

ITA No. 7174/LB OF 2005 DECIDED ON 08/08/2009
CITATION: 101TAX139 ; 2009PTD2219 ; 14VOL2TF125

Income Tax Ordinance, 2001 -- Sections 114(4), 121, 131, 218, 239

Income Tax Ordinance, 1979 -- Sections 61, 63 --

Constitution of Pakistan, 1973 -- Articles 4, 5(2) --

Non service of notice -- Ex-parte assessment -- Failure to file return by assessee -- Exparte assessment -- Issuance of demand notice by Taxation Officer -- Annulment of assessment by CIT(A) on appeal -- Validity -- Whether when issuance of notice is statutory requirement, subsequent proceedings taken on basis of that notice without its valid service are without jurisdiction and ab initio null and void -- Held yes -- Whether before proceeding ex-parte u/s 121 of Income Tax Ordinance, 2001 or u/s 63 of Repealed Income Tax Ordinance, 1979, valid service of notice u/s 114 of Income Tax Ordinance, 2001 or u/s 61 of Repealed Income Tax Ordinance, 1979 is mandatory requirement of law and non-observance thereof is fatal -- Held yes -- Whether CIT(A) has rightly observed that owner is Ibrahim and notices were served on Muhammad Zafar an unrelated and unknown person -- Held yes -- Whether notice was condition precedent for exercise of jurisdiction u/s 63 of Repealed Income Tax Ordinance, 1979 which was lacking due to invalid service, hence assessment order is without jurisdiction and patently illegal being framed contrary to provisions of law, Principle of natural justice and fair play -- Held yes --

Failure to file return -- Finalization of assessment ex parte -- Annulment of assessment order -- Appeal to Appellate Tribunal -- Respondent/assessee who derived income from sale of utensils/crockery, having not filed return, a notice was issued to him under section 114(4) of Income Tax Ordinance, 2001, however assessment was finalized ex parte at net income and assessee/respondent was issued a demand notice by Taxation Officer -- Respondent/assessee filed appeal before Commissioner Income Tax (Appeals) which appeal was accepted and assessment order passed by Taxation Officer was annulled on the ground that notice was issued to person other than the respondent/assessee -- Feeling aggrieved by said order of Commissioner Income Tax (Appeals), Revenue had filed appeal before Appellate Tribunal -- Main ground on which Commissioner Income Tax (Appeals), annulled the assessment order was ex parte action which was unjustified because notices under section 114(4) of Income Tax Ordinance, 2001 were not validly served upon the respondent/assessee -- Mere issuance of notice was not sufficient unless it was validly served -- Notice issued to or served upon some unrelated or unknown person was of no legal effect -- Before taking any action on the basis of a notice, it was duty of the Authority issuing a notice to satisfy itself that the notice had been validly served -- Purpose of notice was to afford an opportunity to the party to explain his position/stance to do the needful and/or to provide

him an opportunity of hearing -- Golden principle of natural justice was that no one should be condemned unheard -- When issuance of notice was a statutory requirement, the subsequent proceedings taken on the basis of that notice without its valid service were without jurisdiction and ab initio null and void -- Before proceeding ex parte under section 121 of Income Tax Ordinance, 2001, a valid service of notice under section 114 of Income Tax Ordinance, 2001, was a mandatory requirement of law and non-observance thereof was fatal -- Proceeding ex parte, did not mean to punish a party for his non-appearance; its purpose was decision of the case on merits without unnecessary delay -- Order passed by Commissioner Income Tax (Appeals) was based on correct appreciation of facts and the law -- Appeal being devoid of any merit was dismissed -- Annulment of assessment merely on the ground of invalid service of notice would not debar the Revenue, subject to limitation to do the needful de novo after meeting the legal requirements especially valid service of notice on the assessee/taxpayer --

Right of protection of law and treating in accordance with law -- Obedience to the Constitution and law was the inviolable obligation of every citizen wherever he could be and of every other person for the time being within Pakistan -- To enjoy protection of law and to be treated in accordance with law was inviolable right of every citizen of Pakistan wherever he could be and of every other person for the time being in Pakistan -- In particular no action detrimental to life, liberty, body, reputation or property of any person would be taken except in accordance with law --

[IN THE INCOME-TAX APPELLATE TRIBUNAL PAKISTAN]

Present: CH. MUNIR SADIQ, JUDICIAL MEMBER and MAZHAR FAROOQ
SHIRAZI, ACCOUNTANT MEMBER

I.T.A. No. 7174/LB of 2005, decided on 8th August, 2009.

Ashraf Ahmad Ali, D.R. for Appellant.

Nemo for Respondent.

ORDER

Originally the titled appeal was decided through this Tribunal's order dated 28-9-2007 and the said order was recalled vide an order dated 13-8-2008 passed in M.As. 18 to 20/LB of 2008.

2. By this order we intend to dispose of the titled appeal filed by the Revenue impugning the order dated 29-8-2008 passed by the CIT(A) Gujranwala Zone in Appeal No. 234 relating to the assessment year 2002-2003.

3. The relevant facts giving rise to the present appeal are that the respondent derives income from sale of utensils/crockery. He did not file a return for the assessment year 2002-2003, therefore, a notice was issued under section 114(4) of the Income Tax Ordinance, 2001. However, the assessment was finalized under section 63 of the repealed Income Tax Ordinance, 1979 ex parte on 20-2-2004 at net income of Rs.100,000 and the assessee/respondent was issued a demand notice by the Taxation Officer to pay Rs.3000 as income tax. Being aggrieved by the treatment at the hands of the Assessing Officer the respondent filed appeal before the CIT(A) which was accepted and the CIT(A) annulled ground the assessment order passed by the Taxation Officer, inter alia, on the ground that the owner of barten store/assessee is Mr. Ibrahim whereas the notices were served upon one Mr. Muhammad Zafar, an unrelated and unknown person. Feeling aggrieved by the order of CIT(A) the Revenue has filed the instant appeal.

4. Learned DR is present for the appellant. Notice was issued to the respondent but despite service he has not appeared to defend his cause, therefore, we proceed ex parte to decide the appeal on merits.

5. The learned DR for the Revenue argued that the learned CIT(A) Gujranwala was not justified to annul the assessment on the basis of case-law cited by the learned AR because that was not identical to the instant case. He further argued that while making assessment legal course of action has been followed because all the proceedings were to be initiated and finalized in accordance with the provisions of section 114 read with section 239 of the Income Tax Ordinance, 2001 and notice under section 114 of the Income Tax Ordinance, 2001 was rightly issued in pursuance of subsection (4) of section 114 which empowers the Assessing Officer to issue such notice in respect of one or more last five completed tax years/assessment years. The Dr further argued that sections 239(1) of the Income Tax Ordinance, 2001 clearly envisages and authorizes the Income Tax Authority to make an assessment in respect of any income year ending on or before the 30th June, 2002 under the repealed Ordinance, 1979 as saved under section 239(2) of the Income Tax Ordinance, 2001.

6. We have heard the learned DR and perused the available record.

7. The main ground on which the CIT(A) annulled the assessment order was that ex parte action under section 63 was unjustified as the notices under section 114(4) of the Income Tax Ordinance, 2001 and section 61 of the repealed Income Tax Ordinance, 1979 were not validly served upon the assessee/respondent.

8. Most of the Taxation Officers and Commissioners of Income Tax think that issuance of notice is sufficient to absolve them of their legal duty. It should be kept in mind that mere issuance

of a notice is not sufficient unless it is validly served. A notice issued to or served upon some unrelated or unknown person is of no legal effect. Before taking any action on the basis of a notice it is the duty of the authority issuing a notice to satisfy itself that the notice had been validly served. The purpose of notice is to afford an opportunity to the party to explain his position/stance, to do the needful and/or to provide him an opportunity of hearing. It is a golden principle of natural justice that no one should be condemned unheard and Superior Courts have laid a great emphasis on it. Guidance may be sought from the cases reported as 1994 SCMR 2232, PLD 1990 SC 666, PLD 1964 SC 673, 1988 CLC 1318, 1981 CLC 909 and 1981 CLC 1654. It needs mention that when issuance of notice is a statutory requirement the subsequent proceedings taken on the basis of that notice without its valid service are without jurisdiction and ab initio null and void. When a statutory notice issued under Income Tax Ordinance 2001/1979 is not served in accordance with the dictates of section 218 of the Income Tax Ordinance, 2001 or section 154 of the repealed Income Tax Ordinance the whole exercise on the basis of that notice, in fact amounts to proceedings conducted/initiated without issuance of notice and are nullity in eyes of law.

9. We have experienced through a number of cases that there is a trend on the part of some income tax authorities to ignore the law regarding service of notice or transgress it while in case of others it may be due to lack of proper instructions/knowledge. Whatever the reason may be, it is, at least, incompetence and maladministration which results into annulment of assessments and loss to revenue. Therefore, before going onto the merits of this appeal we deem it necessary to mention, for the guidance of Income Tax Authorities and all others concerned, some of the relevant provisions of law relating to the service of summons/notice.

Section 154 of the repealed Income Tax Ordinance, 1979. Service of notice.--(1) A notice, order or requisition (hereinafter referred to as 'notice') under this Ordinance may be served on the person therein named either by post or in the manner provided for service of a summons issued by a Court under the Code of Civil Procedure, 1908 (V of 1908).

(2) Any such notice may be addressed-

- (a) in the case of a firm or a Hindu undivided family, to any member of the firm or to the manager or any adult male member of the family;
- (b) in the case of a local authority, a Company or an association of persons, to the principal officer thereof; and
- (c) in the case of any other person (not being an individual), to the person who manages or controls its

affairs.

- (3) Where a firm or other association of persons is dissolved, any such notice may be served on any person who was a member of the firm or the association, as the case may be, immediately before such dissolution.
- (4) In any case to which section 72 applies such notice may be served on the person whose income is to be assessed, or in the case of a firm or an association of persons, or any person, who was a member of such firm or association, as the case may be at the time of the discontinuance of business or profession, or in the case of a company, on the principal officer thereof.

Section 218 of the Income Tax Ordinance, 2001, Service of notices and other documents.---(1) Subject to this Ordinance, any notice, order or requisition required to be served on a resident individual (other than in a representative capacity) for the purposes of this Ordinance shall be treated as properly served on the individual if-

- (a) personally served on the individual or, in the case of an individual under a legal disability or a non-resident individual, the representative of the individual;
 - (b) sent by registered post or courier service to the place specified in clause (b) of subsection (2) or to the individual's usual or last known address in Pakistan; or
 - (c) served on the individual in the manner prescribed for service of a summons under the Code of Civil Procedure, 1908 (V of 1908).
- (2) Subject to this Ordinance, any notice, order or requisition required to be served on any person (other than a resident individual to whom subsection (1) applies) for the purposes of this Ordinance shall be treated as properly served on the person if-
- (a) personally served on the representative of the person;
 - (b) sent by registered post or courier service to the person's registered office or address for service of notices under this Ordinance in Pakistan, or where the person does not have such office or address, the notice is sent by registered post to any office or place of business of the person in Pakistan; or
 - (c) served on the person in the manner prescribed for service of a summons under the Code of Civil

Procedure, 1908 (V of 1908).

- (3) Where an association of persons is dissolved, any notice, order or requisition required to be served under this Ordinance on the association may be served on any person who was [the principal officer or] a member of the association immediately before such dissolution.
- (4) Where section 117 applies, any notice order or requisition required to be served under this Ordinance on the person discontinuing the business may be served on the person personally or on any individual who was the person's representative at the time of discontinuance.
- (5) The validity of any notice issued under this Ordinance or the validity of any service of a notice under this Ordinance shall not be called into question after the return to which the notice relates has been furnished or the notice has been otherwise complied with.

Manner provided for service of a summons issued by a Court under the Code of Civil Procedure, 1908 (V of 1908).

Order V, Rule 10. Mode of service.---Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Rule 10A. Service by post.---(1) Simultaneously with the issue of summons under rule 9, thee shall be sent, unless otherwise ordered by the Court, to the defendant, by registered post, acknowledgement due, another copy of the summons signed and sealed in the manner provided in rule 10.

- (2) An acknowledgement purporting to be signed by the defendant of the receipt of the registered communication or an endorsement by a postal employee that the defendant refused to take delivery of the same shall be deemed by the Court issuing the summons to be prima facie proof of service by summons.

Rule 12. Service to be on defendant in person when practicable or on his agent.--- Whenever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept the service, in which case service on such agent shall be sufficient.

Rule 13. Service on agent by whom defendant carries on business.

- (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which summons is issued, service on any manager or agent, who at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.
- (2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charter.

Rule 15. Where Service may be made on a male member of defendant's family.---Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Rule 16. Persons served to sign acknowledgment.---Where the serving officers delivers or tenders a copy of the summons to the defendant personally or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.

Rule 17. Procedure when defendant refuses to accept service, or cannot be found.---Where the defendant or his agent or such other person as afore-said refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, no any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides, carries on business or personally works for gain and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Rule 18. Endorsement of time and manner of service.---The serving officer shall, in all cases in which the summons has been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the

time when and the manner in which the summons was served, and the name and the address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

Rule 19. Examination of serving officer.---Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may if it has been so verified, examine the serving officer on oath, or cause him to be examined by another Court, touching his proceedings, and may make such further inquiry in the matter, as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

Rule 20. Substituted service.---(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order for service of summons by---

- (a) affixing a copy of the summons at some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain; or
- (b) any electronic device of communication which may include telegram, phonogram, talex, fax, radio and television; or
- (c) urgent mail service or public courier services; or
- (d) Beat of drum in the locality where the defendant resides; or
- (e) Publication in press; or
- (f) Any other manner or mode as it may think fit.

Provided that the Court may order the use of all or any of the aforesaid manners and modes of service simultaneously;

Effect of substituted service.---(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Where service substituted time for appearance to fixed.---(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require

which shall not ordinarily exceed [fifteen days].

Rule 21.---Service of summons where defendant resides within jurisdictions of another Court. A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

Rule 24.---Service on defendant in prison. Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

Rule 25.---Service where defendant resides out of Pakistan. Where the defendant resides out of Pakistan and has no agent in Pakistan empowered to accept service, the summons shall except in the cases mentioned in [Rule-26A] be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

From the above quoted provisions following guidelines could easily be drawn up for effecting service of notice on addressee:--

- (i) A notice may be addressed,--
 - (a) in the case of a firm or a Hindu undivided family, to any member of the firm or to the manager or any adult male member of the family;
 - (b) in the case of a local authority, a company or an association of persons, to the principal officer thereof; and
 - (c) in the case of any other person (not being an individual) to the person who manages or controls its affairs.'
- (ii) All efforts should be made to effect service in person on the addressee through serving officer as well as through registration post, AD or through Courier Service because dispatch of notice under Postal Certificate (UPC) which does not require sign or the addressee for receipt of the post has no presumption under the law as to its delivery and it does not provide any evidence that the notice was served on the addressee.
- (iii) Where a firm other association of persons is

dissolved, any such notice may be served on any person who was a member of the firm or such notice may be served on any person who was a member of the firm or the association, as the case may be, immediately before such dissolution.

In case of discontinued business or profession a notice may be served on the person whose income is to be assessed, or in the case of a firm or an association of persons, on any person who was a member of such firm or association as the case may be at the time of the discontinuance of business or profession, or in the case of a Company, on the principal officer thereof.

- (iv) If after all reasonable efforts it is impracticable to make service on the addressee in person the notice should be served on his agent empowered to accept service.
- (v) If he cannot be found and has no agent empowered to accept service of notice on his behalf then the service may be made on any adult member of the family of assessee who is residing with him. However, it should be kept in mind that a servant is not a member of the family within the meaning of Rule 15 of Order V.
- (vi) The serving officer ought to ascertain the identity of addressee or person upon whom service is effected to examining his computerized National Identity Card or through witnesses and his or their, as the case may be, CNIC number must be mentioned in the report/endorsement. He shall require the signature of the person to whom copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.
- (vii) If the service through above modes is not possible due to refusal of addressee or his agent or male member of his family residing with him then a copy of notice should be affixed on the outer door or some conspicuous part of the house or premises in which addressee ordinarily resides or carries on business or personally works for gain and the serving officer should record reasons for failure of personal service and the circumstances under which he has so affixed along with the name CNIC Number and address of the persons who have identified the house of the assessee/taxpayer and in whose presence the copy was affixed.
- (viii) The serving officer shall, in all cases in which the notice has been served as per (ii), (iii), (iv) or

(v), supra, endorse or annex, or cause to be endorsed or annexed, on or to the original notice, a return stating the time when and the manner in which the notice was served, and the name and the address of the person (if any) identifying the person served and witnessing the delivery or tender of the notice.

- (ix) Where a notice is returned under the situation mentioned in para. (vii) supra the income tax authority who has issued the notice shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may if it has been so verified, examine the serving officer on oath, or cause him to be examined by another officer/income tax authority, touching his proceedings, and may declare that the notice has been duly served or order such service as it thinks fit.
- (x) Where the income tax authority is satisfied that there is reason to believe that the addressee is keeping out of the way for the purpose of avoiding service, or that for any other reason the notice cannot be served in the ordinary way, he shall order for service of notice by---
 - (a) affixing a copy of the notice at some conspicuous part of the house, if any, in which the addressee is known to have last resided or carried on business or personally worked for gain; or
 - (b) any electronic device of communication which may include telegram, phonogram, talex, fax, radio and television; or
 - (c) urgent mail service or public courier services; or
 - (d) Beat of drum in the locality where the defendant resides; or
 - (e) Publication in press; or
 - (f) Any other manner or mode as it may think fit;

However the Income Tax Authority can order the use of all or any of the aforesaid manners and modes of service simultaneously.

9-A. In the light of above provisions it is crystal clear that before proceeding ex parte under section 121 of the Income Tax Ordinance, 2001 or under section 63 of the repealed Income Tax Ordinance, 1979 a valid service of notice under section 114 of the Income Tax Ordinance, 2001 or under section 61 of the repealed Income Tax Ordinance, 1979 is a mandatory requirement of law and non-observance thereof is fatal.

10. We have examined the record which revealed that the assessing officer was aware of the fact that the proprietor of bartan store is/was Muhammad Ibrahim and he had also mentioned his name in the assessment order but the notices were served on Muhammad Zafar an unrelated and unknown person. When confronted with this, the learned DR has not been able to controvert the above factual position. Furthermore the Revenue has not challenged the correctness of this finding by the CIT(A) in the grounds of appeal. CIT(A) has rightly observed that ``the owner is Ibrahim and notices were served on Muhammad Zafar an unrelated and unknown person''. The assessee/respondent neither appeared before the assessing officer nor had any notice served upon him and he came to know about the assessment order when demand notice was served upon him after the passing of assessment order under section 63 of the repealed Income Tax Ordinance, 1979. The situation would have been different if the assessee/taxpayer had submitted to the jurisdiction of Income Tax Authority and did the needful required in the notice or had sought time for compliance in response to such notice or through information from any other source, and the assessee/taxpayer would have no right to question the validity of service of notice unless he was able to show that it had caused him harm/prejudice. As discussed earlier, issuance of notice was a condition precedent for exercise of jurisdiction under section 63 of the repealed Income Tax Ordinance, 1979 which was lacking due to invalid service, hence the assessment order is/was without jurisdiction and patently illegal being framed contrary to the provisions of law, principles of natural justice and fair play. Therefore, entire exercise under section 63 of the repealed Income Tax Ordinance by the assessing officer is held to be null and void ab initio.

11. The learned DR has contended that as the respondent has failed to enter appearance and he has been proceeded ex parte, therefore appeal may be accepted. But we are not persuaded to agree with the view canvassed by the DR, inter alia, for the reasons that proceeding ex parte does not mean to punish a party for his non-appearance. Its purpose is decision of the case on merits without unnecessary delay. On our part it is in fact, an effort to translate the National Judicial Policy into action and reality and to help achieving the goals set in the National Judicial Policy. Furthermore Courts and Tribunals are respected not on account of their power to legalize injustice on technical grounds but because they are capable of removing injustice and are expected to do so.

12. Now we proceed to examine the next contention canvassed by the DR that the CIT(A) has erred in annulling the assessment on the ground that Superior Courts have held that practice of issuing notice under section 114 of the Income Tax Ordinance, 2001 and later on completing assessment under section 63 of the repealed Income Tax Ordinance, 1979 is illegal and liable to be annulled. The impugned order reveals that the CIT(A) has not annulled the assessment exclusively on this ground and this was

only mentioned as a further reason/ground. He has annulled it mainly on the ground of non-service/absence of a valid service of notices on the assessee. We have no hesitation in saying that if the annulment of assessment on this ground is set aside even then it would be of no help to the appellant/Revenue obviously for the reason that the proceedings initiated were null and void ab initio due to invalid service of notices, hence, elaborate discussion and adjudication on this issue or other grounds is not called for.

13. After careful consideration of the facts and for reasons mentioned above we find that the order passed by the first appellate authority/CIT(A) is based on correct appreciation of facts and the law. The appeal being devoid of any merit is dismissed. However, a word of caution is required here. Annulment of assessment merely on the ground of invalid service of notice does not debar the Revenue, subject to limitation, to do the needful de novo after meeting the legal requirements especially valid service or notice on the assessee/taxpayer.

14. It would not be out of place to mention that as per the Article 5(2) of the Constitution of Islamic Republic Pakistan, 1973 obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan. And as per Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 to enjoy protection of law and to be treated in accordance with law is inviolable right of every citizen of Pakistan wherever he may be and of every other person for the time being in Pakistan. In particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Keeping in view the provisions of the Constitution the income tax authorities are not an exception and are bound to obey the Constitution and law. A copy of this order shall be sent to the Chairman Federal Board of Revenue for information and onward transmission of its photo copies along with required instructions to the concerned quarters including all regional Commissioners of Income Tax, Commissioners of Income Tax, Commissioners of Income Tax (Appeals), taxation officers for strict compliance of law relating to service of notice and the guidelines enumerated in this order.

Appeal dismissed.