JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

WRIT PETITION NO.277 OF 2018.

M/S SHANDONG KERUI PETROLEUM
VERSUS
FEDERATION OF PAKISTAN AND OTHERS

Petitioner by	:	**Mr. Asad Ladha and Malik Ghulam Sabir, Advocates.**
Respondent No.1 by	:	**Rana Imran Farooq, Assistant Attorney General.**
Respondents No.2 to 4 by:		**Malik Qamar Afzal, Advocate.**
Date of Decision	:	**06.09.2022.**

SAMAN RAFAT IMTIAZ, J. Through the instant writ petition, the Petitioner has assailed the Order dated 30.06.2017 ("**Impugned Order I**") passed by the Respondent No.3 [Commissioner Inland Revenue] and Order dated 05.10.2017 ("**Impugned Order II**") passed by the Respondent No.2 [Chief Commissioner Inland Revenue].

2. The facts, as per the Memo of Petition, are that the Petitioner is a private company based in China engaged in the business of providing manufacturing and general contracting services to exploration and production companies in Pakistan. The Petitioner entered into a contract with the Oil and Gas Development Company Limited ("**OGDCL**"). OGDCL filed an application dated 31.07.2015 (through online FBR portal IRIS) with the Respondent No.3 in accordance with Section 152(5) of the Income Tax Ordinance, 2001 ("**Ordinance**") for making payment to the Petitioner without deduction of tax on the Offshore Supplies portion of the contract for the tax year 2015-2016 by stating that the Petitioner has given an undertaking that it does not have any registered permanent establishment in Pakistan and that such payments would be covered under Article 7 of the Agreement between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income ("**Double Taxation Treaty**"). The Respondent No.3 vide order dated 22.03.2016 rejected the application for exemption by OGDCL pursuant to Section 152(5A) of the Ordinance on the ground that the Petitioner has been present in Pakistan since

2013 as a result of working on another project which constitutes the permanent establishment of a non-resident person under Article 5 of the Double Taxation Treaty and as such all the provisions of the Ordinance relating to permanent establishment are applicable to the total value of the contract. OGDCL filed a revision application dated 17.05.2016 with the Respondent No.2 under Section 122B of the Ordinance. The said revision application was accepted vide Order dated 30.06.2016 passed by the Respondent No.2 who set aside the order dated 22.03.2016 of the Respondent No.3 on the grounds that the Offshore Supplies portion of the contract was performed outside of Pakistan, the title of goods/equipment was also transferred outside Pakistan, hence payments received outside Pakistan cannot be attributed to the Petitioner's permanent establishment in Pakistan thereby falling outside the scope of chargeability of said receipts in Pakistan and is taken as exempt from levy of tax under Article 7 of the Double Taxation Treaty.

3. The above mentioned order of the Respondent No.2 dated 30.06.2016 related to the tax period 2015-2016 and was accordingly only valid up until 30.06.2016. In this regard, the Petitioner received a letter from the Respondent No.2 dated 25.07.2016 directing the Petitioner to file a fresh application before the Respondent No.3 for the tax period 2016-2017. Accordingly, OGDCL filed a further application (through online FBR portal IRIS) under section 152(5) of the Ordinance for making payment to the Petitioner without deduction of tax on the Offshore Supplies portion of the contract for the tax year 2016-2017. Vide order dated 06.09.2016, the Respondent No.3 observed that the Respondent No.2 had already taken cognizance of the issue and has already taken a decision in this regard in an explicit manner and therefore the same treatment as approved by the Respondent No.2 vide order dated 30.06.2016 referred above is followed in the instant case therefore the exemption as sought for by OGDCL for the Offshore Supplies portion of the contract for the tax year 2016-2017 was granted.

4. Subsequently vide letter dated 05.01.2017, OGDCL wrote to the Respondent No.3 requesting that certain errors in the orders dated 30.06.2016 and 06.09.2016 be rectified as they misstated the law and facts. Despite the exemption granting order dated 06.09.2016 passed by the Respondent No.3 still holding the field, the Respondent No.3 vide Impugned Order I dated 30.06.2017 purportedly passed under section 152(6) of the Ordinance, cancelled the exemption granted through the order dated 06.09.2016 and concluded that the payment made by OGDCL to

the Petitioner in relation to the Offshore Supplies portion of the contract constitutes attributable profits of the permanent establishment of the non-resident Petitioner in Pakistan in terms of Article 7 of the Double Taxation Treaty read with section 101(3) of the Ordinance, hence chargeable to tax. OGDCL was accordingly directed to withhold tax under section 152(2A)(iii) of the Ordinance in relation to the said payment. The Petitioner never received any notice from the Respondent No.3 prior to passing the said revocation/cancellation Impugned Order I. The Petitioner therefore claimed that the Respondent No.3 passed the said Impugned Order I without giving the Petitioner an opportunity to be heard.

5. The Petitioner (through its representatives M/s Tariq Abdul Ghani Maqbool & Co. Chartered Accountants) filed an application for review dated 19.07.2017 under Section 122B of the Ordinance against the Impugned Order I. According to the Petitioner, the said application was filed only by way of abundant caution so as not to fall foul of the law of limitation even though the Petitioner maintained that the Impugned Order I passed by the Respondent No.3 was *coram non judice*, unlawful and *void ab initio*. However, vide Impugned Order II dated 05.10.2017 the Respondent No.2 upheld the Impugned Order I passed by the Respondent No.3 thereby rejecting the exemption application for the Offshore Supplies part of the contract for the tax year 2016-2017. The Petitioner alleges that the Impugned Orders dated 05.10.2017 and 30.06.2017 passed by the Respondents No.2 and 3 are illegal, *coram non judice*, *void ab initio* and are liable to be set aside, hence, instant writ petition.

6. The learned counsel for the Petitioner submitted that the Petitioner is a company incorporated in China as such is non-resident for purposes of Income Tax Ordinance 2001; that the Petitioner's agreement with OGDCL comprised of two components including offshore supplies of plant and equipment and onshore supply of services, both of which were separate and independent; that according to clause 21.0 of the contract taxes on import were payable by OGDCL; that according to the definition of CFR, risk passed to OGDCL when the goods passed the ship's rail in the port of shipment which was outside of Pakistan as such payment was exempt under Section 152(7)(a) of the Ordinance; that no notice was necessary under sub-section (5) of Section 152 of the Ordinance as the case of the Petitioner fell under sub-section 7(a) of Section 152 but sub-clauses (i), (ii), (iii), and (iv) of sub-section 7(a) of Section 152 were not attracted; that pursuant to Article 7 of the Double Taxation Treaty between China and Pakistan income is to

be taxed in home country except if attributable to a permanent establishment in Pakistan, which (a) the Petitioner does not have and (b) even otherwise income on the supply portion of the contract is not attributable to any permanent establishment in Pakistan as payment by OGDCL was also received outside Pakistan; that order dated 06.09.2016 was in favour of the Petitioner yet no appeal was filed against it by the Respondent Department, hence it attained finality; that matter was reopened on application by OGDCL for correction of typographical mistakes but exemption from deduction of income tax was retracted, which is not permitted under Section 152 sub-section 6 as no new facts arose or mentioned in the Impugned Orders. He relied upon *Pir Baksh Vs. The Chairman, Allotment Committee,* PLD 1987 SC 145, *Justice Qazi Faez Isa Vs. President of Pakistan*, PLD 2022 SC 119, *Iqbal Pervaiz Vs. Harsan,* 2018 SCMR 359, *Federation of Pakistan Vs. M/s Noori Trading Corporation (Private) Limited*, 1992 SCMR 710, *Commissioner, Sindh Employees Social Securities Institution Vs. Messrs E.M. Oil Mills and Industries Ltd. Karachi,* 2002 SCMR 39, *Rameshwar Prasad Vs. State of Uttar Pradesh,* AIR 1983 SC 383, *Ishikawajma-Harima Heavy Industries Ltd. Vs. Director of Income Tax,* 2007 IndLaw SC 99 and *Linde AG, Linde Engineering Division Vs. Deputy Director of Income Tax,* 2014 365 ITR 1 (Delhi).

7. The learned counsel for the Respondents No.2 to 4 submitted that the instant petition is not maintainable as there are concurrent findings of facts against the Petitioner by two lower forums; that last order was under revision jurisdiction which is almost the same as writ jurisdiction; that the petition is hit by laches as matter pertains to the Financial Year 2017; that place of permanent establishment is a question of fact which cannot be adjudicated in writ jurisdiction; that the matter could be re-opened as there is no estoppel against law specially in case of fraud; that even otherwise the new information was that the Petitioner does have a permanent establishment in Pakistan; that there is no *res judicata* on exemption; that as recorded in the Impugned Order I passed by the Respondent No. 3 show cause notice was issued to the Petitioner for cancellation of exemption but which was not replied to by the Petitioner; that Petitioner's contract is composite, therefore, cannot be bifurcated; that the Double Taxation Treaty can only come into play when conditions for exemption apply; and that the Petitioner has not proved that tax was paid abroad. He submitted that all the arguments raised by the Petitioner have already been addressed vide the judgment passed in the case of *Messrs Hongkong Huihua Global Technology Ltd. Vs. Federation of Pakistan*,

2019 PTD (Islamabad) 7. He also relied upon *Ahmad Khan Vs. Additional Sessions Judge, Talagang*, PLD 2020 (Lahore) 77, *Creative Electronics (Pvt.) Limited Vs. Government of Pakistan through Prime Minister*, PLD 2020 SC 319, *Muhammad Hanif Vs. Jahangir Khan Tareen*, PLD 2018 SC 114, *The Commissioner Inland Revenue, Zone-IV, Corporate Regional Tax Office, Karachi Vs. Messrs MSC Switzerland Geneva*, 2021 PTD 885 and *A.P. Moller Maersk Vs. The Commissioner Inland Revenue*, 2020 PTD 1614.

8. In rebuttal, the learned counsel for the Petitioner stated that *Messrs Hongkong Huihua Global Technology Ltd.(Supra)* is pending appeal before the Honourable Supreme Court but conceded that it still holds the field as it has not been suspended. However, the learned counsel for the Petitioner submitted a copy of the order dated 04.02.2021 passed by the Appellate Tribunal Inland Revenue wherein it has been noted that the Honorable Supreme Court vide Order dated 16.01.2020 directed the FBR/Deputy Commissioner Inland Revenue to complete assessment proceedings of Messrs Hongkong Huihua Global Technology Limited after providing opportunity of being heard to the taxpayer. The matter came up before the Tribunal as a result of such proceedings who came to the conclusion that the offshore supply part of the income is not taxable in Pakistan being foreign source income and that signing of single contract does not provide jurisdiction to the Respondent No. 4 to tax foreign source income in Pakistan. He also submitted that undertaking was given on 24.07.2015 whereas order passed on 30.06.2016 and as such could not constitute a new finding that would allow re-opening of case; that no show cause notice was received by the Petitioner prior to the issuance of the Impugned Order I; that the Double Taxation Treaty does not require evidence of payment of tax abroad and even otherwise no demand to show payment outside of Pakistan was made by the Respondents; that writ petition is maintainable as re-opening is *coram non judice*; that laches does not apply as latest order was passed in October, 2017 whereas writ petition was filed in January, 2018; that the Petitioner is already paying tax on income attributable to business in Pakistan.

9. Arguments advanced by learned counsel for the parties have been heard and record perused.

10. The contract between the Petitioner and OGDCL dated 26.06.2015 provides in its recital that OGDCL, as the owner & operator of various fields, is constructing a Gas Processing Facility at Kunnar Pasakhi Deep (KPD) field. For

this facility, various packages/equipment have been procured and are required to be procured. OGDCL invited bids for procurement (Supply) of various packages, equipment & material and construction (i.e. Civil works & buildings) installation and pre-commissioning, commissioning of various equipment & packages to be supplied by the contractor and free issued by OGDCL for KPD-TAY Integrated Development Project ("**PC-4**"). The contractor submitted its bids and through letter No. 26.06.2015, OGDCL communicated its intention to award the contract for procurement (Supply) of various packages, equipment & material and construction (i.e. Civil works & buildings) installation and pre-commissioning, commissioning of various equipment & packages for KPD-TAY Integrated Development Project (PC-4) and whereas the contractor has agreed to execute as per terms and conditions of the agreement.

11. The object of the contract as per clause 1.0 was procurement (Supply) of various packages, equipment & material and construction (i.e. Civil works & buildings) installation and pre-commissioning, commissioning of various equipment & packages to be supplied by the Contractor & free issued by OGDCL within the agreed Time Frame for Completion, in strict accordance with all the requirements of the Contract.

12. According to Clause 21.0 of the conditions of contract, the contract was for a fixed lump sum price for the given scope of work for supply, construction and BOQ. The total price of the supply part was provided as US $ 10,497,594.00 while the services part of contract was US $ 33.910.496/- aggregating to US $ 44,317,090.00. The Petitioner was to execute the woks at the site meaning PC-4 project. The project completion period was provided under clause 13.0 as six months from the date of establishment of fully irrevocable Letter of Credit for Supply and Services parts of the Contract executed between OGDCL and the Petitioner.

13. Keeping such facts and circumstances in mind, I now consider the definition of 'permanent establishment' as provided in Section 2(41) of the Ordinance which is reproduced herein below:

> *(41) **"permanent establishment"** in relation to a person, means a fixed place of business through which the business of the person is wholly or partly carried on, and includes--*
>
> *(a) a place of management, branch, office, factory or workshop, premises for soliciting orders, warehouse, permanent sales exhibition or sales*

outlet, other than a liaison office except where the office engages in the negotiation of contracts (other than contracts of purchase);

(b) a mine, oil or gas well, quarry or any other place of extraction of natural resources;

(ba) an agricultural, pastoral or forestry property;

(c) a building site, a construction, assembly or installation project or supervisory activities connected with such site or project but only where such site, project and its connected supervisory activities continue for a period or periods aggregating more than ninety days within any twelve-months period;

(d) the furnishing of services, including consultancy services, by any person through employees or other personnel engaged by the person for such purpose;

(e) a person acting in Pakistan on behalf of the person (hereinafter referred to as the "agent", other than an agent of independent status acting in the ordinary course of business as such, if the agent-

(i) has and habitually exercises an authority to conclude contracts on behalf of the other person;

(ii) has no such authority, but habitually maintains a stock-in-trade or other merchandise from which the agent regularly delivers goods or merchandise on behalf of the other person; or

(f) any substantial equipment installed, or other asset or property capable of activity giving rise to income. [Emphasis added].

14. It may be seen from the said definition of 'permanent establishment' that sub-section (c) thereof includes a building site, construction or installation project or supervisory activities connected with such site provided that the project continues for a period or periods aggregating for more than ninety days within any twelve-months period. The learned counsel for the Petitioner conceded that there is no requirement that the place as described in sub-section (c) of Section 2(41) of the Ordinance be owned by the non-resident. In view of the foregoing, the OGDCL site where the Petitioner was, *inter alia*, performing construction (i.e. civil works and building), installation services for a period of 6 months would, therefore, qualify as a 'permanent establishment' as per the definition provided in the Ordinance.

15. The contention of the learned counsel for the Petitioner before this Court that the payment by OGDCL to the Petitioner was not liable to deduction of tax without even the need to issue notice under Section 152(5) as the case falls under Section 152(7)(a) of the Ordinance without attracting sub-clauses (i) to (iv) of Section 152(7)(a) of the Ordinance was not raised before the Respondents and even otherwise has already been dispelled by this Court in strikingly similar

circumstances in the case of *Messrs Hongkong Huihua Global Technology Limited (Supra)*. As noted herein above, although a civil petition has been filed before the apex Court to challenge such ruling the same has not been suspended and is as such still in the field.

16. Having said that it is noted that no reference was made to the Double Taxation Treaty by the petitioner in the case of *Messrs Hongkong Huihua Global Technology Limited (Supra*) whereas the provisions of the Double Taxation Treaty have been pressed into service in the case before me therefore it is necessary for me to consider the same.

17. The record reflects that the Respondent No. 2 had concluded in its order dated 30-06-2016 that such payments are exempted under Article 7 of the Double Taxation Treaty for the Tax Year 2016 based on which the Respondent No. 3 had initially also exempted the payment in the Tax Year 2017 vide Order dated 06-09-2016.

18. Nevertheless, vide the Impugned Order I the Respondent No. 3 decided to cancel the exemption granted through the order dated 06.09.2016 and concluded that the payment made by OGDCL to the Petitioner in relation to the Offshore Supplies portion of the contract constitutes attributable profits of the permanent establishment of the non-resident Petitioner in Pakistan in terms of Article 7 of the Double Taxation Treaty read with section 101(3) of the Ordinance, hence chargeable to tax, which was upheld vide the Impugned Order II passed by the Respondent No. 2. While the Respondents claim that a show cause notice was served upon the Petitioner prior to the passage of the Impugned Order I, receipt of it is denied by the Petitioner. It has been highlighted that no date or number of such show cause notice was provided nor was receipt otherwise established.

19. It was also contended that no new facts arose or have been highlighted in the absence of which the Respondent No. 3 had no right to reopen the matter and cancel the exemption already granted. The learned counsel for the Respondents was unable to show any new circumstances that arose which could be the basis for the reopening of the matter and for cancellation of the exemption granted by the Respondent No. 3 vide order dated 06.09.2016 for the Tax Year 2017 vide the Impugned Order I. He argued that contrary to the undertaking given by the Petitioner, the Respondents had new evidence that the Petitioner does indeed have a 'permanent establishment' in Pakistan. However, perusal of the Order dated

30.06.2016 through which exemption was granted for the Tax Year 2016 by the Respondent No. 2 shows that existence of a permanent establishment of Pakistan was already in the knowledge of the Respondents yet the conclusion reached was that the payment received outside Pakistan for supply of machinery/equipment outside Pakistan cannot be attributed to the permanent establishment in Pakistan and is to be taken as exempt under Article 7 of the Double Taxation Treaty. The exemption initially granted by the Respondent No. 3 vide Order dated 06.09.2016 for the Tax Year 2017 was also on the basis of such conclusion reached in the previous year. Therefore, it cannot be said that knowledge of the permanent establishment of the Petitioner in Pakistan constituted "new evidence" which gave the Respondents the right to reopen the matter and cancel the exemption granted earlier vide Order dated 06.09.2016.

20. On merits, the focus of the arguments submitted by the learned counsel for the Petitioner against the Impugned Orders was that even if the Petitioner was found to have a 'permanent establishment' in Pakistan the profit of business which is not attributable to such permanent establishment is not be liable to taxation in Pakistan under the Double Taxation Treaty. He submitted that goods were supplied outside of Pakistan and payment for the goods supplied under the Contract was received outside of Pakistan and as such not attributable to the permanent establishment in Pakistan therefore not liable to tax in Pakistan.

21. On the other hand the learned counsel for the Respondents defended the findings of the Respondents No.2 & 3 vide the Impugned Orders that since the contract between the Petitioner and OGDCL is a 'composite contract" irrespective of where and how the payment is made it remains a payment for one contract and it cannot be split up between services and supply portion. The perusal of the Impugned Order I shows that reliance has been made on commentary on paragraph 2 of Article 7 of the Double Taxation Treaty particularly paragraphs 20 and 21 which prescribe a *"factual and functional analysis"* to be conducted in order to determine the attribution of profits to a permanent establishment. Before going further it is important to consider the significance of such commentary in respect of which I would like to quote the following from the judgment passed by the Honorable Sindh High Court at Karachi in the case of *A.P. Moller Maersk Vs. The Commissioner Inland Revenue,* 2020 PTD 1614:

> *9. The* ***Organization for Economic Cooperation and Development is defined****, in Judicial Interpretation of Tax Treaties, by Carlo Garbarino and*

published by Edward Elgar Publishing Limited United Kingdom, ***as a forum where governments can compare policy experiences, seek answers to common problems, identify good practices and work to coordinate domestic and international policies.*** *OECD reportedly works with governments to understand what drives economic, social and environmental changes and measures productivity and global flows of trade and investment. In addition thereto the OECD prescribes international standards on a wide range of things, from agriculture inclusive without limitation and tax. Garbarino writes that* ***model conventions and commentaries are released by the OECD from time to time and the said model has become the standard of reference of application of bilateral treaties. The reach of the OECD framework is described by the author as having extended beyond the OECD area, as it is employed as a basic document of reference in negotiations between member and non-member countries and also between non-member countries.***

…….

It is imperative to record at this juncture that the ATIR Order expressly recognizes the category of income ancillary to profits from operation of ships in international traffic, categorizing the heads of CDC, CSC and THC therein, and furthermore that it is not the case of the respondent tax department that CDC, CSC and THC have not been recognized as a part of receipts from the operation of ships in international traffic by OECD, ***however, it is the respondent's case that OECD guidelines are inapplicable in Pakistan. The question that follows now is whether the OECD model has been accorded judicial recognition in Pakistan.***

10. The learned counsel for the applicants had relied ***upon a Division Bench Judgment of this Court in A.P. Moller v. Taxation Officer of Income Tax and another reported as 2012 PTD 1460 ("AP Moller"), upheld by the honorable Supreme Court in A.P. Moller v. Commissioner of Income Tax, Zone I, Karachi and another reported as 2012 SCMR 557 ("AP Moller II"), in order to bulwark his argument that the OECD guidelines were given due judicial recognition in Pakistan.*** *Surprisingly, the learned counsel for the respondent also relied upon the same judgment in augmentation of the contrary argument of the tax department.*

Munib Akhtar, J authored AP Moller and his articulation pertinent to the present controversy is reproduced herein below:

> *"……However, before examining the relevant provisions of the DTAs in detail, it is important to consider, in general, the nature of such agreements, and the principles involved in interpreting and applying them.*
>
> *……*
>
> *34. In our view, the foregoing extracts lay down the relevant principles and the correct approach to be taken while interpreting and applying a double taxation agreement. Two more points need to be made.* ***Firstly, the Organization for Economic Cooperation and Development (OECD) has, since 1963, developed a model double taxation treaty or conviction ("the OECD Model"), which has been regularly updated and suitable redrafted since its first publication.*** *Since 1980, the United Nations has also published a model double taxation treaty ("the UN Model"), which is designed specifically with developing countries in mind. The UN Model is based largely on the OECD Model.* ***Along with the OECD Model, the OECD also publishes (and regularly updates) a commentary ("the OECD Commentary"),***

> ***which is regarded as an authoritative guide to the model*** *(the extract quoted in para 31 supra is taken from the Commentary). The United Nations has also published a commentary on the UN Model ("the UN Commentary") which relies heavily on the OECD Commentary.* ***In at least some jurisdictions, the courts have specifically held that the OECD Commentary may be referred to while interpreting DTAs which are based on the OECD Model.*** *(See Nabil Orow, op. cit., pp. 94-95, and especially Thiel v Federal Commissioner of Taxation (1990) HCA 37; (1990) 171 CLR 338, referred to therein. See also, e.g., National Westminster Bank, PLC v. United States (2008) 512 F.3d 1347 (US Court of Appeals, Federal Circuit), where an earlier version of the Commentary was considered and relied on.) Obviously, this also applies in the case of those DTAs which are based on the UN Model. Almost all modern treaties follow these models, and this is true of the Danish DTA and the French DTA.* ***In interpreting and applying these DTAs therefore, reference can usefully be made to the OECD and UN Models*** *and the commentaries on these models. (The UN Commentary can be found at: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan002084.pdf)...*
>
> *(Underline added for emphasis)*
>
> ***It is apparent from the foregoing that the OECD guidelines, including the commentary with respect to Article 8 relied upon by the applicants, have been accepted by an earlier Division bench of this Court for reference while interpreting double taxation treaties. It is also manifest that the judgment referred to supra was also maintained by the honorable Supreme Court*** *in AP Moller II, wherein it was held that the treatment given by the learned High Court to the questions raised in the reference applications appears to be correct and thus merits no interference.* ***We are bound by the ratio expounded by the earlier Division Bench of this Court (upheld by the honorable Supreme Court), hence, maintain that the OECD guidelines and commentary are an appropriate tool to employ in the interpretation of double taxation treaties and agreements.*** *"* [Emphasis added].

22. As may be seen from the above excerpt, OECD guidelines and commentary are regarded as a relevant tool to employ in the interpretation of double taxation treaties and agreements. However, the learned counsel for the Respondents failed to identify any part of the commentary which would support the findings contained in the Impugned Orders I and II regarding composite contracts. The examination of the OECD commentary pertaining to paragraph 2 of Article 7 of the Double Taxation Treaty particularly paragraphs 20 and 21 relied upon in the Impugned Order I indicates that for the *"factual and functional analysis"* accounting records and contemporaneous documentation may serve as a useful starting point for purposes of attribution of profits to a permanent establishment. However, the Impugned Orders do not contain any analysis of the accounting records of the Petitioner or any other documentation other than the contract between the

Petitioner and OGDCL itself. There is no evidence that imports were made in the name of the permanent establishment in Pakistan or invoices raised by the same.

23. In fact it is undisputed that the supply was made outside Pakistan. The Respondents do not appear to have considered paragraphs 24 and 25 of the commentary on paragraph 2 of Article 7 of the Double Taxation Treaty according to which where goods are supplied by another part of the enterprise, the profits arising from that supply do not arise from activities carried on through the permanent establishment and are not attributable to it.

24. The issue of composite agreement came up in the case of *Ishikawajma-Harima Heavy Industries Ltd. Vs. Director of Income Tax, Mumbai,* AIR 2007 SC 929, wherein the Supreme Court of India held that the principle of apportionment can be applied to determine which fiscal jurisdiction can tax which part of the transaction as follows:

> *"47. In cases such as this, where different severable parts of the composite contract is performed in different places, the principle of apportionment can be applied, determine which fiscal jurisdiction can tax that particular part of the transaction. This principle helps determine, where the territorial jurisdiction of a particular state lies, to determine its capacity to tax an event. Applying it to composite transactions which have taxability of various operations some operations in one territory and some in others, is essential to determine the taxability of various operations.*
>
> *It is, therefore, in our opinion, the concepts profits of business connection and permanent establishment should not be mixed up. Whereas business connection is relevant for the purpose of application of Section 9; the concept of permanent establishment is relevant for assessing the income of a non-resident under the DTAA. There, however, may be a case where there can be over-lapping of income; but we are not concerned with such a situation.* ***The entire transaction having been completed on the high seas, the profits on sale did not arise in India, as has been contended by the appellant. Thus, having been excluded from the scope of taxation under the Act, the application of the double taxation treaty would not arise.*** *Double Tax Treaty, however, was taken recourse to by Appellant only by way of an alternate submission' on income from services and not in relation to the tax of offshore supply of goods."* [Emphasis added].

25. In short there is no dispute that supply of machinery/equipment was made outside Pakistan and title thereof also transferred outside Pakistan. In such circumstances, based on the foregoing discussion, in my opinion, the profit arising from the said transaction is not attributable to the Petitioner's permanent establishment in Pakistan and as such would be exempt under Article 7 of the Double Taxation Treaty. The findings of the Respondents No. 2 and 3 in the Impugned Orders are against the provisions of the Double Taxation Treaty and as such are not sustainable apart from the fact that in the circumstances of the instant

case the Respondents had no power to cancel the exemption already granted by earlier order.

26. For all the foregoing reasons, I find that there was no justification for canceling the exemption granted vide order dated 06.09.2017 vide the Impugned Order I or for upholding the same by Impugned Order II and as such both the Impugned Orders dated 30.06.2017and 05.10.2017 are hereby set-aside.

27. Instant petition is **allowed**.

(SAMAN RAFAT IMTIAZ)
JUDGE

JUNAID