

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 3974 of 2015

M/s Islamabad Electric Supply Company Limited

Vs

Inland Revenue Officer, Regional Tax Office, Islamabad, etc.

DATE OF HEARING: 19.02.2021.

PETITIONER BY: M/s Muhammad Habib Ullah Khan and
Hazrat Wali Khattak, Advocates

RESPONDENTS BY: Mr. Saeed Ahmed Zaidi, Advocate.

BABAR SATTAR, J.- The petitioner is aggrieved by show cause notice (**“SCN”**) dated 05.11.2015 issued under section 161 read together with section 205 of the Income Tax Ordinance, 2001 (hereinafter referred to as the **“Ordinance”**).

2. Learned counsel for the petitioner states that a notice under section 161 of the Ordinance cannot be issued unless the department has previously exercised authority under Rule 44(4) of the Income Tax Rules, 2002 (**“Rules”**) and that as the Department has ordered no reconciliation under Rule 44 which is a prerequisite for exercising of authority under section 161 read together with section 205, the show cause notice suffers from jurisdictional defect and is void ab initio. The learned counsel placed reliance on Messer Nishat Chunian Ltd. v. Federal Board of Revenue (2014 PTD 2078) and Attock Cement

Pakistan Ltd. v. Collector of Customs and 4 others (1999 PTD 1892) and various judgments of the learned Appellate Tribunal.

3. Learned counsel for the respondent Department states that Rule 44 merely requires reconciliation of the deduction with the financial account; that the show cause notice is not a penal act and pursuant to it no demand has been generated against the petitioner and further that it is merely an opportunity being provided to the petitioner to explain how the amounts withheld for purposes of section 161 are in accordance with the provision of the Ordinance; that invoking Rule 44 of the Rules is not a prerequisite for exercise of authority under section 161 read together with section 205.

4. Section 161 of the Ordinance states the following:

161. Failure to pay tax collected or deducted.— (1) Where a person—

(a) fails to collect tax as required under Division II of this Part [or Chapter XII] or deduct tax from a payment as required under Division III of this Part [or Chapter XII][or as required under section 50 of the repealed Ordinance]; or

(b) having collected tax under Division II of this Part [or Chapter XII] or deducted tax under Division III of this Part 1 [or Chapter XII] fails to pay the tax to the Commissioner as required under section 160, [or having collected tax under section 50 of the repealed Ordinance pay to the credit of the Federal Government as required under sub-section (8) of section 50 of the repealed Ordinance,] the person shall be personally liable to pay the amount of tax to the Commissioner [who may [pass an order to that effect and] proceed to recover the same.]

(1A) No recovery under sub-section (1) shall be made unless the person referred to in sub-section (1) has been provided with an opportunity of being heard.

(1B) Where at the time of recovery of tax under sub-section (1) it is established that the tax that was to be deducted from the payment made to a person or collected from a person has meanwhile been

paid by that person, no recovery shall be made from the person who had failed to collect or deduct the tax but the said person shall be liable to pay 6 [default surcharge]at the rate of [“twelve”] per cent per annum from the date he failed to collect or deduct the tax to the date the tax was paid.]

(2) A person personally liable for an amount of tax under sub-section (1) as a result of failing to collect or deduct the tax shall be entitled to recover the tax from the person from whom the tax should have been collected or deducted.

(3) The Commissioner may, after making, or causing to be made, such enquiries as he deems necessary, amend or further amend an order of recovery under sub-section (1), if he considers that the order is erroneous in so far it is prejudicial to the interest of revenue: Provided that the order recovery shall not be amended, unless the person referred to in sub-section (1) has been provided an opportunity of being heard.

Rule 44(4) of the Rules that the petitioner relies on to assert that the SCN suffered from jurisdictional defect states the following:

44. Statement of tax collected or deducted.-

(4) A person required to furnish the statement under sub-rule (2) shall, wherever required by the Commissioner, furnish a reconciliation of the amounts mentioned in the aforesaid biannual statements with the amounts mentioned in the return of income, statements, related annexes and other documents submitted from time to time.

5. From the plain language of section 161 of the Ordinance it is obvious that it creates an obligation for a taxpayer to act as withholding agent for taxation authorities and deposit the tax withheld on behalf of taxation authorities. A taxpayer who either fails to deduct tax under section 161(1)(a) or fails to deposit the same with the taxation authorities under section 161(1)(b) is liable to pay the said amount and the Commissioner is authorized to proceed to recover the same after providing the taxpayer with an opportunity of being heard under section 161(1)(a). Section 165 of the Ordinance creates an

obligation for the taxpayer required to deduct tax for purposes of section 161 to furnish certain statements to the Commissioner as prescribed under the Ordinance and the Rules. Rule 44(4) merely grants the Commissioner power to require a taxpayer obliged to file statements under section 165 to furnish reconciliation of amounts mentioned in the statements with the amounts mentioned in the return of income tax submitted from time to time. Rule 44(4) in no way circumscribes the power to the Commissioner under section 161 of the Ordinance. In the instant petition the impugned SCN dated 05.11.2015 in the relevant parts states the following:

“You have e-filed withholding statements u/s 165(2) of the Income Tax Ordinance, 2001 for the tax year 2014. Your Income Tax return e-filed for the said tax year show that you have made huge payments on account of cost of sales and P&L expenses. On cross matching your withholding statement and income tax return for the instant tax year, it was found that you have not discharged your responsibilities as withholding agent in the manner as prescribed. According to section 161 where a person fails to collect tax or deduct tax from a payment or having collected tax or deducted tax and fails to pay the tax to the Commissioner as required under section 160 of the Income Tax Ordinance, 2001, the person shall be personally liable to pay the amount of tax. As you may have explanation, therefore before finalizing proceedings under section 161/205 of the Income Tax ordinance 2001, you are provide an opportunity to explain the discrepancies discussed below”

6. After identifying the various discrepancies in relation to which an explanation has been sought from the petitioner, the SCN states that, “there is every possibility that you may have deducted and deposited the tax but not recorded in the e-filed withholding statement or you may have genuine explanation otherwise but as per record available with this office the default is standing. You are, therefore, given an opportunity to explain your position with documentary evidence.”

7. It is settled law that SCN is not a penal instrument but an opportunity provided to the taxpayer to explain his side of the story to the taxation authorities in relation to tantamount view formed that the taxpayer might have acted in breach of law. A show cause notice cannot ordinarily be challenged before this Court in its discretionary constitutional jurisdiction unless it falls within certain limited exceptions. After reviewing the case law on the matter this Court in W.P No. 1750/2015 (Pakistan Oilfields Ltd. v. Federation of Pakistan and 4 others) identified the exceptions as follows:

- a. Where the impugned notice is without jurisdiction/lawful authority;
- b. Whether the impugned notice is non est in the eye of law;
- c. Whether the impugned notice is patently illegal;
- d. Whether the impugned notice is issued with premeditation or without application of mind for extraneous reasons;
- e. Whether the aggrieved person does not have adequate and efficacious remedy;
- f. Where the issues of show cause notice violate any fundamental rights of the aggrieved person;
- g. Where there is an important question of law requires interpretation of any fiscal law or any other substantive law.

8. Learned counsel for the petitioner has failed to make out a case that the SCN suffers from any jurisdictional defect or otherwise falls within the aforesaid exceptions. Reliance of the learned counsel for the petitioner on Attock Cement Pakistan Ltd. is misconceived as there the august Supreme Court had found that the demand generated was not in accordance with law and had been made by the department with a view to achieving the target of recovery of revenue and therefore was held to be based on malafide. Nothing has been pointed out from the record in the instant case that could lead this court to draw an inference that the SCN suffers from malafide.

9. In view of circumstances of the present case, the ratio in Attock Cement Pakistan Ltd. is not attracted. Even Nishat Chunian Ltd. does not really help the petitioner's case as in the said matter the learned Lahore High Court had observed that "the petitioner has, instead of proving of requisite information for reconciliation of amount regarding deduction of withholding tax in its statement with its accounts also prematurely approached this Court on an apprehension without any concrete evidence of penalization".

10. In view of the above, the petitioner has failed to make out a case for intervention by this Court in writ jurisdiction and the petition is **dismissed** with no order to as to cost.

(BABAR SATTAR)
JUDGE

Saeed.