
Income Tax Ordinance, 2001 -- Sections 131, 161, 177 --

Failure to pay tax collected or deducted -- Taxation Officer repeatedly asked the taxpayer to furnish party-wise details -- On not furnishing said details, the Taxation Officer proceeded to hold the taxpayer as personally liable under section 161 of Income Tax Ordinance 2001 -- Without identifying names and addresses of the parties or persons from whom and how much tax was to be deducted, provisions of section 161 of Income Tax Ordinance, 2001 could not be invoked -- Taxation Officer could not appreciate that the tax referred to be deducted under section 161 of the Income Tax Ordinance, 2001 had to be of some identified taxpayer/ person and a taxpayer could be declared personally liable only after establishing that he was a withholding agent, who failed to withhold the tax from transaction, liable to such tax -- Taxation Officer had misunderstood the spirit of section 161 of the Income Tax Ordinance, 2001, as he himself had observed in his order under section 161 that proceedings were initiated to ascertain the compliance level; he could only see whether withholdings, as per return and statutory statement, was made or not and that any transaction, liable to withholding, had not escaped taxation -- No transaction could be held to have escaped deduction under section 161 of Income Tax Ordinance, 2001, unless the taxpayer was a withholding agent that a particular transaction was liable to deduction/ withholding and that a specified tax of a specific person was to be withheld, who could take credit of the tax recoverable under section 161 of Income Tax Ordinance, 2001 -- Commissioner(Appeals) had rightly held that action of the Taxation Officer, was not sustainable in the eyes of law, in circumstances --

Order under section 161 cannot be passed without identifying the transaction liable to tax; specifying the amount of tax to be deducted; and should be against specific persons --

The provisions of section 161 shall become redundant, if a person is held personally liable without identifying the person who's tax was not collected or deducted and without identifying the amount of such tax --

The provisions of section 177 can be resorted to check the veracity of declaration under section 161 --

[IN THE APPELLATE TRIBUNAL INLAND REVENUE, LAHORE]

Present: SHAHID JAMIL KHAN, JUDICIAL MEMBER

I.T.As. Nos.1151/LB and 1152/LB of 2011, decided on 19th October, 2011.

Naeem Hassan D.R. for Appellant.

None for Respondent.

Date of hearing: 19th October, 2011.

ORDER

SHAHID JAMIL KHAN (JUDICIAL MEMBER).--Department has challenged a combined order passed by Commissioner (Appeals-II), Lahore bearing Nos. 17 and 18 dated 16-5-2011.

2. Respondent taxpayer returned income as manufacturer and seller of P.C. Polls, for tax years 2007 and 2009. Proceedings under section 161 of the Income Tax Ordinance, 2001 were initiated against respondent taxpayer, statedly to check the compliance as withholding agent. During proceedings respondent taxpayer furnished item-wise, date-wise details and taxation officer found major portion of payments as below taxable limit, however, details of payments made for purchase of some items were not accepted by the taxation officer. As per order under section 161, taxation officer repeatedly, requested the taxpayer too furnish party-wise details. On not furnishing the asked details, the taxation officer proceeded to hold the respondent taxpayer as personally liable under section 161 of the Ordinance. Relevant portion from the order under section 161 is reproduced:--

"Purchases of Rs.19,958,297.

Examination of item-wise and date wise details furnished by the taxpayer reveal that major portion of the payment made on account of purchase of misc. items i.e. sand, rubber ring, G.I. Pipes, crush, conplast, sanitary fittings, both room tiles, thermopole sheets. Cable and Switch etc. are below taxable limit. However, some payments were made for purchase of bricks. Cement, iron angle, wooden balley, steel items which seems to have been purchased from one or two parties because these items are essential for manufacturing the PC Pole. The item-wise detail furnished comprises of twenty pages and every page contain 48 entries of items. It seems that the taxpayer made cash payment to 960 shopkeepers for purchase of daily use items. How, it can be imagined that the taxpayer made payments to hundreds of shopkeepers for purchase of such items which are monthly used for manufacturing of PC Pole. The taxpayer was repeatedly requested to furnish party-wise detail of such items but he did not furnish party-wise detail and proof of such purchases in the shape of vouchers so that the authenticity of his

claim may be verified. Therefore, the taxpayer is treated as in default to the extent of Rs.1,470,980 and tax under section 161 is charged.

3. This order was challenged before the Commissioner (Appeals), who held the order under section 161 as not sustainable in the eyes of law to the extent of purchases for tax years 2007 and 2009. Relevant portion is also reproduced:-

"After having giving due consideration to the arguments and submissions made by the A.R. of the appellant and having gone through the record I am of the view that the contention of the learned A.R. of the appellant carries weight. As a matter of fact, it was the duty of the taxation officer to identify the names and addresses of the parties or persons from whom and how much the tax was to be deducted. This bent of mind reflects poor appreciation of law and facts on the part of the taxation officer which being based on surmises and stock phrases does not find place in the new Income Tax Ordinance. Any order passed without obtaining such vital details, levy of tax on guess work has been reprimanded by the higher appellate authorities.

Keeping in view the above narrated facts, I have no hesitation in holding that action of the taxation officer is not sustainable in the eyes of law and hence withholding tax charged under section 161 of the Income Tax Ordinance, 2001 under the head "Purchases" for the tax years 2007 and 2009 is, therefore, deleted."

4. D.R. submits that the taxation officer had no option, when asked party-wise details were not furnished by the respondent taxpayer. None is present on behalf of the respondent taxpayer despite service of notice. It is reported by Notice Server that the A.R. of the taxpayer refused to accept notice as the same was served only a day before. In my opinion, the A.R. should have appeared in compliance to notice and could request for adjournment. Under these circumstances, the respondent taxpayer is proceeded ex parte.

5. I have carefully examined both the orders under consideration and have perused the provisions of sections 161 and 153 of the Income Tax Ordinance, 2001. Though taxation officer has given some reasons for holding the respondent taxpayer as personally liable, yet I am persuaded by opinion of the learned Commissioner (Appeals). I agree with his observations that without identifying names and addresses of the parties or persons from whom and how much tax was to be deducted, provisions of section 161 could not be invoked. It appears that taxation officer was in old frame of mind and could not appreciate that the tax referred to be deducted under section 161 has to be of some identified taxpayer/person and a taxpayer can be declared personally liable

only after establishing that he was a withholding agent, who failed to withhold the tax from a transaction, liable to such tax. In this case details and documentary evidence about the transaction in question was disbelieved and discarded by the taxation officer for his own reasons. He misunderstood the spirit of section 161 of the Income Tax Ordinance, 2001 as he himself has observed, in his order under section 161, that proceedings were initiated to ascertain the compliance level. He could only see whether withholding, as per return and statutory statements, was made or not and that any transaction, liable to withholding, had not escaped taxation. It is reiterated 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. These findings are fortified by subsections (1B) and (2) of section 161. Under the subsection (1B) if the amount of tax, required to be deducted, is paid meanwhile by the person, who's tax was to be deducted, then the taxpayer proceeded under section 161 shall pay only default surcharge of the period, he failed to deduct tax till it was paid by that person. Subsection (2) declares that a person held personally liable under section 161(1) shall be entitled to recover the tax from the person, from whom the tax should have been collected or deducted. These provisions shall become redundant, if a person is held personally liable without identifying the person who's tax was not collected or deducted and without identifying the amount of such tax.

The order under section 161, in question, by the taxation officer leaves a very important and necessary question that who shall get credit of the tax imposed by this order? Had department intended to look into the affairs of respondent taxpayer, to check veracity of declarations, it should have resorted to the provisions of section 177 i.e. through audit. I have found the order by the Commissioner (Appeals) well reasoned and in accordance with law and reiterate his observations that such order does not find place under the new Income Tax Ordinance. The order by Commissioner (Appeals) is upheld.

Departmental appeals are dismissed.

Appeals dismissed.