

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

W.P.No.3448/2017

M/s Hongkong Huihua Global Technology Ltd.

**Versus**

Federation of Pakistan through Secretary Ministry of Finance,  
Revenue Division and others

<b>Date of Hearing:</b>	27.09.2019
<b>Petitioner by:</b>	Mr. Salman Akram Raja, Advocate Malik Ghulam Sabir, Advocate and Barrister Asad Ladha.
<b>Respondents by:</b>	Barrister Umer Aslam Khan, for respondents No.2 to 4. Mr. Nadeem Hassan, Advocate for respondent No.5. Mr. Muhammad Faheem, Deputy Commissioner (IR), LTU, Islamabad.

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**MIANGUL HASSAN AURANGZEB, J:-** Through the instant writ petition, the petitioner, M/s Hongkong Huihua Global Technology Limited, impugns: (i) the order dated 14.06.2017 passed by respondent No.3 (Commissioner Inland Revenue, Zone-III, Large Taxpayer Unit, Islamabad), whereby the petitioner's application for tax exemption was dismissed under Section 152(5) of the Income Tax Ordinance, 2001 ("the 2001 Ordinance"); and (ii) the order dated 02.10.2017 passed by respondent No.2 (Chief Commissioner Inland Revenue, Large Taxpayer Unit, Islamabad) whereby the petitioner's revision application and application for grant of stay filed under Section 122B of the 2001 Ordinance against the order dated 14.06.2017 was also turned down. Furthermore, the petitioner prays for a direction to the respondents to allow its application for exemption from the payment of tax pursuant to Section 152(5) of the 2001 Ordinance. The petitioner also seeks a direction to respondent No.5 (Oil and Gas Development Company Limited) to release payments for the foreign supplies made by the petitioner without deduction of income tax.

2. The facts essential for the disposal of this petition are that on 16.11.2015, respondent No.5 awarded a contract for Engineering, Procurement, Construction and Commissioning

(“E.P.C.C.”) of NASHPA Gas Processing, LPG Recovery Plant and Allied Facilities (“the Contract”) to the petitioner. The Contract price was agreed to be US Dollars 1,48,000,000/-. The petitioner is based in Hongkong and is a wholly owned subsidiary of M/s China Oil HBP Science and Technology Corporation Ltd. After the award of the Contract, the petitioner is said to have established a branch office in Pakistan. The Contract had the following two components:-

- i. Offshore supply of goods in the shape of import of Equipment, bulk material items and consumables settled at lump sum price of US Dollars 110,206,922.95;*
- ii. Local Supply of Services (including foreign services) amounting to US Dollars 37,793,077.05.*

3. The payment for offshore supplies was to be made through a Letter of Credit (“L/C”) which was established by respondent No.5 and payment was to be remitted outside Pakistan against such supplies. All import duties and taxes were to be borne by respondent No.5 and title in the goods was to be transferred outside Pakistan.

4. On 30.05.2016, respondent No.5 filed an application before respondent No.3 for making payment to the petitioner without the deduction of Income Tax under Section 152(5) of the 2001 Ordinance. The exemption from the deduction of Income Tax had been sought only with respect to payments for the offshore supply component of the Contract. Vide order dated 18.06.2016, respondent No.3 dismissed the said application. The said order dated 18.06.2016 was assailed by respondent No.5 in a revision petition under Section 122B of the 2001 Ordinance before respondent No.2. Vide order dated 02.09.2016, the said revision petition was allowed and respondent No.3’s said order dated 18.06.2016 was set-aside. The matter was remanded to respondent No.3 with the direction to consider the same in view of the observations in the said order dated 02.09.2016.

5. Vide order dated 15.11.2016, respondent No.3 once again rejected respondent No.5’s application for exemption for the payment of Income Tax on the payments to the petitioner for the offshore component of the Contract i.e. US Dollars

1,10,206,922.95. Respondent No.5 did not file a revision petition against the said order dated 15.11.2016. However, the petitioner's revision petition against the said order was allowed by respondent No.2 vide order dated 25.04.2017. The operative portion of the said order, dated 25.04.2017, is reproduced herein below:-

*"In the instant case, admittedly payment of offshore supplies is made outside Pakistan through foreign L/c so application of section 152(2A) on the offshore supplies is incorrect. Offshore supplies are imports in the name of OGDCL under CFR arrangement [supported by import documents] and payments of said supplies are being made under foreign letters of credit. So it is foreign source income and such foreign source income is outside the scope defined in section 11(6) of the Ordinance. I therefore set aside the order of CIR for rejection of exemption on the offshore supply component [US \$ 110M], keeping in view the above facts and circumstances.*

*The instant Revision Application stands disposed off in the manner and to the extent mentioned above. This Order consists of 05 pages and each page bears my signature."*

6. The said order dated 25.04.2017 was not assailed by the income tax authorities. After the passing of the said order, the petitioner, on 03.05.2017, applied to respondent No.3 for the issuance of an exemption for the payment of Income Tax with respect to the payments made to it by respondent No.5 regarding the offshore supply component of the Contract.

7. Apparently, vide letter dated 04.05.2017, respondent No.3 sought a clarification from respondent No.2 on whether upon the setting aside of respondent No.3's order dated 15.11.2016, the matter was remanded to respondent No.3 for a *denovo* consideration of the application for exemption. In the said letter, respondent No.3 had opined that upon the setting-aside of its order dated 15.11.2016, the matter had stood remanded to respondent No.3 for a *denovo* consideration of the application for exemption. Respondent No.2, vide letter dated 09.05.2017, agreed with respondent No.3's opinion and clarified that he had not granted an exemption to the taxpayer. Furthermore, respondent No.2 directed respondent No.3 to take-up the application for exemption afresh and take a decision thereon. It may be mentioned that neither the petitioner nor respondent No.5

was associated in the said communication process between respondent No.2 and respondent No.3.

8. Vide order dated 14.06.2017, respondent No.3 rejected the petitioner's said application. On 24.06.2017, the petitioner filed a revision petition against the said order before respondent No.2. Vide order dated 02.10.2017, respondent No.2 dismissed the said revision petition and concurred with respondent No.3 by holding that the payment of US Dollars 110,206,922.95 to be made by respondent No.5 to the petitioner would "*constitute profit of the 'Permanent Establishment' in Pakistan hence chargeable to tax under Section 101(3) read with 152(2A)(iii) of the 2001 Ordinance.*" Respondent No.5 was directed to withhold tax as per the prescribed rate while making the payment of US Dollars 1,10,206,922.95 to the petitioner. Furthermore, respondent No.5 was directed to make payment to the petitioner "*after deduction of due withholding taxes and duties*". Respondent No.3's said order dated 14.06.2017 and respondent No.2's said order dated 02.10.2017 have been assailed by the petitioner in the instant writ petition.

9. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that after the passing of respondent No.2's revisional order dated 25.04.2017, respondent No.3 had become *functus officio*; that respondent No.3 could not have passed an order in derogation of respondent No.2's findings in the said order dated 25.04.2017; that after respondent No.2's said order dated 25.04.2017, the only thing left for respondent No.3 was to grant an exemption certificate to the petitioner; that respondent No.2's said order dated 25.04.2017 was not a remand order and did not contain any direction to respondent No.3 to re-hear the matter; that with the passing of the said order dated 25.04.2017, the matter became a past and closed transaction, and therefore all orders passed subsequent to the said order were *void ab-initio* and *coram-non-judice*; that respondent No.2's said order dated 25.04.2017 had attained finality since the same had not been challenged by the department; that the internal communication between respondent

No.2 and respondent No.3 constituted gross misconduct on the part of both the officers and was intended to bypass the statutory hierarchy and the laws of limitation; and that this was a *malafide* process in which the petitioner was not associated.

10. Learned counsel for the petitioner further submitted that the Contract executed between the petitioner and respondent No.5 was not an indivisible composite Contract; that the said Contract had been bifurcated into two distinct parts comprising of foreign supplies and local services; that payment for each part had to be made under a separate Letter of Credit and the payment terms for each part were different; that the amendment made in Sections 101 and 152 of the 2001 Ordinance through the Finance Act, 2018 are not clarificatory in nature, but set out a different and new legal position; that the amended Sections 101 and 152 of the 2001 Ordinance cannot be made retrospectively applicable to the petitioner's case; that prior to the said amendments, the import of foreign goods, payment for which was made outside Pakistan and the title in such goods passed to the purchaser outside Pakistan, fell outside the ambit of Sections 101(3) and (14) as well as Section 152 of the 2001 Ordinance inasmuch as they did not constitute Pakistan-source income of the petitioner; that the said amendments were brought about in order to bring such foreign supplies within the ambit of the 2001 Ordinance; that clause 11.1 of the Contract provides that all machinery, equipment, materials, spare parts, components, apparatus, accessories and articles and all other items which respondent No.5 had paid, for shall at all material times remain the property of respondent No.5; that insurance of goods is generally the responsibility of the person who possesses the title to the goods; that under the Contract, marine insurance on imported systems and packages was to be arranged by respondent No.5; that under the Contract, the goods were to be supplied on C.F.R. basis under which title to the goods passes to the purchaser upon the goods being loaded on to the ship at the port of loading; that the Bill of Lading with respect to the imported goods was passed on to respondent No.5 outside Pakistan; that Section 152(2A) of the 2001 Ordinance prior to its

amendment by the Finance Act, 2018 was not applicable to the petitioner as the same applied only if payment has to be made to a permanent establishment in Pakistan; and that no payment has been received by the petitioner's permanent establishment in relation to the foreign supply portion of the Contract as all monies with respect to the same have been received outside Pakistan through a foreign Letter of Credit. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein. In making his submissions, learned counsel for the petitioner placed reliance in the cases of Cress LPG (Pvt.) Ltd. through Authorized Representative Vs. M.T. Maria III through Master/Chief Engineer/ Chief Officer and others (2018 CLD 972), Tahir Zaman Vs. Jin Wei (M) SDN BHD and others (2004 CLD 603), Commissioner, Sindh Employees Social Securities Institution and another Vs. Messrs E.M. Oil Mills and Industries Ltd., S.I.T.E., Karachi and 2 others (2002 SCMR 39), Quetta Textile Mills Vs. Pakistan through Secretary, Ministry of Finance (2000 YLR 2683), Federation of Pakistan through Ministry of Finance and others Vs. M/s. Noori Trading Corporation (Private) Limited and 14 others (1992 SCMR 710), Pir Bakhsh Vs. Chairman, Allotment Committee (PLD 1987 SC 145), Ishikawajima Harima Heavy Industries Limited Vs. Director of Income Tax, Mumbai (AIR 2007 SC 929), Linde AG, Linde Engineering Division and another Vs. Deputy Director of Income Tax (2014 Indlaw DEL 1504, [2014] 365 ITR 1), and Rameshwar Prasad Etc. Vs. State of Uttar Pradesh & Others (AIR 1983 SC 75).

11. On the other hand, learned counsel for respondents No.2 and 3 submitted that respondent No.3 passed the impugned order dated 14.06.2017 after obtaining a clarification from respondent No.2; that the latter had, vide order dated 25.04.2017, remanded the matter to respondent No.3; and that respondent No.2 had also clarified that he had neither granted any exemption to the petitioner nor directed respondent No.3 to grant an exemption. Learned counsel for respondents No.2 and 3 further submitted that respondent No.5 had awarded the Contract to the petitioner on E.P.C.C. basis; that all aspects of the Contract i.e. from the

purchase and supply of the equipment to its installation and construction were an indivisible whole; that the cumulative reading of clauses 1.0, 11.1 and 22.0 of the Contract shows that the contract between the petitioner and respondent No.5 was a single composite contract which involved activities such as supply of the equipment and its installation at the NASHPA Gas Processing, LPG Recovery Plant and allied facilities; that clause 25.5 of the Contract obligated respondent No.5 to deduct from the payments due to the petitioner against the entire Contract value, including supplies and/or services, Income Tax/Sales Tax at source at the rates prevailing from time to time; that all payments made by respondent No.5 to the petitioner came within the meaning of Pakistan-source income under Section 101(3) of the 2001 Ordinance; that since the Contract was made between the petitioner (who is a non-resident) and respondent No.5, tax is liable to be deducted from the gross amount paid under the Contract in accordance with Section 101(3) of the 2001 Ordinance; that since the equipment i.e. NASHPA LPG Recovery Plant and its allied equipment had to be installed and operated in Pakistan, hence the same was liable to taxation under the laws of Pakistan; that by virtue of Section 2(41)(c) and Section 101(3) read with Section 152(2A)(iii) of the 2001 Ordinance, the petitioner has a permanent establishment in Pakistan and is, therefore, liable to taxation under the laws of Pakistan; that all activities undertaken by the petitioner in furtherance of its obligations under the Contract are taxable in Pakistan in terms of Section 101(3) of the 2001 Ordinance; and that all payments made by respondent No.5 under the Contract to the petitioner are subject to taxation under Section 152(2A) of the 2001 Ordinance. Learned counsel for respondents No.2 and 3 further submitted that since the orders impugned in the instant petition do not suffer from any jurisdictional infirmity, the instant petition is liable to be dismissed.

12. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition

have been set out in sufficient detail in paragraphs 2 to 8 above and need not be recapitulated.

13. The Contract was awarded to the petitioner after a tender bidding process. It is an admitted position that the petitioner and respondent No.5 have not entered into two separate contracts, one for the supply of equipment from abroad for which payment had to be made through a Letter of Credit in a foreign country, and the other for the local supplies and services. The Contract is an E.P.C.C. contract and its components include the procurement of equipment from abroad as well as the installation of that equipment in NASHPA LPG Recovery Plant and its allied facilities.

14. The Contract price of US Dollars 1,48,000,000 for the Gas Processing, LPG Recovery Plant and allied supplies at NASHPA is clearly mentioned in clause 22.0 of the Contract. In the said clause, it is clearly stated that *“the Contract shall be on E.P.C.C. basis with fixed lumpsum price.”* Clause 22.1 of the Contract provides that a foreign currency component of US Dollars 1,10,206,922.95 for supplies of equipment from abroad and US Dollars 37,793,077.05 for foreign services. The Contract also provides for a local currency component. The mere fact that there is a provision of a foreign currency component in the Contract does not make the said component severable from the rest of the Contract. It is an admitted position that in the bidding process, the petitioner did not bid separately for the component of the Contract with respect to supplies from abroad.

15. Section 152(2A) of the 2001 Ordinance provides that every prescribed person making a payment in full or part including a payment by way of advance to a permanent establishment in Pakistan of a non-resident person: (i) for the sale of goods; (ii) for the rendering of or providing services; and (iii) on the execution of a contract, other than a contract for the sale of goods or the rendering of or providing services, shall, at the time of making the payment, deduct tax from the gross amount payable (including sales tax, if any) at the rate specified in Division II of Part III of the First Schedule 6.



16. Now, Section 2(41)(c) of the 2001 Ordinance defines a *“permanent establishment”* in relation to a person as a fixed place of business through which the business of the person is wholly or partly carried on, and includes 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-month period.

17. The Contract executed between the petitioner and respondent No.5 admittedly includes construction at the NASHPA Gas Field. The commissioning of the NASHPA Gas Processing, LPG Recovery Plant and its allied facilities includes the process of assembly and installation of the equipment whether procured locally or imported. It is also not disputed that such a process of assembly and installation required the supervision of the petitioner at the site of the said project. Clause 14 of the Contract provides a completion period of seventeen months. After taking all these factors into account, I am of the view that the petitioner, who is a non-resident person, has a permanent establishment in Pakistan, and therefore respondent No.5, while making payment of the Contract price (whether for local supplies or for the supply of equipment from abroad) shall at the time of making payment deduct tax from the gross amount payable in accordance with Section 152(2A) of the 2001 Ordinance.

18. As mentioned above, on 30.05.2016, respondent No.5 filed an application under Section 152(5) of the 2001 Ordinance before respondent No.3 for making payment to the petitioner without the deduction of Income Tax only with respect to payments for the offshore supply component of the Contract. Section 152(5) of the 2001 Ordinance provides that where a person intends to make a payment to a non-resident person without deduction of tax under this section, other than payments liable to reduce rate under relevant agreement for avoidance of double taxation, the person shall, before making the payment, furnish to the Commissioner a notice in writing setting out (a) the name and address of the non-

resident person; and (b) the nature and amount of payment. Section 152(7) of the 2001 Ordinance provides that Section 152(5) 2001 Ordinance shall not apply to a payment on account of *inter-alia* an import of goods where the title to the goods passes outside Pakistan and is supported by import documents except an import that is part of an overall arrangement for the supply of goods, their installation, and any commission and guarantees in respect of the supply where: (i) the supply is made by the head office outside Pakistan of a person to a permanent establishment of a person in Pakistan; (ii) the supply is made by a permanent establishment of the person outside Pakistan to a permanent establishment of the person in Pakistan; (iii) the supply is made between associates; and (iv) the supply is made by a resident person or a Pakistan permanent establishment of a non-resident person.

19. Having gone through Section 152(7) of the 2001 Ordinance, I am of the view that the petitioner's case does not fall in any of the scenarios envisaged by Section 152(7)(a)(i) to (iv) of the said Ordinance. In the case at hand, the supply of equipment from abroad was made to respondent No.5. This was repeatedly stated by the learned counsel for the petitioner and he had emphasized that the title to the goods had passed to respondent No.5 outside Pakistan. Accepting this argument of the learned counsel for the petitioner, it cannot be said that the supplies were made by the head office outside Pakistan of a person to a permanent establishment of the person in Pakistan. Therefore, Section 152(7)(a)(i) of the 2001 Ordinance does not apply to the instant case. Respondent No.5 is certainly not the petitioner's permanent establishment in Pakistan. Again, since the supply was made to respondent No.5 and not to a permanent establishment of the person making supplies, Section 152(7)(a)(ii) of the 2001 Ordinance would also not apply. It is an admitted position that the supply was not made between associates and it was also not made by a resident person or a Pakistan permanent establishment of a non-resident person. Consequently, Section 152(7)(a)(iii) and (iv) of the 2001 Ordinance would also not apply in the instant case.

The matter pertaining to the supply of equipment from abroad by the petitioner to respondent No.5 in furtherance of the Contract for which payment was made through a Letter of Credit in a foreign country did not fall in any of the exceptions enumerated in Section 152(7)(a)(i) to (iv) of the 2001 Ordinance. Hence, I am of the view that the petitioner's application for exemption from deduction of tax under Section 152(5) of the 2001 Ordinance was correctly turned down by respondent No.3.

20. Section 11(6) of the 2001 Ordinance provides that the income of a non-resident person under a head of income shall be computed by taking into account only amounts that are Pakistan-source income. Section 101(3) of the 2001 Ordinance provides *inter-alia* that business income of a non-resident person shall be Pakistan-source income to the extent to which it is directly or indirectly attributable to a permanent establishment of a non-resident person in Pakistan, and any business connection in Pakistan. I have already held that the petitioner has a permanent establishment in Pakistan in terms of Section 2(41)(c) of the 2001 Ordinance. The payments were made by respondent No.5 with respect to an E.P.C.C. contract to be executed in Pakistan. Additionally, as mentioned above, the petitioner made supplies of equipment from abroad in furtherance of its obligations under the E.P.C.C. contract. The petitioner's obligations under the said contract also included not just the installation of the said equipment but also its commissioning. The Contract was a lump sum contract. Therefore, the payments made to the petitioner under the Contract would be its Pakistan-source income. Therefore, the petitioner could not wash his hands of the imported equipment once the same was imported into Pakistan. The imported equipment was to be inspected and tested, and if upon such inspection or test, it failed to conform to the required specification, respondent No.5 could reject it and the petitioner would in such a case replace the rejected equipment or make alterations necessary for it to meet the required specification. This is explicitly provided in clause 36.3 of the Contract. But for the execution of the E.P.C.C. contract which does not sever or

bifurcate the petitioner's responsibilities regarding the supply of equipment from abroad from the other obligations of the petitioner under the Contract, the question of respondent No.5 making payment to the petitioner would not have arisen. Therefore, the payment made to the petitioner by respondent No.5 in pursuance of the provisions of the Contract is the petitioner's Pakistan-source income which is liable to taxation under Section 11(6) of the 2001 Ordinance. Additionally, clause 25.5 of the Contract provides as follows:-

*"The company shall have the right, as provided under the laws of Pakistan to meet its obligations and in particular to deduct from the payments due to the Contractor, (against entire contract value including supplies and/or services, components, as applicable) income tax/sales tax at source at the rates prevailing from time to time, from the invoiced amounts, or such reduced rates fixed by the taxation authorities for the Contractor on production of documentary evidence by the Contractor and pay such amount to appropriate authorities."*  
**(Emphasis added)**

21. The petitioner cannot wriggle out of its obligations under clause 25.5 of the Contract. Respondent No.5, after agreeing that it would deduct from the payments made to the petitioner against the "*entire contract value including supplies*" Income Tax at source, could not have applied to respondent No.5 for an exemption under Section 152(5) of the 2001 Ordinance. Clause 25.5 of the Contract does not provide that respondent No.5 would not deduct Income Tax from the payments with respect to the foreign currency component of the Contract or payments for the supply of equipment from abroad. If this Court were to hold that respondent No.5 ought not to deduct tax from such payments to the petitioner, it would amount to re-writing the Contract between the parties.

22. There is nothing on the record to show that the petitioner did pay tax in the Peoples Republic of China/Hong Kong for the supply of equipment to respondent No.5. No reference was made by the learned counsel for the petitioner to the Treaty for Avoidance of Double Taxation between the Governments of the Islamic Republic of Pakistan and the People's Republic of China. The factum as to the amendment made in Section 152(7) of the 2001

Ordinance through the Finance Act, 2018 does not place the petitioner's case on any better footing. The petitioner's rights are to be adjudicated in accordance with the law prevailing when the Contract was executed and when the supplies in question were made.

23. As regards the contention of the learned counsel for the petitioner that after the passing of respondent No.2's revisional order dated 25.04.2017, respondent No.3 could not have re-initiated the process for determining whether the payments made to the petitioner for the supply of equipment from abroad were exempt from the payment of tax under Section 152(5) of the 2001 Ordinance, suffice it to say that after the passing of respondent No.3's order dated 14.06.2017, respondent No.2, who had earlier passed the order dated 25.04.2017 had, vide order dated 02.10.2017, concurred with respondent No.3's said order dated 14.06.2017. Respondent No.2 had also clarified that he had remanded the matter to respondent No.3. Respondent No.3 before proceeding with the matter had also obtained clarification from respondent No.2. Therefore, it is my view that the concurrent orders dated 14.06.2017 and 02.10.2017, passed by respondents No.3 and 2 respectively, do not suffer from any procedural impropriety.

24. In view of the above, I do not find any merit in this petition which is accordingly dismissed with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)  
JUDGE**

**ANNOUNCED IN AN OPEN COURT ON \_\_\_\_\_/2019**

**(JUDGE)**

**APPROVED FOR REPORTING**

*Qamar Khan\**

*Uploaded By : Engr. Umer Rasheed Dar*