APPELLATE TRIBUNAL INLAND REVENUE LAHORE BENCH LAHORE

ITA NO.242/LB/2014
(Tax year-2011)

M/S. Concost Steel Industries (Pvt) Ltd., Lahore. Appellant

Versus

The CIR., WHT- Zone, RTO, Lahore. Respondent

Appellant by:- Mian Tahir Advocate.

Respondent by:- Mr. Sajjad Tasleem, DR

Date of hearing:-14-02-2014 Date of Order:- 14-02-2014

ORDER

Titled appeal has been filed at the instance of the taxpayer calling in question the impugned order dated 30-10-2013 passed by the learned CIR(Appeals-II), Lahore on the following grounds:-

1. That the order passed by the Assistant Commissioner Inland Revenue and confirmed in appeal by the learned Commissioner Inland Revenue (Appeals) are illegal, bad in law and against facts of the case.

2. That the appellate order dated 30/11/2013, which was received pm 17/01/2014 is illegal, bad in law and against facts of the case.

3. That the appellate order passed by the learned Commissioner Inland Revenue (Appeals) is barred by time as provided in section 129(4) of the Income Tax Ordinance, 2001.

4. That without prejudice to the above grounds, the order passed by the Assessing Officer and confirmed by the learned CIR (Appeals) are against the law and facts of the case.

    i) That the Assessing Officer is clear violation of law, have used the power under section 161 as a revenue generating measures rather than a tool for indentifying the default if any and deterrence.

    ii) That power under section 161 of the I.T. Ordinance cannot be equated with power under section 177 of the Ordinance wherein the records and the books of account are to be examined, so as to examine the income tax affairs of the tax-payers.

iii) That invoking the provision of section 161 can only be done during the calendar year and not in a Tax Year after the close of the said period.

a) That during the course of proceeding complete detail/documents were furnished with the Department. That he Assessing Officer was not justified to finalize the proceeding u/s 161/205 without considering the reply/details/documents furnished by the tax-payer.

b) That complete details/list of parties from whom the local purchases were made furnished to the Assessing Officer, that without considering the list of the parties, the entire local purchases amounting to Rs.38,30,86,565/- were made subjected to charge the tax under section 161 amounting to Rs.1.33,73,030/-.

c) That the payments made to different transporters were fully vouched and verified and payment to each concern is below the taxable limit for which complete list of transporter has already been filed. In the presence of this situation, the entire expense amounting to Rs.1,01,91,598/-was charged to tax amounting to Rs.2,03,832/- at the rate of 2% under section 161 is illegal and bad in law.

d) Complete details of overheads expenses has also been furnished during the course of proceeding, the entire expense of Rs.38,55,680/- was made subjected to chargeability to tax u/s 161 at the rate 3.5% at Rs.2,31,341/-is illegal and bad in law.

e) That under the head 'salaries & wages' at Rs.79,68,465/- the entire amount was made subjected to tax u/s 161 at the rate 5% of Rs.3,98,423/-was illegal because complete details of salaries along-with salary sheet, copies of I.D. Cards etc were furnished to Assessing Officer.

f) Complete list were furnished during the course of proceeding, the Assessing Officer was not justified in invoking the provision of section 161, because said section is not attracted on following expenses being below the taxable limit.

Travelling & Conveyance	20,32,235/-	6%	1,21,934/-
Repairs & Maintenance	6,41,482/-	6%	38,489/-
Stationery	7,59,863/-	3.5%	26,565/-
Advertisement	4,39,500/-	6%	26,370/-

Other heads

i.	Fee & Taxes	250,455/-
ii.	Rent	156,000/-
iii.	Vehicle Running	18,75,531/-

iv.	Newspaper	156,423/-		
v.	Misc Expenses	16,80,970/-		
		42,77,168/-	6%	256,630/-

g) That the Assessing Officer was not justifies in finalizing the proceeding in a very harsh manner and also not followed the history of the case.

h) That chargeability of default surcharge under section 205 of the I.T. Ordinance amounting to Rs.3,429,379/-is illegal and bad in law.
It is, therefore, prayed that the proceeding finalized by the Assessing Officer may please be modified/amended -- as considered fit—and necessary relief allowed to meet the ends of justice and equity.

2. Brief facts relevant for the disposal of the present appeals are that return for the tax years 2011 e-filed was treated to be deemed assessed u/s 120 of the Income Tax Ordinance 2001. Being withholding agent, the taxpayer was legally obliged ,to deduct and deposit the withholding tax while making the payments and file the withholding statements u/s 165 of the Income Tax Ordinance 2001. Proceedings u/s 161 of the Income Tax Ordinance, 2001, were initiated by issuing show cause notices dated 11.05.2012 for compliance on 18.05.2012. On 27.02.2013, the A.R. sought adjournment, which was accordingly granted. Various statutory notices were issued by the ACIR. In response thereto after availing certain adjournments, the appellant filed reply/details/documents which were examined by the Officer of Inland Revenue and observed certain discrepancies which were confronted to the appellant through show cause notice dated 08-04-2013 for compliance on 15-04-2013. On the due date the AR of the appellant requested for adjournment which was allowed upto 23-04-2013. The case was refixed for hearing on 29-04-2013 due to strike of Regional Tax House. Since the taxpayer has failed to defend its case inspite of providing ample opportunities, the ACIR finalized the impugned order on 29-04-2013 by

creating tax demand of Rs.20,716,603/- for the tax year 2011. Being aggrieved the taxpayer approached the learned first appellate authority who upheld the treatment meted out by the ACIR . hence the instant appeal by the taxpayer.

Both the parties have been heard and relevant orders perused. The learned counsel of the taxpayer argued that the department has failed to issue notice as provided in rule 44(4) of the Income Tax Rules, 2002. Without Issuance of notice, the proceedings initiated by the department is illegal. It was averred at the bar that the Assessing Officer is in clear violation of law and have standard to use the power vested under section 161 as a revenue generating measures rather than a tool for indentifying the default. 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 deduction/withholding and (iii) that a specified tax of a specific person was to be withheld. who could take credit of the tax recoverable under section 161. In this regard the judgment cited by the learned counsel of 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. ----------
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> 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 deduction/withholding and (iii) that a specified tax of a specific person was 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."

5. The learned counsel of the taxpayer has also brought our attention to the CBR Circular No.7(2) dated 01.02.1994. According to the said Circular, the assessee was required to be provided 15 clear days for giving his explanation which has not been provided in instant case. In this case notice under section 161(1A)/205 of the Ordinance was issued on 11-05-2012 for due date of 18-05-2012. However, adjournments were given or sought and the case was fixed for hearing on 29-05-2012. Certain adjournments were sought or granted and the case was fixed on 01-07-2012, 27-09-2012, 08-10-2012, 22-11-2012, 28-01-2013, 18-03-2013, 15-04-2013, 23-04-2013, 24-04-2013 and 29-04-2013. On the due date i.e. 29-04-2013 no body attended that office nor any application seeking adjournment was received. In this view of the matter the learned ACIR was of the view that the taxpayer has failed to respond appropriately to the claim of non-deduction as confronted vide show cause notice dated 11-05-2012. The amended order was also finalized on 29.04.2013. It was contended that since the learned ACIR has clearly violated the said CBR Circular No.7(2) dated 01-02-1994 by not providing 15 clear days before making estimation/assessment, hence orders of both the authorities below are not sustainable. In this regard reference was made to reported judgment of Lahore High Court cited as 2012 PTD 964.

6. We have gone through this contention of the taxpayer with regard to reasonable opportunity has not provided before making of assessment order under section 161/205 which is also correct because as per CBR Circular No.7(2) dated 01-02-1994, the taxpayer was required to provide 15 clear days for giving his explanation which is missing all along in this case. Admittedly, the taxpayer in the present case is a withholding agent, hence he should have been given more opportunities to explain his position, thus he could not penalized for default on part of Assessing Authority. The reported judgment of the Hon'able Lahore High Court cited as 2012 PTD 964 is also on all four to the instant case. The relevant extract from the reported judgment is as follows:

> "At the out-set it is pertinent to notice that the CBR Circular No.7(2) dated 01-02-1994 manifests that three opportunities of clear 15 days should be offered to the assessee before making estimation/assessment. In the instant case the Assessing Officer issued first notice to the respondent on 14-04-2010 allegedly served on 17.04.2010 with a date of compliance i.e. 24.04.2010 whereas the second notice was issued on 24.05.2010 allegedly served on 26-05-2010 with a date of compliance i.e. 31-05-2010. It is crystal clear that in both the notices only five days time(each) was provided to the respondent assessee to make the explanation/reply violative to the CBR Circular cited above. Therefore, amended assessment order passed on 31-05-2010 was obviously made without providing reasonable opportunity of explaining the position and thus the same was not tenable in law."

7. For the foregoing reasons and keeping in view the legal pronouncements on the issues involved, we are of the view that the order passed by the CIR(A) is illegal, ab intio void, hence not sustainable in the eye of law. Therefore, the order of the learned CIR(A) is vacated and the

exparte order passed under section 161/205 by the ACIR is hereby annulled.

It is ordered accordingly.

(JAWAID MASOOD TAHIR BHATTI)
CHAIRMAN

(FIZA MUZAFFAR)
ACCOUNTANT MEMBER