

**Topic: Judgments on Section 161/205 and Rule 44(4)**

**By Muhammad Imran Ghazi dated 07-05-2015**

**Section 160.** Payment of tax collected or deducted. Chapter X - Part V - Division II (Section 148), Division III (Section 149 to 158) and Chapter XII (Section 231A to 236J)

**Section 161.** Failure to pay tax collected or deducted.

**Rule 44(4).** Wherever required by the CIR, furnish a **reconciliation of the amounts mentioned in the annual and monthly statements with the amounts mentioned in the return of income, statements, related annexes and other documents** submitted from time to time.

**Section 205(3).** Default Surcharge – 18% 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.

**Section 153.** Payments for goods, services and contracts – (7)(c) “an association of persons constituted by, or under law; (7)(h) “an association of persons, having turnover of fifty million rupees or above in tax year 2007 or in **any subsequent tax year.**

**Circular No. 1(17)WHT/91-Pt dated 29-08-2002** – Ordinary AOP which is created by an agreement, does not fall within the definition of the “Prescribed Person” given in sub-section (9) of section 153 of ITO, 2001.

**2012 PTD (Trib.) 122** – Three elements must exist in order. (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.

**High Court Lahore PTR No. 338 of 2013** – 25-02-2015 - CIR vs M/s Islam Steel Mills – Negate the above Tribunal judgment held in light of Bilz Judgment reported as [2002 PTD (Supreme Court) 1] that 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 Ord. and it is then for the taxpayer to discharge the onus as to why deductions were not made. That the IRO 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.

**2014 PTD 2078 HC** – Nishat Chunian v. FBR – 05-06-2014 – **Section 205** – It is pre-emptorily issued notice u/s 205 to the petitioner in respect of the matter which, in essence, concerns reconciliation of the amounts contained in the statutory statements filed by the tax payer company with the amounts given in their audited accounts. The requirement for such reconciliation cannot be presumed to be a default in the hand, **Rule 44(4)** - in so far as entitlement for reconciliation of accounts is concerned, this is a right belonging to the respondent authorities which is duly conferred under Rule 44(4).

**ICA No. 267/2015** – 12-03-2015 - Lahore High Court – Nishat Chunian vs FBR etc – Intra Court appeal dismissed on technicalities.

**W.P. No.28035/2014 HC** – Noon Sugar Mills Ltd v. Federation of Pakistan etc. – 05-03-2015 – Use of the word “*income tax affairs*” u/s 177 as well as under section 214C includes information pertaining to the collection and deduction of withholding tax which cannot be done separately under the garb of Rule 44(4). The Petitioners do not dispute the fact that they are required to deduct or collect withholding tax and they are admittedly filing returns u/s 165. They dispute the calling for the reconciliation statements under Rule 44(4). Rule 44(4) empowers the Commissioner to call for a reconciliation statement of the amounts mentioned in the monthly statements filed by the Petitioners. Since the monthly statement is specifically with respect to the withholding tax deducted and collected by the Petitioners, it is not an audit of the *income tax affairs* of the Petitioners. Statements filed by the Petitioners under Rule 44(4) cannot be equated with an audit of the *income tax affairs* of the Petitioners.

**2015 PTD (Trib.) 654** – 25-02-2014- Composite reading of sections 161, 177, 120 and 122C clearly reveals that these sections are interconnected. The direct invoking of section 161 without audit under section 177 constitutes fishing and roving inquiry and have the effect of increasing the taxable income assessed under section 120, being violation of over-riding of section 120(1) and (1A) and hence action u/s 161/205 is not sustainable. – Section 161 is a charging section and for its invocation no audit, inquiry or investigative is necessary but there is no room for any intendment, presumption and inference in interpretation for application of penal provisions. Burden of the proof is on the depart who assert default in view of Articles 117 and 118 of Qanun-e-Shahadat Order, 1984. Benefit of doubt, ambiguity or alternative interpretation is right of the taxpayer as held in 1973 SCMR 14, 1977 SCMR 371.

**(2015) 111 Tax 169 H.C Lah** held that recovery u/s 162 from whom tax collected and deducted can't be made if he filed his income tax return unless amend his return u/s 122.

**IT.A No.s 804/IB** Tribunal Islamabad – 22-02-2007 – Department cannot worked back purchases from the mere figure of Sales declares under 143B.

**There are 2 scenarios:**

- 1) Call for record through notice under Section 161
- 2) Call for reconciliation through notice under Section 161 read with Rule 44(4)

Concern to Sr.No.1, there is no prior knowledge and study requires of tax payer affairs. Practically, the tax lords issue notice blindly and arbitrarily (either running or completed assessment year) to withholding agents mentioning the period instructed to tax payer come with accounts/record.

Concern to Sr.No.2, call for reconciliation requires prior knowledge of amount, which reconciliation is required and practically it is only possible where taxpayer has submitted his income tax return and declared profit and loss expenses. Tax Lords has no way to come to the knowledge of affairs about running tax year and can't call for reconciliation.

Rule 44(4) is sub-ordinate of section 161 and we can't deny to adhere the proceedings of notice of u/s 161. But as per my opinion, tax lords have to opt right way to invoke the provisions of section 161 according to under mention Sr. No. 2 only.