APPELLATE TRIBUNAL INLAND REVENUE OF PAKISTAN
(DIVISION BENCH-II), ISLAMABAD

ITA No.893 & 894/IB/2024
(Tax Year 2021 & 2022)

M/s. Nova City Developers,
4th Floor Razia Sharif Plaza, Main Jinnah Avenue, Blue Area, Islamabad.
(Reg. No.8212643) — Appellant

Vs

The CIR, (Building & Developers), Unit – I, RTO, Islamabad. — Respondent

Appellant By	Mr. Ameer ul Azeem, ACA
Respondent By	Mr. Shumail Tareen, DR
Date of Hearing	26.09.2024
Date of Order	26.09.2024

ORDER

MIAN ABDUL BASIT (MEMBER):- The titled two appeals have been filed by the appellant/registered person against two separate orders for tax year 2021 & 2022 both dated 13.05.2024 passed under section 161/205 and 182 of the Income Tax Ordinance, 2001 **(The Ordinance)** by the learned Assistant/Deputy Commissioner (Building & Developers) Unit-I, Islamabad [DCIR]. The tax demand of Rs.110,972,515/- and Rs.83,346,647/- has been created through the said orders for tax year 2021 and 2022 respectively. Since both the appeals shares identical facts and legal issues, the appeals are being decided through this single order.

2. Tersely, the facts leading to these appeals are that the taxpayer e-filed its return of Income for the tax year 2021 & 2022. The taxpayer is a withholding agent in terms of section 153(7) of the Income Tax Ordinance, 2001. The assessing officer initiated formal proceedings, issuing a notice under Rule 44(4) of the Income Tax Rules, 2002 on 18.07.2023 the taxpayer filed its reply. The taxpayer stated that since, it is registered under section 100D, therefore, withholding tax was not required deducted/deposited by the taxpayer. However, the taxpayer response was deemed unsatisfactory with

the observation that section 100D does not absolve the taxpayer from withholding altogether. According to the DCIR, the exemption outlined under Rule 7 of the 11th Schedule to the Ordinance applies to payments made against acquisition of construction related services and supplies. Payments other than construction related supplies and services are required to be subjected to withholding tax. Therefore, a show cause notice under section 161(1A) *ibid* was issued on 17.10.2023, wherein taxpayer was required to furnish complete reconciliation required under Rule 44(4) of the Income Tax Rules, 2002 showing details of payment, name and NTN number of suppliers, extent of payment, exempt amounts along with exemption certificates. As per the show cause notice, the taxpayer was required to collected advance tax under section 236K(3) on total advance from customers, however, it failed to collect/deposit the due tax. Moreover, the taxpayer failed to provide list of customer along with their CNICs to identify filer/non-filer status of the customers. The assessing officer imposed tax, penalty and default surcharge via his orders passed for tax year 2021 and 2022. The tax was calculated as under:

<u>For the Tax Year 2021</u>

Advances from customers	2,437,259,557/- (1/100) = 24,372,595/-
Advances from customers	2,437,259,557/- (2/100) = 48,745,191/-
Total Tax u/s 236K(3)	**73,117,786/-**

Total tax recoverable u/s 161	Rs.75,582,423/-
Less: Tax already deducted	Rs.295,778/-
Net tax recoverable u/s 161	Rs.75,288,645/-
Default Surcharge u/s 205 @ 12% per annum from 01.07.2021 to 30.04.2024. 75,286,645 (34/100)	Rs.25,597,459/-
Total tax recoverable u/s 161/205	Rs.100,884,104/-
Penalty under serial No.15 of sub-section 1 of section 182	Rs.40,000/- or 10% of the amount of tax whichever is higher
Penalty Rs.100,884,104*10% =	Rs.10,088,410/-
Total tax recoverable u/s 161/205 and 182	Rs.110,972,515/-

For the Tax Year 2022

Advances from customers	1,830,681,873/- (1/100) = 18,306,819/-
Advances from customers	1,830,681,873/- (2/100) = 36,613,637/-
Total Tax u/s 236K(3)	**62,792,558/-**

Total tax recoverable u/s 161	Rs.75,582,423/-
Less: Tax already deducted	Rs.686,264/-
Net tax recoverable u/s 161	Rs.62,106,294/-
Default Surcharge u/s 205 @ 12% per annum from 01.07.2021 to 30.04.2024. 62,106,294 (22/100)	Rs.13,633,384/-
Total tax recoverable u/s 161/205	Rs.75,769,679/-
Penalty under serial No.15 of sub-section 1 of section 182	Rs.40,000/- or 10% of the amount of tax whichever is higher
Penalty Rs.75,769,679*10% =	Rs.7,576,967/-
Total tax recoverable u/s 161/205 and 182	Rs.83,346,647/-

The appellant has assailed the orders for the above tax years of DCIR through the instant appeals, hence the present proceedings.

3. Mr. Ameer ul Azeem, ACA appeared on behalf of the appellant/ taxpayer, whereas Mr. Shumail Tareen, learned DR represented the tax department.

4. The learned AR argued that the assessing officer failed to consider the withholding statements filed under Section 165 of the Ordinance, 2001, and the replies dated 21.11.2023 and 05.04.2024 filed by the appellant, thereby making the orders illegal. The AR emphasized that the appellant had deducted and withheld tax wherever applicable on the expenses incurred and deposited it into the government's treasury during the tax year per the provisions of the Ordinance, 2001 in particular as provided in clause 7 of the 11th Schedule to the Ordinance, 2001. The learned AR argued that a complete record of tax withheld or deducted on the relevant expenses, along with proof of payment to the government, was submitted to the assessing officer; however, the officer failed to properly acknowledge this. The learned AR further explained that detailed information and records, including a breakdown of expenses below the threshold limit and those set to be paid in

the future, was provided. Despite this, the assessing officer treated all expenses as being subject to withholding and took action under Section 161 of the Income Tax Ordinance, 2001, rendering the order unjustifiable. The learned AR contended that the assessing officer neither considered the appellant's reply nor reviewed the submitted records and also failed to address the objections raised, thereby rendering the entire proceedings unwarranted. The learned AR submitted that the appellant had collected 1% tax on the fair market value of the advances in accordance with Section 236K, read in conjunction with Division XVIII of Part IV of the First Schedule to the Ordinance, 2001. He, however, contended that the assessing officer unjustifiably imposed the tax based on the consideration received, rather than the fair market value. In response, the learned DR argued that the appellant did not provide sufficient records of tax deductions on purchases, justifying the assessing officer's decision to charge tax. The learned DR argued that the appellant was obligated to collect 1% tax on the consideration received when it exceeded the fair market value, and on the fair market value when it was higher than the consideration received, thereby justifying the orders to impose the tax on the consideration received. The learned DR maintained that the appellant failed to produce evidence of withholding on business expenses and fully supported the tax authorities' orders, requesting dismissal of the appeal.

5. We have heard the arguments of both sides and have perused the available record. The appellant, as per the order, had failed to furnish the complete evidence of withholding/deduction of tax on its purchases and expenses. The foremost important issue in connection to these appeals are to ascertain whether the proceedings of the assessing officer for creating demand of non-deducted; and, or non-payment of deducted/withheld tax on

purchases/expenses, were legally sustainable in contemplation to the provision of section 161 of the Ordinance, 2001. In order to attend this issue reading of the provision of sections 153 and 161 of the Ordinance, 2001 will be more beneficial. Section 153 of the Ordinance, 2001 explains the scope and criterion for the deduction of tax on making payments for goods, services and contracts. Section 161 of the Ordinance, 2001 delineates the prescribed rate of tax deduction on expenses incurred in different categories, specifying the applicable rate for deducting tax on different types of expenditures. The department, while initiating the proceedings, has not mentioned the heads of expenses but the total expenses and purchases indicated in the income tax returns were taken to impose the tax. It is an admitted position that the tax is required to be withheld/deducted at the time of making the payments against expenses and not all the purchases and other expenses recorded in the income tax return required withholding/deduction of tax. Therefore without referring to the payments made towards the purchases/expenses incurred by the taxpayer, the provision of section 161 cannot be invoked.

6. According to the appellant, the appellant was required to collect tax at the rate of 1% of the fair market value and not on the consideration received against the sale of immovable property as outlined in section 236K read in conjunction with Division XVIII of Part IV of the First Schedule to the Ordinance, 2001. However, the tax department is of the view that the appellant was obligated to collect 1% tax on the consideration received when it exceeded the fair market value and on the fair market value when it was higher than the consideration received. To address this issue, the study of the provision of sections 68, 236K Division XVIII of Part IV of the First Schedule of the Ordinance, 2001 would be advantageous. Section 68(4) of the Ordinance, 2001, clarifies that the "fair market value" of a property is the

value determined by the Federal Board of Revenue (FBR). If the FBR has not determined a value, then as per section 68(5), the value assessed by the District Officer (Revenue) will be considered the fair market value. Furthermore, Division XVIII stipulates that the tax to be collected under section 236K is 1% of this fair market value. In the appellant's case, the AR asserted that the fair market value should be the one determined by the District Officer (Revenue) under section 68(5), since no value was set by the FBR. However, the tax department contended that the fair market value should instead be the actual consideration received for the property, as per the provisions of section 68(1). This disagreement revolves around which interpretation of "fair market value" should apply in this case, whether the value set by the local revenue authority under section 68(5) or the actual price of the transaction as referenced in section 68(1). The comparison between the provisions of Division X of Part X of the First Schedule, which mandates the collection of tax under section 236C (tax required to be collected from the seller), and the provisions of Division XVIII of Part IV of the First Schedule, which require the collection of tax under section 236K (tax collected from the buyer), reveals a key distinction in how the tax is applied. Under section 236K, the tax is collected based on the consideration received, whereas under section 236C, the tax is collected based on the fair market value. The legislature has intentionally used different phrases in Division X and Division XVIII to highlight this distinction, indicating a deliberate difference in the method of tax collection between the two sections. Therefore, the admitted position is that the tax from the seller should be collected based on the consideration received and the tax from the buyer should be collected based on fair market value. The key question to be determined is what would be the fair market value, i.e. whether it will be the

consideration received as provided under Section 68(1) of the Ordinance, 2001, or the value determined by the District Officer (Revenue) under Section 68(5) of the Ordinance, 2001. The scheme of the Ordinance, 2001 indicates that if either the Federal Board of Revenue (FBR) or the District Officer (Revenue) determines the value of immovable property in a specific area, that value will be considered the fair market value. If neither the FBR nor the District Officer (Revenue) has established a value, the consideration received by the seller will be deemed the fair market value. The tax department has adopted a similar position in the case of another taxpayer, Future Development Holding (Private) Limited, by considering the value determined by the District Officer (Revenue) as the fair market value. The assessing officer has also overlooked several aspects while determining the appellant's tax liability, including the incorrect calculation of advances received and the fact that the tax collected under Section 236K is an adjustable tax. This necessitates consideration of the provisions outlined in Section 161(1B) of the Ordinance, 2001. Therefore, the assessing officer is directed to re-determine the appellant's tax liability concerning the advances received by the appellant, in accordance with the precedent set by cases decided within the same jurisdiction. Additionally, the officer should consider the other objections raised by the appellant.

7. Regarding the other issues in this case related to the non-withholding or non-deduction of tax on expenses incurred under various categories, including direct and indirect expenses such as web software development, travel/conveyance, printing, gardening, repair and maintenance, advertising, and security, we find the order to be flawed. We note that, despite acknowledging the appellant's submission of replies and records, the assessing officer imposed the tax on the entire expenses reported in the

return without considering expenses below the threshold limits or those that had not yet been paid. It is also observed that DCIR calculated the tax assessing that the rate of non-filer would apply. However, for this stance the DCIR have not presented any evidence and legal reasons. Since it is the legal duty of the adjudicating authority to give due consideration to the assertions of the individual against whom the allegation is made, failure on the part of the assessing officer to address the appellant's records and reply renders the order legally unsustainable. The proceedings under Section 161 of the Ordinance, 2001, stem from the assessing officer's failure to review the appellant's withholding statements. It is undisputed that these statements were filed, yet the assessing officer did not examine them, nor did he report any defects in them. The notice under Section 161 was issued based solely on the appellant's income tax return, without accounting for payables, indicating that the proceedings lacked the identification of un-reconciled amounts. The order shows the assessing officer required the appellant to provide detailed records of payments and withholding tax deductions, revealing his uncertainty about whether tax was withheld on expenses. Moreover, not all documented purchases necessarily incur withholding tax. In our view, the entire proceedings for the year 2021 & 2022 are fundamentally flawed and legally defective. The requirements of Section 161 have been disregarded, and the assessing officer's intent to inquire about tax withholding on various expenses is evident. Section 161 does not authorize the assessing officer to solicit details from the taxpayer; rather, it mandates that the officer specify the relevant expenses and applicable withholding tax provisions in the notice The concept of withholding proceeding under section 161 has authoritatively and comprehensively settled by the august Supreme Court of Pakistan in a case reported as

Commissioner Inland Revenue, Zone-I, LTU Vs. MCB Bank Limited (**2021 SCMR 1325**) wherein the Hon'ble Supreme Court of Pakistan has over ruled the finding in earlier case reported as Bilz (Pvt.) Limited Vs. Deputy Commissioner of Income Tax and others (**2002 PTD 1= PLD 2002 SC 353**).

8. In the sagacity of forgoing reasons and in allegiance to the judgment of the Honorable Supreme Court of Pakistan supra, both the orders dated 13.05.2024 are hereby set aside with the direction to proceed afresh, for the correct determination of tax liability, if any, after seeking the record in this regard. The assessing officer shall communicate in writing any identified deficiencies or defects related to the records and documents submitted by the taxpayer , to the appellant before concluding the reassessment proceedings. The fresh proceedings shall be finalized strictly in accordance with the observation made hereinabove and in particular in line with the judgment supra. It is to be noted that if it is observed during the fresh adjudication that the recipients of payments have discharged their tax liability for tax years 2021 and 2022, no tax recovery will be made from the appellant, however, the default surcharge shall be charged from the appellant in accordance with the provision of section 161(1B) of the Ordinance, 2001.

9. The appeals stand disposed of in the above manner.

10. This order consists of nine (09) pages and each page bears my signature.

(MIAN ABDUL BASIT)
MEMBER

(NASIR IQBAL)
MEMBER

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