductions are to be made are enumerated therein. Section 161 of the Ordinance is in fact more rights-based in favour of the taxpayer. It confers a right to be heard and does not make him liable for the recovery of tax to be deducted if the tax has meanwhile been paid by the person. In our considered opinion, the *ratio decidendi* of Bilz judgment, the principle of law it enunciates, and the intelligible criteria it lays down to be followed equally applies, with greater force, to the cases under section 161 of the Ordinance. The orders of the Inland Revenue Officer and the Commissioner Inland Revenue are valid and proper on the touchstone of Bilz judgment and must be upheld. The third element relied upon by the Tribunal to necessarily exist as a precondition is alien to the inquiry under section 161 of the Ordinance. However, it goes without saying that the department must establish that the taxpayer is a withholding agent and also must specify the transactions liable to deduction/withholding. This has to be the basis for any action to be initiated under section 161 of the Ordinance. The allegation cannot take the form of a roving inquiry and must be premised on facts and identifiable

data, with specifics regarding payments made. This is also the essence of the Bilz judgment. However, the onus thereafter shifts to the taxpayer to bring forth names of persons to whom payments were made and the lawful basis (based on verifiable evidence) for failure to withhold tax.

13. It is clear from the ratio of the judgment, reproduced above, that the department is merely under an obligation to make a reference of the details of the 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 the taxpayer to discharge the onus as to why deductions were not made. As pointed out above, with regard to the notice dated 23.12.2011 served upon the respondents/taxpayers by the department that it was pointed out that payment had been made for the purpose of scrap and reagent but the tax had not been withheld and this contravenes the provisions of section 161 of the Ordinance. The respondents neither submitted a reply nor did they furnish any convincing evidence to rebut the allegations against them. We are afraid that merely by saying that the respondents were not in possession of the record for the relevant period does not validly

discharge the onus and in the absence of anything to the contrary, it will be deemed that there was a failure to collect and deduct tax on the part of the respondents and hence they are personally liable to pay the amount of tax to the Commissioner. We are, thus, of the opinion that that the Officer Inland Revenue as well as the Commissioner were within their right to pass an order to that effect and the Tribunal has committed an error of law by setting aside the orders, validly passed by the forums below.

14. In view of the above, the questions of law framed for reference to this Court is answered accordingly and the reference applications are hereby **accepted**.

A copy of this judgment shall be sent to the Tribunal under seal of the Court.

(ABID AZIZ SHEIKH) **JUDGE**

(SHAHID KARIM) **JUDGE**

Approved for reporting.

JUDGE

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Rafaqat Ali`

(Schedule 'A')

LIST OF CASES

Sr. No.	Customs Reference Nos.	Title	Impugned Order (Dated)
1	339 of 2013	Commissioner Inland Revenue Vs. M/s Chaudhry Steel Mills	28.08.2013
2	340 of 2013	-do-	-do-
3	341 of 2013	-do-	-do-
4	342 of 2013	Commissioner Inland Revenue Vs. M/s Allahdin Steel Mills	-do-
5	343 of 2013	-do-	-do-
6	344 of 2013	-do-	-do-
7	345 of 2013	-do-	-do-
8	346 of 2013	Commissioner Inland Revenue Vs. M/s Royal Steel Mills	-do-
9	347 of 2013	-do-	-do-
10	348 of 2013	-do-	-do-
11	349 of 2013	Commissioner Inland Revenue Vs. M/s Sardar Steel Mills	-do-
12	350 of 2013	-do-	-do-
13	351 of 2013	-do-	-do-
14	352 of 2013	-do-	-do-
15	353 of 2013	Commissioner Inland Revenue Vs. M/s M.M Steel Mills	-do-
16	354 of 2013	-do-	-do-
17	355 of 2013	-do-	-do-
18	356 of 2013	Commissioner Inland Revenue V M/s White Gold Steel Mills	-do-
19	357 of 2013	-do-	-do-
20	358 of 2013	-do-	-do
21	359 of 2013	Commissioner Inland Revenue Vs. M/s Shehbaz Steel Mills	-do-
22	360 of 2013	do-	-do-
23	361 of 2013	do-	-do-
24	362 of 2013	do-	-do-