

**IN THE HIGH COURT OF SINDH, KARACHI**  
**C. P. NO. D-3532 / 2020**

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Date Order with signature of Judge

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**Present: *Mr. Justice Muhammad Junaid Ghaffar***  
***Mr. Justice Agha Faisal***

**Applicant:** China Power Hub Generation Company  
(Pvt.) Limited.  
Through M/s. Hyder Ali Khan, Samiur  
Rehman Khan and Hamza Waheed,  
Advocates.

**Respondent(s):** Pakistan & Others  
Through Dr. Shah Nawaz Memon Advocate.

**Date of hearing:** 11.02.2021.

**Date of Order:** 11.02.2021.

**O R D E R**

**Muhammad Junaid Ghaffar, J:** Through this Petition, the Petitioner has impugned Show Cause Notice(s) dated 18.06.2020 issued under Section 205(3) of the Income Tax Ordinance, 2001 ("**Ordinance**") for tax years 2017, 2018 and 2019 for payment of default surcharge on amount of tax not withheld or deducted by the Petitioner as withholding agent in terms of section 153 of the Ordinance.

2. Learned Counsel for the Petitioner submits that for tax years 2017 & 2018, the Petitioner was issued Notice under Section 161 and 205 of the Ordinance, and for tax year 2019 under s.161 ibid, whereafter pursuant to order 12.03.2020 the adjudged amount was paid as per demand notice under Section 137(2) of the Ordinance. He submits after payment of the entire amount as claimed; impugned Notice(s) have been issued which according to him are without lawful authority and jurisdiction. He submits that no further Notice can be issued in these circumstances for recovery of Default Surcharge which was never adjudicated by the officer concerned, whereas, the amount was paid without further appeal; hence, the impugned notice(s) is liable to be set-aside. Per learned Counsel after passing of an ad-interim order and its service, in order to frustrate this petition, an order has been passed

after office hours and in view of the changed circumstances the relief sought may be molded by also setting aside the said order.

3. On the other hand, learned Counsel for the Department submits that since tax was not withheld which was then paid after passing of the order(s); hence, the impugned Show Cause Notice is in accordance with law for payment of Default Surcharge. According to him the interim order was not received in time and an order has now been passed pursuant to the impugned show cause notice, therefore, this petition is not maintainable.

4. We have heard both the learned Counsel and perused the record. It appears that tax for years 2017 and 2018 separate show cause notices were issued to the Petitioner in terms of s.161/205 of the Ordinance, and after reply from the Petitioner order(s) were passed on 12.3.2020 through which the amount of tax allegedly not withheld was adjudged; however, no default surcharge was imposed or adjudicated. Similarly, for tax year 2019 a show cause notice was issued only under s.161 and that was also adjudicated vide order dated 12.3.2020 and again no default surcharge issue was raised. It is also not disputed that after passing of orders under s.161 for respective years, a notice to pay tax under Section 137(2) of the Ordinance were also issued and no demand of default surcharge was ever raised. It is also a matter of record that in one tax year even a rectification application was entertained and the amount was amended by accepting the petitioner's contention, whereas, all three orders under s.161 / 205 have attained finality as no further Appeal is pending in respect of the said issue, and the Petitioner after passing of such order(s) has paid the said amount as per notice under s.137(2) of the Ordinance. Subsequently, the impugned notice(s) have been issued on the ground that default surcharge under s.205(3) of the Ordinance was not charged and remains recoverable. On perusal of earlier Notice(s) in respect of tax years 2017 and 2018 it appears that the said Show Cause Notice was issued collectively under Section 161 and 205 of the Ordinance, whereas, for tax year 2019 it was only under s.161 and even nothing was alleged as to the payment of any default surcharge. To this extent, notwithstanding that no comments have been filed except a statement, there appears to be no dispute. We have repeatedly confronted the learned Counsel for the Respondent as to how once again another Notice in respect of the same alleged default

can be issued for which earlier a Notice was already issued and while adjudicating the matter, no Default Surcharge was imposed by the Officer having jurisdiction in the matter, to which learned Counsel has not been able to respond satisfactorily. However, he has argued that once the amount adjudged under s.161 was paid without objection and any further Appeal, the amount of default surcharge became payable mandatorily without further objections. We are least impressed with such argument. First, it is not mandatorily payable as it has to be adjudicated upon and this adjudication has to be done along with the main order being passed in terms of s.161 of the Ordinance. If not, then in each and every case, which culminates after legal proceedings by way of Appeal and Reference as provided under the Ordinance, a new show cause notice would be issued in a mechanical manner, that since the litigation has ended against a tax-payer, then he is liable for payment of default surcharge as provided under s.205 *ibid*. This with utmost respect is an incorrect approach by the Respondents. It is the officer concerned having jurisdiction who has to first issue a combined notice under section 161 read with s.205 of the Ordinance, confronting a tax-payer as to why the amount of tax not withheld or deducted be recovered and further as to why in failure to do so, the default surcharge be also recovered. In our considered view, there can't be separate or independent proceedings under both the sections. If it is a case of confronting a tax-payer under s.161 then it has to be done simultaneously. It is only in this manner that the officer passing the order under s.161 can decide and come to a conclusion that the tax-payers conduct also warrants imposition of a default surcharge.

5. In the instant matter when the second Show Cause Notice dated 18.06.2020 is looked into, it states that Default Surcharge under Section 205(3) of the Ordinance, was not charged and remains recoverable and the only ground taken is that since an order was passed in terms of s.161 of the Ordinance, which has attained finality and tax adjudged has been paid, therefore, default surcharge has to be paid. In our considered view, the subsequent Show Cause Notice for Default Surcharge in respect of which earlier a similar Notice was though issued; but no Default Surcharge was imposed cannot be sustained on these assertions. Similarly, when for tax-year 2019, it was not even alleged while issuing a notice under s.161 that a default surcharge would also be imposed in terms of s.205 *ibid*, then subsequently, no

separate proceedings can be initiated after the order passed under s.161 has been accepted and complied with. The Order(s) in question which have attained finality; are silent about Default Surcharge, meaning thereby, that the Petitioner was not held liable for payment of Default Surcharge consciously, notwithstanding that withholding tax was to be paid for the relevant period. If for some reason the officer concerned has failed to adjudicate the quantum of Default Surcharge, the only inference which can be drawn is, that the officer has consciously not imposed any default surcharge. Here the question of willful default or intention would not arise as nothing has been adjudged against the petitioner. It is not a case wherein a change of opinion could be allowed from one officer to another. Matter has been finally adjudicated without imposing any default surcharge; hence, subsequent proceedings initiated by way of another show cause notice cannot be sustained and by no stretch of imagination subsequent Notice for the same issue under the same provision can be justified.

6. There is another aspect of the matter as well which has not been argued or referred to by any of the learned Counsel. The impugned notice(s) has been issued under s.205(3)<sup>1</sup> of the Ordinance, and the same has a proviso<sup>2</sup> and it provides that if a person opts to pay the tax due on the basis of an order under s.129 [i.e. decision in Appeal by the Commissioner on the 1<sup>st</sup> Appeal] on or before the due date given in the notice under section 137(2) issued in consequence of the said order and does not file an appeal under section 131, he shall not be liable to pay default surcharge for the period beginning *from the date of the order under section 161 to the date of payment*. This proviso is beneficial inasmuch as it waives even the total amount of default surcharge which may have been imposed through an order s.161, if the tax-payer after filing of 1<sup>st</sup> Appeal and passing of an order by the Commissioner under s.129 *ibid* does not pursue any further Appeal. Here in the instant matter, the Petitioner, notwithstanding to what has been held hereinabove, has paid the

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<sup>1</sup> (3) A person who fails to 12[collect tax, as required under Division II of Part V of this Chapter or Chapter XII or deduct tax as required under Division III of Part V of this Chapter or Chapter XII or fails to] pay an amount of tax collected 345 or deducted as required under section 160 on or before the due date for payment shall be liable for 1[default surcharge] at a rate equal to [12"] per cent per annum] on the amount unpaid computed for the period commencing on the date the amount was required to be collected or deducted and ending on the date on which it was paid to the Commissioner

<sup>2</sup> [Provided that if the person opts to pay the tax due on the basis of an order under section 129 on or before the due date given in the notice under sub-section (2) of section 137 issued in consequence of the said order and does not file an appeal under section 131, he shall not be liable to pay default surcharge for the period beginning from the date of order under section 161 to the date of payment.]

amount adjudged through an order s.161 pursuant to a demand notice under s.137(2) without even resorting to 1<sup>st</sup> Appeal in terms of s.129 of the Ordinance, whereas, for reasons best known to the Respondents an honest and tax compliant person has been dragged into this litigation without any substantial basis in hand. Even if any amount of default surcharge would have been imposed or adjudged along with the order under s.161, it was subject to waiver, if the Petitioner had filed 1<sup>st</sup> Appeal and after passing of an order under s.129 had paid the adjudged amount of tax. It has discouraged the petitioner from being tax complaint; rather we may say has encouraged the petitioner to at least pursue 1<sup>st</sup> Appeal in all cases. Therefore, even when looked into from this angle, the impugned notices are wholly unwarranted in law. Hence, in the given facts and circumstances in our view the impugned show cause notices issued in terms of s.205(3) of the Ordinance, are not sustainable and liable to be quashed / set-aside.

7. Lastly, we may observe that insofar as imposition of default surcharge is concerned, it is settled law that it is not to be imposed in a mechanical manner; but only after a proper adjudication as to the willful default and presence of *mens-rea*. Here in this case it has been averred on behalf of the Petitioner all along that firstly, after submission of reply, the allegation of not withholding /deducting tax against host of issues was decided in favor; whereas, even a rectification was also allowed in respect of one tax-year, and lastly, the only issue that decided against was in respect of withholding of tax for payment made under offshore-contracts, and was a case of interpretation of s.152 as according to the petitioner the title of assets was transferred outside Pakistan; hence was a case of a genuine interpretation of the contracts and the applicability of the Ordinance on such contracts. In these circumstances, it would have been even otherwise a difficult proposition to sustain imposition of any default surcharge. It settled law that each and every case has to be decided on its own merits as to whether the evasion or payment tax was willful or mala fide, decision of which would depend upon the question of recovery of additional tax<sup>3</sup>.

8. As to the passing of an order pursuant to the impugned show cause notice on the pretext that the interim order was not served upon within time, an order has now been passed under s.205(3) for payment

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<sup>3</sup> DG Khan Cement Company Limited vs. Federation of Pakistan reported as 2004 PTD 1179

of default surcharge is concerned, it would suffice to observe that since we have come to the conclusion that the impugned Show Cause Notice(s) itself was without jurisdiction and is to be set-aside / quashed; hence, by applying the principle of taking notice of the subsequent events to grant requisite relief<sup>4</sup>; we without going into the exercise of determination that whether the ad-interim order was served or not; hereby also set aside the order passed subsequently, pursuant to the impugned Show Cause Notice(s).

9. In view of hereinabove facts and circumstances of the case, this petition is allowed and the impugned show cause notices issued under s.205(3) of the Ordinance in respect of tax years 2017, 2018 & 2019 and the Order(s) passed thereon are declared to have been issued / passed without lawful authority and jurisdiction; hence, the same are hereby set-aside / quashed.

**J U D G E**

**J U D G E**

Arshad/

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<sup>4</sup> Samar Gul v Central Government (PLD 1986 SC 35); Syed Ali Asghar v Creators (Builders) (2001 SCMR 279)