be entitled to relief in the case. For instance in a suit for administration, for a suit for accounts or a suit for partition of the property the plaintiff cannot claim absolute right to withdraw the suit unconditionally, if the defendants opposed the prayer. Similarly, in cases where the defendant after filing of the suit acquires a right in respect of the subject-matter of the suit, the plaintiff could not be allowed to withdraw the suit where the right acquired by defendant is likely to be defeated by withdrawal of the suit..." (emphasis supplied)

In the case of *Haji Muhammad Boota and others v. Member (Revenue), Board of Revenue, Punjab and others*" (PLD 2003 SC 979) the apex Court held that withdrawal would not be allowed if it results in perpetuating a fraud or injustice or the withdrawal would otherwise defeat the ends of justice.

9. For the reasons given above, our answer to both the questions is in affirmative. The appeal is decided against the department.

10. Office shall send a copy of this order under the seal of the Court to the learned Appellate Tribunal as per section [1]136(5) of the Repealed Ordinance.

KMZ/C-5/L Question answered.

2015 P T D (Trib.) 654

[Inland Revenue Appellate Tribunal]

Before Ch. Shahid Iqbal Dhillon, Judicial Member and Sajjad Ali, Accountant Member

I.T.As. Nos.1071/LB and 1337/LB of 2012, decided on 28th January, 2014.

(a) Income Tax Ordinance (XLIX of 2001)---

----Ss. 161, 205 & 120(1)---Failure to pay tax collected or deducted---"Opportunity of being heard"---Once the First Appellate Authority had categorically recorded that "heavens would not have fallen had the final opportunity on the issue of merits/facts of the case had been provided to the taxpayer and that nothing could be taxed whimsically and arbitrarily but only on definite information, said

[1] The provision of section 136 of the Repealed Income Tax Ordinance, 1976 as applicable at the time of filing this appeal i.e. 1-2-2000.

Authority was under obligation to quash the whole order instead of allowing partial relief on certain issues and to maintain the order. [p. 661] A

(b) Income Tax Ordinance (XLIX of 2001)---

----Ss. 161, 205, 149(1), 153(1), 158 & 120(1)---Failure to pay tax collected or deducted---Accrual basis accounting---Deduction of tax at the time of making actual payment---Contention of the department that taxpayer/company was maintaining accounts on accrual basis and obligation to deduct tax arose only when expenses were recorded and became payable, was patently illegal and was contrary to the provision contained in Ss.149(1), 153(1) & 158 of the Income Tax Ordinance, 2001, which explicitly contemplate that tax was required to be deducted at the time of making actual payment---Finding of First Appellate Authority and contention of the department were wholly misconceived and initiating of proceedings under S.161 of the Income Tax Ordinance, 2001 was outcome of wrong legal presumption and not tenable in the eyes of law. [p. 661] B

2009 PTD 538 rel.

2002 SCMR 122; 1971 SCMR 681 and PLD 1971 SC 124 ref.

(c) Income Tax Ordinance (XLIX of 2001)---

----Ss. 161, 205, 149, 153(1)(a)(b) & 120(1)---Failure to pay tax collected or deducted---Levy of tax on consolidated figure without identifying payment, time of payment, amount of tax---Validity---Levy of tax on the allegation of non-deduction of tax under S.149 of the Income Tax Ordinance, 2001 at the flat rate of 10% on the total aggregate salary and wages of all employees for whole of the tax year and on the allegation of non-deduction of tax under S.153(1)(a)(b) of the Income Tax Ordinance, 2001 on the consolidated figure of the expenses and purchases for whole of the year reported in the audited accounts on accrual basis and matching basis without any power of Best Judgment Assessment and identifying payment, time of payment, amount of tax was coram non judice and nullity. [p. 661] C

(d) Income Tax Ordinance (XLIX of 2001)---

----Ss. 161/205, 177, 120 & 122C---Failure to pay tax collected or deducted---Invoking of S.161 of the Income Tax Ordinance, 2001 without audit under S.177 of the Income Tax Ordinance, 2001---Validity---Composite reading of Ss.161, 177, 120 & 122C of the Income Tax Ordinance, 2001 clearly revealed that these sections were

interconnected---Direct invoking of S.161 of the Income Tax Ordinance, 2001 without audit under S.177 of the Income Tax Ordinance, 2001 constituted fishing and roving inquiry and had the effect of increasing the taxable income assessed under S.120 of the Income Tax Ordinance, 2001, being violation of over-riding effect of S.120(1) and (1A) of the Income Tax Ordinance, 2001 and action under Ss.161/205 of the Income Tax Ordinance, 2001 was not sustainable---Proceedings initiated under Ss.161/205 of the Income Tax Ordinance, 2001 and consequential orders based thereupon were void ab initio and suffered from various legal, procedural and factual irregularities---Order of Taxation Officer was vacated and annulled by the Appellate Tribunal. [pp. 661, 663] D & I

2002 SCMR 122; 1971 SCMR 681; PLD 1971 SC 124 and 2008 SCMR 240 **ref.**

2012 PTD 122 (Trib.); 2009 PTD 538; PLD 1993 SC 473 and PLD 2003 SC 979 **rel.**

(e) Income Tax Ordinance (XLIX of 2001)---

----Ss. 161 & 205---Failure to pay tax collected or deducted---Parameters for initiating proceedings under S.161 of the Income Tax Ordinance, 2001---Certain parameters were required to be brought on record by the Taxing Authority for holding the taxpayer as "taxpayer in default"---Appellate Tribunal had determined such parameters in a case reported as 2012 PTD (Trib) 122 for initiating proceedings and passing of order under Ss.161/205 of the Income Tax Ordinance, 2001. [p. 662] E

2012 PTD (Trib.) 122; 2004 PTD 880 and 2008 PTD 787 **rel.**

(f) Income Tax Ordinance (XLIX of 2001)---

----Ss. 161 & 205---Qanun-e-Shahadat (10 of 1984), Arts. 117 & 118---Failure to pay tax collected or deducted---Section 161 of the Income Tax Ordinance, 2001 was a charging section and for its invocation no audit, inquiry or investigation was necessary but there was no room for any intendment, presumption and inference in interpretation of application of penal provision---Burden of proof was on the department which assert the default in view of Arts. 117 & 118 of the Qanun-e-Shahadat, 1984---Benefit of doubt, ambiguity or alternative interpretation was right of the taxpayer. [p. 662] F

1973 SCMR 14 and 1977 SCMR 371 **rel.**

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(g) Income Tax Ordinance (XLIX of 2001)---

----Ss. 161, 153, 236A & 236C---Failure to pay tax collecte deducted---Purchase of land---Advances from customers---Levy o under S.161 of the Income Tax Ordinance, 2001 on the purcha land and in respect of advances received from customer was out o scope of S.153 of the Income Tax Ordinance, 2001 as the purcha land did not fall within the definition of "goods" and taxpayer was not required to deduct tax at the time of receipt of advance customers and had been correctly deleted by the First App Authority---Immovable property was subject to collection of tax u independent Ss.236A & 236C of the Income Tax Ordinance, 20 the time of sale by the registration/Public authorities and not appli to the taxpayer. [p. 662] G

1999 PTD 4028; 2008 PTD 1401; 2005 PTD 974 and 2004 422 **rel.**

(h) Income Tax Ordinance (XLIX of 2001)---

----Ss.205 & 161---Default surcharge---Levy of default surc without identifying date of deduction and corresponding da deposit---Validity---Levy of default surcharge without identifying of deduction and corresponding date of deposit could not be justified---In the absence of terminal end and without determinat the default period the levy of default surcharge was not possible a opening deductible event and terminal end were missing---Le default surcharge on hypothetical basis and without establishing default on the part of taxpayer was illegal and nullity in the eye o [p. 662] H

1992 PTD 342; 2006 SCMR 626 and PLD 1991 SC **rel.**

Ghazala Hameed, D.R. for Appellant.

Muhammad Mansha FCA for Respondent.

Date of hearing: 28th January, 2014.

ORDER

CH. SHAHID IQBAL DHILLON, JUDICIAL MEME Through this consolidated order we intend to dispose of cross a preferred at the instance of the taxpayer and the department chall the order dated 31-5-2012 passed by the learned Commissioner Revenue, Lahore pertaining to the tax year 2011. The taxpayer co that the relief allowed by the learned CIR(A) is inadequate v

the department impugns the deletion of tax levied under section 161 under various heads as unjustified and arbitrary. After hearing both the representatives of the parties the cross appeals are disposed of as under:

2. Facts leading to the instant cross appeals in brief are that return e-filed by the taxpayer, a private limited company engaged in real estate development business for the tax year under appeal was firstly treated as deemed order in terms of section 120(1) of the Ordinance. Subsequently, on scrutiny of record the Taxation Officer observed that the appellant had failed to deduct tax on the payments made under certain heads i.e. wages/salary, trade and other payables, property, plant and equipment, purchases, repair and maintenance, other expenses, advertisement and professional charges. Therefore, a notice under sections 161/205 was issued and considering the reply furnished by the taxpayer as un-satisfactory order levying tax under section 161 at Rs. 43,129,716 and default surcharge at Rs.5,487,518 under section 205 of the Ordinance was passed on 16-3-2012.

3. The appellant being aggrieved with the treatment accorded by the Taxation Officer preferred appeal before the learned CIR(A) on the grounds that both the order and the proceedings are without jurisdiction, against the facts of the case, without adopting due process of audit and judicial practice. The grounds of appeal also included that non-jurisdictional and legal objections were not addressed through separate speaking order before proceeding on merits of the case. The learned CIR(A) after considering the grounds and arguments of the rival parties vide order dated 31-5-2012 annulled levy of tax at an average flat rate of 10% on wages and salaries; deleted levy of tax on the advances of Rs.678,240,228 received from customers and on the purchase of land valuing Rs.51,760,985 @ 3.5 % under section 153(1) (a) of the Ordinance, being out of scope. The tax levied on the alleged payments made on account of purchase of petroleum products and newspapers and periodicals due to exemption from withholding provision was deleted subject to verification. Similarly, tax imposed @ 6% in respect of printing and stationery and supply of cement was directed to be charged @ 3.5% subject to verification. The tax levied by the Taxation Officer on rest of the heads was, however, confirmed. It is this order which has caused grievance to both the appellant as well as the department. Hence these cross appeals.

4. At the very outset, the learned counsel of the appellant vehemently agitated the initiation of proceedings under sections 161 and 205 of Ordinance, as well as issuance of the show-cause notice by the ACIR and the resultant order as illegal and void ab initio. The AR also asserted that statutory procedure required for collection of evidence and

particulars about non-compliance of deduction of tax by the taxpayer and recourse to section 177, has not been adopted before invoking section 161 of the Ordinance. Hence, the very initiation of proceedings and consequential order was a nullity and not sustainable in the eyes of law. In support of this contention the reliance was placed on the reported following judgments:--

(i) 2002 SCMR 122, (ii) 1971 SCMR 681 and (iii) PLD 1971 SC 124.

5. The AR of the taxpayer further contended that proceedings under sections 161/205 are wholly based on assumptions and subjective data, relating to aggregate annual amounts of purchases, expenses or consumption reported in the audited accounts and return. The accounts of the company are maintained on accrual and matching basis, however no significance to this aspect was given by the Taxation Officer. He contended that no reference to any credible and reliable information and essential ingredient in unequivocal and explicit term supporting allegation of non-compliance of deduction has been made and confronted in the show-cause notice, which is a precedent condition for initiating proceedings and passing order under section 161 of the Ordinance. The AR of the appellant further submitted that ACIR is not competent to pass best judgment assessment, by exercising the power of section 121 in the garb of sections 161/205. Any default for not furnishing the details of deduction of tax is under the purview of section 121 is subject to the condition of non production of record during the course of audit under section 177 and section 177(10); the action which is required under section 121 cannot be extended to sections 161/205. The passing of order under sections 161/205 together with disposal of legal objections is agitated as denial of right of opportunity of being heard on merits of case, fair trial and due process of law as enshrined in Article 4 read with Article 10A of the Constitution and section 161(1A) the Ordinance. According to the learned AR the findings of the learned CIR(A) are mutually inconsistent and hit by the doctrine of blowing hot and cold in the same breath and approbate and reprobate. The AR also vehemently contended that invoking of section 161 without identification of suppliers and resort to sections 162 and 169(2)(f) and section 161(1)(b), is illegal and rendered these sections redundant. The learned AR also objected the enforcement of advance tax provision after the close of year and payment of due tax by the suppliers at the time of filling of their respective returns for the tax year 2011. He also objected the imposition of default surcharge as unjustified in the absence of opening and terminal end and that too without establishing any mens rea or wilful default on the part of taxpayer. To support his contention the reliance has been placed upon the judgments reported as 2012 PTD 122 (Trib.) and 2008 SCMR 240.

6. The learned DR appearing on behalf of the department vehemently supported the order of the Taxation Officer and contended that findings contained therein are based on facts of the case. According to him the order of the ACIR was strictly in accordance with law and it does not suffer from any legal infirmity whatsoever. The learned DR also objected the order of learned CIR(A) to the extent of annulment and deletion of levy of tax under section 161 of the Ordinance as unjustified. The DR further contended that proceedings under section 161 are independent and have no nexus with deemed assessment under section 120 and audit under section 177 of the Ordinance. He also supported the findings of the learned CIR(A) about upholding of levy of tax under section 161 on the accrued liability and other heads on the ground that company is maintaining its accounts on accrual basis, therefore, no interference in this regard is required. He further stressed that when liability is accrued and taxpayer claims expenses it becomes payable as provided in section 34(1) of the Ordinance and tax is liable to be deducted on the amounts which become payable. He further argued that the taxpayer is obliged to maintain its accounts/record and to produce the same whenever demanded by the Department under the law. He also asserted that ACIR has discretion either to recover non-deducted tax from withholding agent or from recipient. Lastly he contended that all issues, charges were confronted through the show-cause notice and proper opportunity was provided to the appellant. Since no satisfactory explanation was tendered the tax under sections 161/205 was rightly levied by the ACIR and the learned CIR(A) was not justified in deleting the tax levied under the heads mentioned above. In support of his contention he relied upon the reported judgment cited as 2002 PTD 1.

7. We have given due consideration to the averments of the rival parties and are fully agree with the arguments advanced at the bar by the learned counsel for the taxpayer. After having gone through the available record. We have observed that neither legal requirements of law were fulfilled before invocation of the provision of section 161 nor the transactions were identified on which the taxpayer had failed to deduct/collect the tax. The period of default has also not been specified which is an important factor for the levy of surcharge. The learned AR is also correct in pointing out that the learned CIR(A) has recorded contradictory finding regarding affording of opportunity of hearing. On one hand the learned CIR(A) has rejected this contention by holding it "baseless" but on the other recorded as under:--

> *"heavens would not have fallen, had the final opportunity on the issue of merits/facts of the case had been provided to the appellant together with stating few words about the fate of the legal issue. It is further held inter-alia of the other things, action of the assessing officer in charging tax average rate of 10% on the payments made under the head salaries and wages is based on presumptions and guess work as tax was charged on lump sum amount irrespective of the fact that the payments were made representing different amounts, which is totally illegal and has no room in the Income Tax Ordinance, 2001 under which nothing can be taxed whimsically and arbitrarily but on definite information, having not done so, the action of the assessing officer merits nothing but annulment."*

8. From the plain reading of above findings of the learned CIR(A) it transpires that these are self-contradictory and against the judicial practice and norms of justice. Once the learned CIR(A) categorically recorded that heavens would not have fallen had the final opportunity on the issue of merits/facts of the case had been provided to the appellant and that nothing can be taxed whimsically and arbitrarily but only on definite information, he was under obligation to quash the whole order instead of allowing partial relief on certain issues and to maintain the other. A

9. We have also observed that the findings of the learned CIR(A) and contention of the department, that the appellant company is maintaining accounts on accrual basis and obligation to deduct tax arises only when expenses are recorded and becomes payable, is patently illegal and is contrary to the provisions contained in sections 149(1), 153(1) and 158 of the Ordinance, which explicitly contemplate that tax is required to be deducted at the time of making actual payment. In view of these provisions of law, the findings of the learned CIR(A) and contention of the department are wholly misconceived and initiating of proceedings under section 161 is outcome of wrong legal presumption and not tenable in the eyes of law. Support in this regard is sought from the referred case-law reported as 2009 PTD 538. Further the levy of tax on the allegation of non deduction of tax under section 149 at the flat rate of 10% on the total, aggregate salary and wages of all employees for whole of the tax year and on the allegation of non deduction of tax under section 153(1)(a)(b) of the Ordinance on the consolidated figure of expenses and purchases for whole of the year reported in the audited accounts on accrual basis and matching basis without any power of Best Judgment Assessment and identifying payment, time of payment, amount of tax is coram non judice and nullity. B C

10. We are also inclined to agree with the arguments of the learned AR that 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 sections 120(1) and (1A) of D

the Ordinance and hence action under section 161/205 is not sustainable. In order to reach this conclusion, support is sought from the reported judgment cited as 2012 PTD (Trib.) 1815, 2012 PTD (Trib.) 122, PLD 1993 SC 473 and PLD 2003 SC 979.

11. We have also observed that identical issues came under adjudication before the Tribunal in a number of cases and the Tribunal laid down certain parameters which are required to be brought on record by the Taxing Authority for holding the taxpayer as "taxpayer in default". The support is sought from the case-laws reported as 2004 PTD (Trib) 880, 2008 PTD (Trib.) 787. Recently the Honorable Tribunal in a reported Judgment referred as 2012 PTD (Trib.) 122 adjudicated the same issues and determined parameter for initiating proceeding and passing of order under sections 161/205 which are squarely applicable to facts of the instant case and support the arguments of the learned AR of the taxpayer.

12. There is no cavil to the proposition that section 161 of the Ordinance 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 provision, Burden of proof is on the department 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. We are also convinced with the argument of the AR of the taxpayer and are of the considered view that the department has not appreciated the new scheme of Ordinance and nature of this section. The Judgment relied upon by the DR is also distinguishable and not applicable in the instant case.

13. We have also observed that levy of tax under section 161 on the purchase of land and in respect of advances received from customer is out of the scope of section 153 as the purchase of land does not fall within the definition of goods and taxpayer is also not required to deduct tax at the time of receipt of advance from customers and has been correctly deleted by the learned CIR (A). Further, immovable property is subject to collection of tax under independent sections 236A and 236C of the Ordinance at the time of sale by the registration/Public authorities and not applicable to the taxpayer. The authorities in support of these findings are cited as 1999 PTD 4028 (LHC) (pg 4034), 2008 PTD 1401 (LHC) (Pg 1411), 2005 PTD 974 and 2004 PTD 422.

14. We are fully persuaded with the argument of the AR that levy of default surcharge under section 205 without identifying date of deduction and corresponding date of deposit cannot be held justified. In the absence of terminal end and without determination of the default period the levy of default surcharge is not possible as both opening deductible event and terminal end are missing in the instant case. The levy of default surcharge on hypothetical basis and without establishing wilful default on the part of taxpayer is illegal and nullity in the eye of law as held in reported cases cited as 1992 PTD 342 (Page 344), 2006 SCMR 626 (Pages 629 and 630) and PLD 1991 SC 963.

15. For the reasons recorded above we come to the conclusion that the proceedings initiated under sections 161/205 of the Ordinance and the consequential orders based thereupon are void ab initio and suffer from various legal, procedural and factual irregularities mentioned supra. Therefore, order of the Taxation Officer is vacated and the impugned order is annulled.

16. The appeal preferred at the instance of the taxpayer is accepted and that of the department is rejected being devoid of merits.

CMA/79/Tax(Trib.)

Appeal accepted.

2015 P T D (Trib.) 662

[Inland Revenue Appellate Tribunal]

Before Ch. Shahid Iqbal Dhillon, Judicial Member and Muhammad Akram Tahir, Accountant Member

Messrs SAQIB STAR QUALITY PRINTERS, FAISALABAD

versus

C.I.R., ZONE-III, R.T.O., FAISALABAD

S.T.A. No.525/LB of 2013, decided on 12th May, 2014.

Sales Tax Act (VII of 1990)---

----Ss.11(3), 11(2), 7, 8(1)(ca), 21(3), 23, 33, 34 & 73---Assessment of Tax---Taxpayer contended that S.11(2) of the Sales Tax Act, 1990 would apply only where any person had not paid the tax due on supplies made by him and S.11(3) of the Sales Tax Act, 1990 could be invoked in case of his collusion with the tax officials or due to a deliberate act; that since Show-Cause Notice issued was completely silent with regard to collusion or deliberate act, the very acquiring of jurisdiction was fatal and void ab-initio; that goods were procured under the coverage or proper sales tax invoices issued in terms of S.23 of the Sales Tax Act, 1990 duly incorporated in supplier's sales registers and summary statements and the suppliers had duly