IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL, CJ
MR. JUSTICE MUHAMMAD ALI MAZHAR
MRS. JUSTICE AYESHA A. MALIK

CIVIL PETITIONS NO.1920 TO 1924 OF 2022
Against the Judgment dated 09.03.2022 passed by the Islamabad High Court, Islamabad in I.T.R. Nos. 205, 208, 206, 209, 207/2015)

M/s Islamabad Electric Supply Company Limited (IESCO) through its Finance Director, Islamabad ...Petitioner
(In all cases)

VERSUS

The Appellate Tribunal Inland Revenue (H.Q), Islamabad through its Chairman and others ...Respondents
(*In all cases)*

For the Petitioner: Mr. Haseeb Shakoor Paracha, ASC
(In all cases)

For the Respondents: Dr. Farhat Zafar, ASC
Ch. Akhtar Ali, AOR
(In all cases)
Mr. Naeem Hasan Secretary (Lit), FBR

Date of Hearing: 10.08.2022

JUDGMENT

MUHAMMAD ALI MAZHAR, J:- These five Civil Petitions for leave to appeal are directed against the common judgment dated 09.03.2022, passed by the learned Islamabad High Court, Islamabad in I.T.R. Nos. 205, 208, 206, 209, 207/2015), whereby the I.T.Rs were answered in the negative.

2. The compendiously and tersely enunciated facts necessary for disposal of these civil petitions are that the petitioner is a public limited company dealing in the supply of electricity to the consumers. The respondent No.3 initiated the proceedings under

Section 161 and 205 of the Income Tax Ordinance 2001 ("**Ordinance**"), He passed the order and created the tax demand for payment against non-deduction of withholding tax, including default surcharge under Sections 161 and 205 read with Section 124 of the Ordinance. Being aggrieved, the petitioner filed appeals before the respondent No.2 but could not succeed, thereafter, the appeals were filed before the respondent No.1 (Appellate Tribunal Inland Revenue) which were also decided against the petitioner vide order dated 13.03.2015. As a last resort, the petitioner filed aforesaid Income Tax References in the learned High Court but the question of law framed in the Tax References was also answered in negative, while upholding the order passed by the learned Appellate Tribunal Inland Revenue.

3. The learned counsel for the petitioner argued that the both the learned High Court and the learned Appellate Tribunal Inland Revenue failed to consider that the order under Sections 161 and 205 of Ordinance cannot be passed without initiating proceedings under Section 177 of the Ordinance which is a precondition before taking any adverse action under Sections 161 and 205. It was further contended that the lower fora passed the orders without considering the relevant provisions of law and all impugned orders are based on assumptions and guess work only. The petitioner was imposed a tax liability without any definite information which amounted to double taxation. He further argued that as per Rule 44 of the Income Tax Rules, 2002 ("**Rules**"), the learned respondent No. 3 should have sought the reconciliation of amounts which were put on view in the annual and monthly statements of withholding tax. Simultaneously, he argued that the operations of the petitioner are spread in 52 locations and the record and information send for by the department was too voluminous thus it was not possible for the petitioners to produce huge record in the prescribed form.

4. Heard the arguments. The learned High Court by means of a consolidated impugned judgment dealt with aforesaid Income Tax Reference Applications, pertaining to the tax demand for the years 2007, 2008, 2009, 2010, 2011 and 2012. In order to resolve the difference of opinion, the learned High Court framed the following common question of law in the Reference Applications:-

> "Whether under the facts and circumstances of the case, was the Respondent No.1 justified to hold Proceedings and Pass Order under Section 161/205 without proceedings under Section 177 of the ITO, 2001?"

5. The bone of contention is precisely confined to the question of law framed by the learned High Court with regard to the invocation of the machinery provided under Section 161, without recourse to Section 177 of the Ordinance. In fact, Section 160 of the Ordinance is provided in Division IV of the Ordinance which is predominately germane to the General Provisions Relating to the Advance Payment of Tax or the Deductions of Tax at Source. Where a person fails to collect tax as required under the modalities and procedure envisaged under Section 161, he shall be personally liable to pay the amount of tax to the Commissioner who may proceed to recover the same but, before making any such recovery he has to provide an opportunity of being heard to the defaulter. For the ease of reference, Section 161 of Ordinance is reproduced as under:-

> "**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 for 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 [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 of recovery shall not be amended, unless the person referred to in sub-section (1) has been provided an opportunity of being heard."

6. In unison, Section 165 of the Ordinance envisages that every person collecting or deducting tax shall furnish to the Commissioner a quarterly statement in the prescribed form set out in the said Section. The proceedings initiated by the Deputy Commissioner (IR) under Section 161 and 205 read with section 124 of the Ordinance reflect that the Principal Officer of the petitioner was confronted with the Audited Accounts electronically filed for the concerned tax years showing huge payments of operating cost and P & L expenses, which were cross-matched with the withholding statements, and Income Tax Returns, whereby it was found that petitioner had not discharged their responsibility as a withholding agent in the prescribed manner. It was further pointed out by the Deputy Commissioner (IR) that in the withholding annual statements the petitioner failed to mention CPR Numbers, therefore the petitioner was called upon to file documentary evidence of payments with CPR Numbers, so that the tax deduction amount could be verified and credit of tax deduction could be allowed accordingly. The record further reflects that the proceedings under Section 161 and 205 of the Ordinance were finalized and an order was issued with the tax demand, however,

on an appeal filed before the Commissioner with the plea of not providing reasonable opportunity of being heard, the Commissioner Inland Revenue (Appeals), remanded the matter with the direction that documents should be obtained and, after providing reasonable opportunity of hearing, the order should be passed afresh. After remand, the petitioner was asked to provide detail of payments made on account of various expenses with relevant supporting documents but the petitioner repeatedly asked for adjournments on one pretext or another and avoided submitting relevant documents or an explanation on the issue of non-deduction/non-collection of tax as required under the Ordinance. The order of the Deputy Commissioner (IR) passed after remand put on show at least eleven adjournments which were entreated by the petitioner for submitting the documents or required data but neither did they provide any such record, nor did they submit any explanation for non-deduction of tax. The Appellate Order of the Commissioner Inland Revenue also pointed out that the taxpayer was afforded various opportunities to provide the relevant documents, failing which the officer had no option but to close the proceedings on the basis of the available facts. Concomitantly, the learned Appellate Tribunal Inland Revenue also expressed the same views that sufficient opportunities were provided to the taxpayer but they failed to provide relevant documents or details, hence no option was left except to pass the order on the basis of the available record.

7. If we flick through Section 165 of the Ordinance, in collocation with Rule 44 of the Rules, it educates that a person responsible for collecting or deducting tax under Division II or Division III of Part V of Chapter X of the Ordinance or under Chapter XII of the Ordinance shall furnish or e-file a biannual statement as set out in Part X of the Second Schedule to the Rules. According to the niceties of sub-rule (3), the statement shall be accompanied by the evidence of deposit of tax collected or deducted to the credit of the Federal Government, whereas sub-rule (4) explicates that a person required to furnish the statement shall, whenever required by the Commissioner, furnish a reconciliation of the amounts mentioned in the biannual statement with the amounts mentioned in the

return of income, statements, related annexes and other documents submitted from time to time.

8. It is somewhat prominent that no drastic action can be triggered under Section 161 of the Ordinance unless the person is provided with an opportunity of being heard. In the case of the petitioner too the Tax Authority, after affording ample opportunities of hearing, raised the demand after complying with the requirements of due process of law, and thereafter passed the orders in accordance with the procedure and mechanism provided under Section 161 of the Ordinance.

9. Now we will engage in the exactitude of Section 177 of the Ordinance which is predominantly related to the audit exercise, whereby the Commissioner may call for any record or documents including books of account maintained under this Ordinance for conducting audit of the income tax affairs of a person but after recording reasons in writing and, as a precondition, the said reasons shall be communicated to the taxpayer while calling for the record or documents including books of accounts of the taxpayer. However, the proviso to sub-section (1) clarified that no record shall be called after expiry of six years from the end of the tax year to which they relate.

10. The legislature has not put into effect any precondition under Section 177 of the Ordinance to embark on an audit exercise first, and then start off proceedings under Section 161 of the Ordinance. The well recognized rule of construction or interpretation of any statute or its particular provision is that the intention of the legislature must be discovered from the words used. If the words used are capable of one construction only, then it would not be open to the courts to adopt any other hypothetical construction. If the words of a statute or its any provision are readily understood without any ambiguity, then obviously, it is not for the court to raise any doubt as to what they mean for any contrary view, rather than implementing the same without any hesitation. A statute or any enacting provision must be so construed as to make it effectual and operational. Lord Denning in the case of *Fawcett Properties v. Buckingham County Council.* [1961] AC 636, held that "when a statute has some meaning even though it is obscure, or several meanings, even though there is little to choose between

them, the courts have to say what meaning the statute is to bear, rather than reject it as a nullity." The legislature doesn't use superfluous or insignificant words in a provision or statute and therefore, while interpreting any word or terms in a statute a construction that makes the statute operative and the words pertinent must be preferred to the one that renders the words ineffective, void and useless. It is also significant to refer to the legal maxim *"ut res magis valeat quam pereat"* which expounds that it is better for a thing to have effect than to be made void or it is better to validate a thing than to invalidate it. A statute is supposed to be an authentic repository of the legislative will and the function of a court is to interpret it according to the intent of them that made it. The court should as far as possible avoid that construction which attributes irrationality to the legislature. It must obviously prefer a construction which renders the statutory provision constitutionally valid rather than that which makes it void. [Ref: CST v. Mangal Sen Shyam Lal AIR 1975 SC 1106, K.P. Varghese v. ITO [1981] 131 ITR 597 (SC) and State of Punjab v. Prem Sukhdas [1977] 3 SCR 403.]

11. The course of action and benchmark enumerated under Section 161 of the Ordinance is not contingent upon the compliance of pre-audit requirements mentioned under Section 177, nor does Section 177 of the Ordinance override or overlap the provisions contained under Section 161 of the Ordinance as a precondition of audit, rather both the provisions are, in all fairness, seemingly independent with self-governing corollaries. After completion of audit under the provisions of Section 177 of the Ordinance, the Commissioner may, if considered necessary, amend the assessment under sub-section (1) or sub-section (4) of Section 122 of the Ordinance, as the case may be, after providing an opportunity of being heard to the taxpayer under sub-section (9) of Section 122. Whereas Section 161 of the Ordinance has an altogether different premise wherein 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 with the rider that the order of recovery shall not be amended, unless the person referred to in sub-section (1) has been provided an opportunity of being

heard which exercise of powers has nothing to do with the general exercise of audit mentioned under Section 177 of the Ordinance. So far as Section 205 of the Ordinance is concerned, it is by and large related to default surcharge which obviously emanates the characterization of defaults in different scenarios, including where a person who fails to collect tax as required or fails to pay an amount of tax collected or deducted as required under section 160 on or before the due date for payment is liable for default surcharge at a rate mentioned in the Section.

12. The learned Counsel for the petitioner cited the judgment rendered by this Court in the case of Commissioner Inland Revenue Zone-I, LTU Vs. MCB Bank Limited **(2021 SCMR 1325).** The facts of this case are distinguishable to the facts and circumstances of the case in hand. No such question of law was raised that the action under Section 161 and 205 of the Ordinance cannot be initiated with complying with the prerequisites of Section 177 of the Ordinance. The show cause notice issued under Sections 161 and 205 of the Ordinance were challenged on altogether different grounds.

13. As a result of the above discussion, we do not find any illegality or perversity in the impugned judgment of the learned High Court. The civil petitions are therefore dismissed and leave is refused.

Chief Justice

Judge

Judge

Islamabad the
10th August, 2022
Khalid
Approved for reporting.