

Form No: HCJD/C.

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Tax Reference No.16 of 2005

Commissioner of Income Tax Companies Zone, Islamabad

Vs

M/s Geofizyka Krakow Pakistan Ltd, Islamabad.

Petitioner's by: Mr. Babar Bilal, Advocate

Respondent's by: Hafiz Muhammad Idrees, Advocate

Date of Decision: 16.02.2015.

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Aamer Farooq, J.- This is an application under section 133(4) of the Income Tax Ordinance, 2001 for interpretation of the relevant law arising out of decision of Income Tax Appellate Tribunal dated 23.01.2004.

2. The assessee is a non-resident company, based in Poland, engaged for providing data services to Oil Exploration Companies in Pakistan. The assessee/respondent filed return of income for the year 1999-2000 declaring net loss of Rs:12,029,896. However, against the declared loss, income was assessed at Rs:9,792,066 under section 62 of the Income Tax Ordinance, 1979 (The Ordinance) vide order dated 30.03.2002. The assessee/respondent filed appeal before Commissioner Income Tax (Appeals) who set aside the assessment, however, made certain directions. The assessee/respondent filed second appeal before Income Tax Appellate Tribunal and contended that in view of Article 7(3) of Double Taxation Agreement, Pakistan Tax Laws were not applicable to it. The learned Income Tax

Appellate Tribunal deleted the addition made under section 24(i) of the Ordinance vide order dated 23.01.2004. The petitioner moved the instant application with the request that two questions of law arise out of the judgement of the learned Income Tax Appellate Tribunal which need to be addressed and the law to be interpreted, in this regard. The following two questions were framed in the application:

i) Whether on the facts and circumstances of the case, the ITAT was justified to hold that tax laws of Pakistan are not applicable to the case of the assessee as provisions of treaty for avoidance of double taxation and prevention of fiscal evasion.

ii) Whether on the facts and circumstances of the case, the ITAT was justified to delete the disallowance made under section 24 (i) of the Income Tax Ordinance, 1979 with the observation that the relevant DTT debars such disallowance.

3. This Court vide order date dated 25.01.2006 allowed question No.1 to be considered and interpret the law involved.

4. Learned Counsel for the petitioner, inter alia, submitted that under section 24(i) of the Ordinance the expenses were to be accounted for and the Tax Laws of Pakistan are applicable in the circumstances.

5. Learned counsel for the respondent submitted that under section 163 of the Ordinance, in case of Double Taxation Agreement the same prevails over the Ordinance. Learned counsel also placed reliance on Article 7(3) of the Double Taxation Agreement entered between Islamic Republic of Pakistan and the Polish People's Republic, for avoidance of double taxation.

6. In the present case an agreement was executed in 1976 which was given effect through SRO 438(i)76 dated 06.05.1976

whereby the agreement for avoidance of double taxation between Islamic Republic of Pakistan and the Polish People's Republic was given statutory footing. Article 7(3) of agreement reads as follows:

“In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purpose of the permanent establishment including the executive and general expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

7. The question in hand is that whether in light of section 163 of the Ordinance Double Taxation Agreement would prevail over Pakistan Income Tax Laws. In this behalf section 163 is reproduced below and is follows:

‘S.163. Avoidance of double taxation and prevention of fiscal evasion.-

(1) The Federal Government may enter into an agreement with the Government of any country for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income leviable under this Ordinance and under the corresponding law in force in that country, and may, by notification in the official Gazette, make such provisions as maybe necessary for implementing the agreement.

(2) Where any agreement is made in accordance with sub-section (1), the agreement and the provisions made by notification for implementing the said agreement shall, notwithstanding anything contained in any law for the time being in force, have effect in so far as they provide for-

(a) relief from the tax payable under this Ordinance; or

- (b) Determining the income accruing or arising, or deemed to accrue or arise, to non-residents from sources within Pakistan; or*
 - (c) Where all the operations of business or profession are not carried on within Pakistan, determining the income attributable to operations carried on within and outside Pakistan, or the income chargeable to tax in Pakistan in the hands of such persons, including their agents, branches or establishments in Pakistan; or*
 - (d) Determining the income to be attributed to any person resident in Pakistan having any special relationship with a non-resident; or*
 - (e) Exchange of information for the prevention of fiscal evasion or avoidance of taxes on income chargeable under this Ordinance and under the corresponding law in force in that other country.*
- (3) The provisions of the Seventh Schedule shall have effect where an agreement provides that the tax payable under the laws of the country concerned shall be allowed as credit against the tax payable in Pakistan.*
 - (4) Notwithstanding anything contained in subsections (1), (2) and (3), any such agreement may include provisions for relief from tax for any period before the commencement of this Ordinance or before the making of the agreement.*

8. The examination of the above provision makes it clear that Double Taxation Agreement takes precedence over the local Income Tax Laws with respect to the issues provided in section 163(2)(a) to 163(2) (e) as well as 163 (3) and 163(4), provided that the Agreement is made as required in subsection 1 to section 163 and is notified. Section 163(2) contains a non obstante clause

as it states that notwithstanding anything contained in any law for the time being in force the provisions of Agreement shall prevail.

9. A non obstante clause is usually used in the provision to show the intention of the Legislature that the provision in question should prevail despite anything to the contrary. The meaning and concept of non obstante clause was elucidated by the Hon'ble Supreme Court of Pakistan in case titled "Muhammad Mohsin Ghaman and others Vs. Government of Punjab through Home Secretary Lahore and others" (2013 SCMR 85).

"One of the foundational principles governing the interpretation of non obstante clause is that it has to be read in the context of what the legislature intended in the enacting part of the provision. In 'Interpretation of Statutes' by NS Bindra, the author with reference to specific precedent case-law precisely addresses this issue and comments as follows:

"It has to be read in the context of what the legislature conveys in the enacting part of the provision. It should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing law which is inconsistent with the new enactment. The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously, for even apart from such clause a later law abrogates earlier laws clearly inconsistent with it.

The proper way to construe a non obstante clause is first to ascertain the meaning of the enacting part on a fair construction of its words. The meaning of the enacting part which is so ascertained is then to be taken as overriding anything inconsistent to that meaning in the provisions mentioned in the non obstante clause. A non obstante clause is usually used in a

provision to indicate that that provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency between the non obstante clause and another provision one of the objects of such a clause is to indicate that it is the non obstante clause which would prevail over the other clauses. It does not, however, necessarily mean that there must be repugnancy between the two provisions in all such cases. The principle underlying non obstante clause may be invoked only in the case of 'irreconcilable conflict'.

10. In case titled 'Arif Hussain Shah Vs. Operation Director' reported as **(PLD 1979 Lahore 603)** it was observed as follows:

"The word 'non obstante' means 'notwithstanding'. It means "despite" or "in spite of ". A "non obstante" clause is used in a provision to indicate that the provision should prevail despite anything to the contrary in any provision. While interpreting 'non obstante' clause, it should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning as a "non obstante" clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing law which is inconsistent in the new enactment. The enacting part of the Statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously for, even apart from such clause a later law abrogates an earlier law clearly inconsistent with it."

11. The discussion of above mentioned case law makes it clear that the purpose of non obstante clause is that the Legislature intends that a particular provision which starts with 'notwithstanding' should prevail over any other inconsistent provision. ***In the present case subsection 2 to section 163 express that Double Taxation Agreement should prevail over the other provisions of law with respect to issues provided in clauses 'a' to 'e' of subsection 2 to section 163 ibid. Therefore, in the instant case Article 7(3) of the above mentioned***

Agreement shall prevail over section 24(i) of Income Tax Ordinance, 1979.

12. Therefore, this reference is disposed of with the observation that in case of 'Double Taxation Agreement', if it is in accordance with subsections (1) and (2) of section 163 of Income Tax Ordinance, 1979 the same prevails over Pakistan's Income Tax ~~Laws~~.

(ATHAR MINALLAH)
JUDGE

(AAMER FAROOQ)
JUDGE

Altaf Malik

Approved for reporting