IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE SAJJAD ALI SHAH
MR. JUSTICE MUNIB AKHTAR

CIVIL APPEAL NO.502 OF 2017
(Against judgment dated 06.03.2015 passed by the Lahore High Court, Lahore in in PTR No.239/2014.)
AND
C.M.A. NO.1066-L OF 2015 IN
CIVIL APPEAL NO.502 OF 2017
AND
CIVIL APPEAL NO.503 OF 2017
(Against judgment dated 06.03.2015 passed by the Lahore High Court, Lahore in in PTR No.240/2014.)
AND
C.M.A. NO.1068-L OF 2015 IN
CIVIL APPEAL NO.503 OF 2017
AND
CIVIL APPEAL NO.504 OF 2017
(Against judgment dated 06.03.2015 passed by the Lahore High Court, Lahore in in PTR No.241/2014.)
AND
C.M.A. NO.1130-L OF 2015 IN
CIVIL APPEAL NO.504 OF 2017
AND
CIVIL APPEAL NO.505 OF 2017
(Against judgment dated 06.03.2015 passed by the Lahore High Court, Lahore in in PTR No.242/2014.)
AND
C.M.A. NO.1131-L OF 2015 IN
CIVIL APPEAL NO.505 OF 2017
AND
CIVIL APPEAL NO.506 OF 2017
(Against judgment dated 06.03.2015 passed by the Lahore High Court, Lahore in in PTR No.243/2014.)
AND
C.M.A. NO.1087-L OF 2015 IN
CIVIL APPEAL NO.506 OF 2017

The Commissioner Inland Revenue, Zone-I, LTU ... Appellant / Applicant (in all cases)

vs

MCB Bank Limited ... Respondents (in all cases)

For the Appellant/ Applicant : Mr. Ibrar Ahmed, ASC
Mr. Naseem Hassan, Sec. Lit. (FBR)

For the Respondents : Mr. Sikandar Bashir Mohmand, ASC

Date of Hearing : 13.01.2021

JUDGMENT

Munib Akhtar, J.: This bunch of connected appeals was disposed of by means of a short order, which is set out below. The following are the reasons for that order.

2. The appeals arise under the Income Tax Ordinance, 2001 ("Ordinance") and relate to different tax years of the same respondent, a banking company. Those tax years are TY 2003-2006 (CA Nos. 502-505/2017) and TY 2011 (CA 506/2017). The point involved is the same: whether the show cause notices under ss. 161 and 205 of the Ordinance, dated 18.06.2012 and separately issued in respect of each of the said tax years, were lawful? Both the learned Appellate Tribunal and the learned High Court answered this question in the negative. The department petitioned this Court for leave to appeal, which was granted vide order dated 11.04.2017 to consider whether the impugned judgment was consistent with the decision of this Court reported as *Bilz (Pvt) Ltd. v Deputy Commissioner of Income Tax and another* 2002 PTD 1, PLD 2002 SC 353 (herein after "*Bilz*").

3. Section 161 provides, in subsection (1), inter alia that if a person (here the respondent) fails to deduct tax as required in terms of various provisions of the Ordinance (as specified therein), then that 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". Subsection (1A) provides that no such recovery shall be made unless the person affected is given an opportunity of being heard. Section 205 relates to the default surcharge that is payable by a person in default, but this section does not require any specific consideration for purposes of these appeals.

4. As noted above, separate show cause notices under s. 161, all dated 18.06.2012, were served on the respondent in respect of the subject tax years. The text of the notices for the tax years 2003-2006 was identical (save of course for the actual amounts as relevant for each tax year), whereas that for the tax year 2011 was

substantially different. The importance of this distinction will emerge presently.

5. We first take up the notices for the tax years 2003-2006. The amounts given in the notices had, as stated therein, been culled from the tax returns filed by the respondent, and alleged that on the various payments made by it in respect of "administrative, selling & financial expenses", the respondent had failed to deduct tax as required under the relevant provisions of the Ordinance. The sub-heads (listed in table form) in respect of which such default was alleged were the following: "salaries, wages & benefits", "rent, rate & taxes", "travelling/conveyance", "repair & maintenance", "stationary/office supplies", "professional charges", "advertisement, publicity & sales promotion", "other charges", "restructuring expenses", "profit on debt" and "others". Against each sub-head only one consolidated figure was given, i.e., for the whole of the tax year. The notices then went on to state as follows:

> "Apart from above, any other payment made during the year like addition in Assets, Advance to Customers, payments on account of Trade Creditors etc. may also be included in the above information."

The notices also stated that annual withholding statements had not been filed by the respondent.

6. In contrast to the above, the format and language of the notice for TY 2011 was markedly different. Although the heading and sub-headings of the outlays and payments involved were the same, in addition to the lump sum annual amount against each the notice also contained another table giving the monthly breakup under each relevant section where, according to the department, deductions ought to have been made. There was, after that, yet another table which purported to show the deductions actually made and the shortfall therein (along with the applicable rate of deduction). There was also nothing similar to the general para ("Apart from the above...") that had been included in the other notices.

7. The respondent contested the notices. One ground taken was that the notices for the tax years 2003-2006 were barred by limitation. This was on the basis of s. 174, which requires the taxpayer to maintain the records specified therein for a period of six years after the end of the tax year to which they relate. Since

the notices were issued on 18.06.2012, it was claimed that the record from which it could be determined whether the respondent was in default (which was in any case denied) was not, as a matter of law, available. However, this and other submissions were rejected by the concerned Deputy Commissioner and adverse orders made in all cases. The respondent's appeals to the Commissioner (Appeals) succeeded partially, although the plea of limitation again failed. The respondent took the matter further to the Appellate Tribunal. There, it met with success. The plea of limitation was accepted on the basis of a judgment of the Sindh High Court reported as *Habib Bank Ltd. v Federation of Pakistan and others* 2013 PTD 1659 ("*Habib Bank*"). The department now took the matter to the Lahore High Court in tax references. Without touching on the point of limitation (on which questions of law had also been taken), the learned High Court dealt with the department's claim that its case was covered by the judgment in *Bilz*. It was concluded that on its correct application, that decision did not apply. The High Court relied on a then recent decision of that Court, reported as *Commissioner Inland Revenue v. Islam Steel Mills* 2015 PTD 2335 ("*Islam Steel Mills*"). (We may note that leave petitions against this judgment were dismissed as withdrawn as also being time-barred: CP 1201-L of 2015 etc., vide order dated 07.06.2016.) Although in the cited decision the matter was decided in favor of the department, in the matters at hand the decision went against the latter. It was held as under:

> "11. ... It was perhaps not necessary for the applicant-department to identify the persons/parties in respect of which the payments have been made yet the department is under an obligation to identify ... clear and precise transactions and the heads of payment to form the subject matter of the notice under section 161 of the Ordinance. This is woefully lacking in the instant case and thus we have no reason to disagree with the conclusion drawn by the Tribunal in the impugned order."
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> The tax references accordingly stood dismissed.

8. Before us, learned counsel for the department submitted that the learned Tribunal had wrongly concluded that the notices for the tax years 2003-2006 were barred by limitation. As regards the judgment in *Habib Bank* it was submitted that the department had filed appeals against the same, which had been disposed off by order dated 10.03.2020, a copy of which was placed before us. Thus, it was contended, the plea of limitation failed. As regards the

impugned judgment of the learned High Court it was submitted that it had failed to properly appreciate and apply the decision in the *Bilz* case. Learned counsel submitted that that decision was fully applicable to the facts and circumstances of the present case and it was prayed that the appeals be allowed. Learned counsel for the respondent supported the decisions of the learned Tribunal and the learned High Court and prayed that the appeals be dismissed.

9. After having heard learned counsel, and considered the record and case law, we concluded that the appeals in relation to the notices for the tax years 2003-2006 failed and ought to be dismissed, while the appeal in relation to TY 2011 ought to be allowed. We turn first to consider the decision in *Bilz*. This was a leave refusing order of a learned two-member Bench of this Court. The matter arose under the Income Tax Ordinance, 1979 ("1979 Ordinance"). The provision there equivalent to s. 161 was s. 52 (with s. 86 being the equivalent of s. 205). The assessee had sought leave to appeal against a judgment of the Lahore High Court, which is reported as *Bilz (Pvt) Ltd. v Deputy Commissioner of Income Tax and another* 2001 PTD 2337 (herein after "*Bilz (HC)*"). Identical notices under ss. 52 and 86, all dated 31.10.1998 (one of which is reproduced at para 3 in *Bilz*) were issued against the assessee for the assessment years 1995-96, 1996-97 and 1997-98 (per paras 3-4 of *Bilz*). Each notice specified, in respect of various heads of payments/outlays, the total amount, the amount that ought to have been withheld/deducted (specifying also the rate involved), the actual withholding (which was 'nil') and the amount of additional tax payable under s. 86. These notices were resisted by the assessee, who met with some success at the first appellate stage but failed before the Tribunal. From there the assessee took the matter to the High Court in tax appeals, proposing as many as 12 questions of law said to arise out of the impugned order (reproduced in para 2 of *Bilz (HC)*). The High Court was singularly unimpressed. It held that no questions of law arose at all, the findings of the Tribunal being entirely factual in nature. Since no appeal could be filed against questions/findings of fact, the appeals failed and were dismissed (paras 5-6 of *Bilz (HC)*). In para 4, the High Court noted the findings of fact made by the Tribunal (emphasis supplied):

> "4. The Department successfully assailed the partial relief allowed to the assessee. By way of the impugned order, a Division Bench of the Tribunal concluded that the *particulars of the parties to whom payments in excess of the stipulated amounts were made were deliberately withheld by the assessee*; that the Assessing Officer had undertaken the required care in excluding payments which fell below the stipulated limit of Rs.25,000 that exemption certificate was produced in respect of only one party which related to the assessment years 1998-99 and that no documentary evidence was produced to establish that assessments in respect of the payees had already been completed, and therefore, the assessee could not be held to be as assessee in default under section 52 of the Ordinance."

(We may note that there was a slight difference between the High Court and this Court as to assessment years involved but nothing turns on this.)

10. It was in the foregoing circumstances that the assessee petitioned this Court for leave to appeal, which was refused. In para 8 of *Bilz*, the conclusion arrived at by the High Court that no questions of law arose for consideration was specifically endorsed.

11. *Bilz* is sometimes taken (and the department certainly so acts) as an authority for a broad and general proposition, namely, that since the taxpayer especially has knowledge of the persons to whom payments are being made, all that the tax authorities have to do for purposes of s. 161 is to identify the payments, whether singly or in lump sum (i.e., as part of a broader class or category of such payments). It is then for the taxpayer entirely to show whether the required deductions were made and if he fails to do so then s. 161 comes into operation. This is how, e.g., *Bilz* was understood by the Lahore High Court in *Islam Steel Mills* (see para 13 thereof). This, in our view, is a complete misunderstanding of the law, and misreading of *Bilz*. It must be kept in mind that both the *Bilz* litigation and the appeals presently before us arose out of tax appeals/references. As is well established the final forum for determining questions of fact is the Tribunal. Thereafter, only questions of law can be taken. Now, as noted above, in *Bilz (HC)* it was specifically observed that the Tribunal had found, as a fact, that the assessee had deliberately withheld the particulars of the parties to whom payments had been made. Furthermore, both in the High Court and in this Court it was specifically observed that no questions of law arose for consideration. These aspects are crucial for a proper appreciation of the *Bilz* litigation. It moved within a specific, and narrowly drawn, factual locus, i.e., the

deliberate withholding of information regarding the payees by the assessee. In any case, and further, it raised no questions of law as could ground the matter in the reference jurisdiction of the High Court. When so understood it at once becomes clear that *Bilz* does not (and, in our respectful view, cannot) lay down any broad or general proposition of the sort noted above. Its applicability is limited, and must be strictly confined to factual circumstances of the sort in which the litigation was grounded. To the extent that no questions of law arose therein it is, with respect, doubtful whether the leave refusing order of this Court can in any case be regarded as containing any observations that have binding precedential effect. It is therefore most unfortunate that the tax authorities have seized certain observations made in *Bilz* and, taking them out of context, been misusing a leave refusing order of this Court as a tool and instrument to harass taxpayers. This so-called "understanding" and application of the decision must be strongly deprecated. It must be clearly understood that *Bilz* is not, and cannot be used as, a platform by the tax authorities to launch fishing expeditions and roving inquiries. It cannot, and does not, support or allow the issuance of show cause notices of deliberate vagueness and breathtaking generality. And it certainly does not shift the burden under s. 161, from the very inception, wholly and solely on the taxpayer by the expedient of simply identifying one or more payments, or a class or category of payments. It also follows that, with respect, the High Court misunderstood *Bilz* in the *Islam Steel Mills* case. The observations made in that case which are inconsistent with what is said in this judgment are therefore overruled.

12. At the time of the issuance of the show cause notices s. 161 provided in material part as follows (emphasis supplied):

> "**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; ...
>
> 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."

It will be seen that the section becomes applicable not simply because a payment is made (or a transaction or event happens) but

rather on a failure to either collect tax or deduct it. It is the failure that is the triggering event. In each case, the consequence is the same: the person becomes personally liable to pay the amount of the tax. We may note in passing that the Division II referred to in the subsection comprises of only one section, 148, which imposes a duty on the Collector of Customs to collect tax on imports. One wonders how many Collectors have been issued notices and held personally liable in terms of s. 161. Be that as it may, the most important point regarding the section has already been stated: it becomes operative only if there is a failure to collect or deduct. It is in our view a gross misreading of it to conclude that for the section to apply all that the Commissioner has to be do is point to a payment, and that is sufficient to cast the burden wholly and solely on the taxpayer to show that there was no failure. There must, at least initially, be some reason or information available with the Commissioner for him to conclude that there was, or could have been, a failure to deduct. That reason or information must satisfy the test of objectiveness, i.e., must be such as would satisfy a reasonable person looking at the relevant facts and information in an objective manner. The threshold is not so stringent as to require “definite information” (using this term in the sense well known to income tax law) but it is also not so low as to be bound merely to the subjective satisfaction of the Commissioner. And it is certainly not what the tax authorities currently take it to be, based on an incorrect understanding of *Bilz*. It is only if this threshold is successfully crossed that the notice can be issued, and it is only then that the burden may shift on the person allegedly in default to show that s. 161 does not, or ought not to, apply.

13. When the notices issued in these appeals are considered from this perspective, it is clear that those relating to TY 2003-2006 were nothing but a blatant fishing expedition. These notices, without more, must stand condemned as such, as must be the attempt to justify their issuance on the basis of *Bilz*. It must be kept in mind that the key factual aspect in the *Bilz* litigation, namely the specific finding of fact that the taxpayer was deliberately withholding information regarding the payees, is entirely missing in these appeals. The appeals relating to TY 2003-2006 therefore stood dismissed. Insofar as the notice for TY 2011 is concerned, that appears to stand on a different footing. The most

important aspect of that notice is that it did not, like the other notices, merely demand information regarding deductions from the respondent. It also contained the monthly breakup of the deductions allegedly required under various sections, and also the amounts actually deducted and the alleged difference. In other words, there was an application of mind to the question whether there had been a failure to deduct and if so, on what basis and in what amount. Finally, it is important to keep in mind what this notice did not contain, in contradistinction to the other notices. It did not contain a general, rounding off para of the sort with which the other notices concluded (as highlighted in para 5 above). That para conclusively showed that those notices were nothing but roving inquiries, thinly disguised as being based on the application of a (in reality non-existent) legal principle established by this Court. This notice therefore survived scrutiny. With respect, the learned High Court failed to appreciate and maintain the distinction between the contents of the notices and proceeded on an erroneous reading of the record. The department's appeal regarding TY 2011 was therefore allowed.

14. We may deal, albeit briefly, with the issue of limitation. Since the High Court did not treat the matter we will not consider its merits here. However, it should be noted that the order dated 10.03.2020, whereby the appeals to this Court against the decision in *Habib Bank* were disposed of, was in the following terms:

> "After arguing the matter at some length, learned counsel for the parties and so also Mr. Masood Akhtar, the Chief Legal-I, Federal Board of Revenue (FBR), the petitioner, submit that the instant appeals be disposed of with an observation that the revenue authority may issue fresh notices, in respect of the demand in question, after giving reasons for initiating the process beyond the period prescribed for preserving the record, in terms of Section 174 of the Income Tax Ordinance, 2001, the notices shall disclose the amounts due, and if possible also indicate the names of the relevant parties. The entire exercise shall be concluded till 30th June, 2020. The respondents shall fully cooperate in the above endeavor of the revenue authority and shall not seek to delay the matter in any manner whatsoever. The appeals stand disposed of in the above terms."

The foregoing terms appear to leave the *ratio decidendi* of *Habib Bank* intact and may even, on one plausible reading, be taken to have endorsed it. However, this point need not detain us here and must, insofar as this Court is concerned, be regarded as being open for future consideration in a suitable case.

15. The foregoing were the reasons for our short order. CA Nos. 502-505/2017 stood dismissed, while CA 506/2017 was allowed. The short order itself, dated 13.01.2021, was in the following terms: “For reasons to be recorded later, these appeals are partly allowed with respect to tax year, 2011.”

Judge

Judge

Judge

Islamabad, the
13th January, 2021
*Nisar/**
Approved for reporting