

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

W.P.No.3056/2016

Teradata Ireland Limited, etc.

**Versus**

Federation of Pakistan through the Secretary, Finance and others

**Dates of Hearing:** 01.06.2020

**Petitioners by:** M/s Rashid Anwar and Awais Z. Sarki,  
Advocates

**Respondents by:** Mr. Bilal Babar, Advocate for respondents  
No.3 to 5  
Mr. Muhammad Nadeem Khan Khakwani,  
learned Assistant Attorney-General  
M/s Ahmed Shuja Khan, Commissioner,  
Inland Revenue, and Naveed Mukhtar,  
Additional Commissioner, Inland Revenue.

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**MIANGUL HASSAN AURANGZEB, J:-** Through the instant writ petition, petitioner No.1 (Teradata Ireland Limited, a company incorporated under the laws of Republic of Ireland “TD Ireland”) and petitioner No.2 (Teradata Pakistan (Pvt.) Limited, a company incorporated under the provisions of the erstwhile Companies Ordinance, 1984, “TD Pakistan”), both subsidiaries of Teradata Corporation U.S.A., impugn *inter alia* the notice dated 29.07.2016 issued by respondent No.3 (Deputy Commissioner, Inland Revenue), directing TD Ireland to obtain registration under the provisions of Income Tax Ordinance, 2001 (“the 2001 Ordinance”), Sales Tax Act, 1990 (“the 1990 Act”) and Federal Excise Act, 2005 (“the 2005 Act”) as a taxpayer in Pakistan and file its income tax returns under Section 114 of the 2001 Ordinance. The petitioners also challenge the order dated 15.09.2011 passed by respondent No.4 (Commissioner, Inland Revenue, Enforcement and Collection Division-Zone-III, Large Taxpayers Unit, Islamabad) dismissing TD Pakistan’s application for an exemption from deducting income tax from the payments made to TD Ireland under the amended and restated distribution agreement dated 01.10.2007 (“**distributorship agreement**”), and the order dated 30.06.2016 whereby respondent No.5

(Chief Commissioner Inland Revenue, Large Taxpayers Unit, Islamabad) dismissed the revision petition against the said order dated 15.09.2011. Furthermore, the petitioners seek a declaration to the effect that TD Pakistan is not a permanent establishment of TD Ireland in terms of the Convention between Ireland and Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (“Double Taxation Treaty”) and the provisions of the 2001 Ordinance. The Double Taxation Treaty was signed on 13.04.1973 and it came into force on 20.12.1974.

2. The facts essential for the disposal of this petition are that on 01.10.2007, the distribution agreement was executed between TD Ireland and TD Pakistan. Under the said agreement, TD Ireland authorized TD Pakistan to market, sell, and distribute Teradata Solutions in Pakistan. Pursuant to the said agreement, TD Pakistan wanted to make payments to TD Ireland.

3. On 19.07.2011, TD Pakistan’s Auditors applied to respondent No.4 to pass an order under Section 152(5A) of the 2001 Ordinance exempting petitioner No.2 from deducting tax from an amount of US \$ 9,146,506.68/- payable to TD Ireland under the said agreement for the period between 31.12.2007 to 31.12.2010. In the said application, it was clearly stated that TD Ireland does not have a permanent establishment in Pakistan in terms of Article III of the Double Taxation Treaty.

4. A glance at the said application shows that TD Pakistan was desirous to make the following payments to TD Ireland:-

| Serial       | Amount                         | Period     |
|--------------|--------------------------------|------------|
| 1            | US Dollars 5,930,734           | 31.12.2010 |
| 2            | US Dollars 1,624,190.68        | 31.12.2009 |
| 3            | US Dollars 1,420,887           | 31.12.2008 |
| 4            | US Dollars 170,695             | 31.12.2007 |
| <b>Total</b> | <b>US Dollars 9,146,506.68</b> |            |

5. After a scrutiny of the terms and conditions of the distributorship agreement, respondent No.4, vide order dated 15.09.2011, turned down TD Pakistan’s said application and directed it to withhold tax under Section 152(2) of the 2001 Ordinance from the payments to be made to TD Ireland. Furthermore, it was held that TD Pakistan has TD Ireland’s permanent establishment in Pakistan, and therefore, the income accruing to TD Ireland is taxable in Pakistan.

6. Aggrieved by the said order dated 15.09.2011, TD Pakistan preferred a revision petition under Section 122B of the 2001 Ordinance before respondent No.5 (Chief Commissioner Inland Revenue, Large Taxpayers Unit, Islamabad). Vide order dated 30.06.2016, the said revision petition was dismissed. In the said order it was held that TD Pakistan was TD Ireland's permanent establishment in Pakistan and that the income accruing to TD Ireland in Pakistan was taxable under Article II of the Double Taxation Treaty. Furthermore, specific reference was made to the clauses of the distribution agreement which led the revisional authority to hold that TD Pakistan was operating as an agent/distributor of TD Ireland.

7. After the dismissal of TD Pakistan's said revision petition, respondent No.3, vide the impugned notice dated 29.07.2016, directed TD Ireland to obtain registration under the provisions of the 2001 Ordinance, the 1990 Act and the 2005 Act from the Federal Board of Revenue ("F.B.R.") and to file its returns under Section 114 of the 2001 Ordinance.

8. In addition to seeking a declaration to the effect that TD Pakistan is not TD Ireland's permanent establishment in Pakistan, the petitioners impugn (i) the order dated 15.09.2011 passed by respondent No.4, (ii) the order dated 30.06.2016 passed by respondent No.5 and (iii) the notice dated 29.07.2016 issued by respondent No.3.

9. Learned counsel for the petitioners, after narrating the facts leading to the filing of the instant petition, submitted that although the petitioners (TD Ireland and TD Pakistan) are the subsidiaries of TD Corporation, U.S.A., they are separate legal entities and are conducting business at an arms' length under a commercially negotiated contract; that TD Ireland owns the right to sell TD Corporation U.S.A.'s software solutions consisting of hardware, software and professional services under the distribution agreement which became effective on 01.10.2007; that under the said agreement, TD Ireland sells such software solutions to TD Pakistan, which in turn, sells them to its customers in Pakistan; that TD Ireland has no direct involvement in the Pakistani market or the affairs of TD Pakistan; that there exists a simple sale of goods relationship between TD Ireland and TD Pakistan; that TD Pakistan is not TD Ireland's "*permanent establishment*" as defined in the Double Taxation Treaty and the 2001 Ordinance; that TD Pakistan is

the lawful owner of any hardware and software purchased from TD Ireland, and the former is free to deal with the purchased product in any manner it deems appropriate without any intervention from TD Ireland; that TD Ireland owns no property and maintains no inventory in Pakistan; that TD Pakistan conducts its business in Pakistan independently and is not answerable or subject to the control of TD Ireland; and that TD Pakistan has no authority to bind or to act on behalf of TD Ireland in Pakistan.

10. Learned counsel further submitted that no income tax was liable to be deducted or withheld from the payments made by the TD Pakistan to TD Ireland, which is a non-resident company, and is therefore, exempt from the payment of income tax under the provisions of the 2001 Ordinance read with Double Taxation Treaty; that TD Pakistan's application/notice dated 19.07.2011 filed before Commissioner Inland Revenue under Section 152(5) of the 2001 Ordinance intimating that it intended to make payment of US \$ 9,146,506.68 to TD Ireland under the distribution agreement, was unlawfully rejected vide order dated 15.09.2011; that TD Pakistan's revision petition against the said order was dismissed vide order dated 30.06.2016; that thereafter the intimation notice dated 29.07.2016 was sent to TD Ireland calling upon it to obtain registration and file income tax returns on the ground that it had a "*permanent establishment*" in Pakistan; and that the said notice is contrary to the provisions of the 2001 Ordinance as well as the Double Taxation Treaty.

11. It was also submitted that the distribution agreement is to be read as a whole and the Income Tax Authorities could not rely on selected provisions of the said agreement in order to hold that TD Pakistan is TD Ireland's permanent establishment in Pakistan; that the definition of "*permanent establishment*" in the Double Taxation Treaty has to be read with the specific facts of this case; that TD Pakistan is neither TD Ireland's permanent establishment nor an agent in Pakistan; that clause 4 of the distribution agreement explicitly gives TD Pakistan the non-exclusive right to market, sell and distribute the Teradata software solutions of TD Corporation, U.S.A. to TD Pakistan's customers in Pakistan; and that clause 4.1 of the said agreement provides that TD Ireland reserves the right to enter the territory of Pakistan to market, sell and distribute the Teradata software solutions, directly or indirectly

to customers, and to appoint other distributors, re-sellers, representatives and contractors within Pakistan.

12. Learned counsel for the petitioners also referred to other provisions of the distribution agreement to demonstrate that TD Pakistan in its business operations is independent from TD Ireland and is not its alter ego; that the income tax authorities erred by not appreciating that under the Double Taxation Treaty between Ireland and Pakistan, the business income of a resident of a contracting State can only be taxed in the contracting State in which the enterprise is residing; that the business income of TD Ireland is exempt from taxation in Pakistan and it can only be taxed in Ireland; that the only exception is when an enterprise is conducting business in the other country through a permanent establishment in which case any business income attributable to the permanent establishment is taxable in the country where the business is conducted; and that TD Pakistan could be considered as an independent agent and not as TD Ireland's permanent establishment in Pakistan.

13. Furthermore, it was submitted that during the pendency of TD Pakistan's revision petition against the Order-in-Original dated 15.09.2011, the Audit Branch of the Inland Revenue Department issued the show cause notice dated 17.12.2013 to TD Pakistan asserting that the latter was liable to pay excise duty on the payments made to TD Ireland on the ground that these payments were made on account of "*franchise services*"; that the proceedings pursuant to the said show cause notice culminated in the Order-in-Original dated 28.02.2014; that TD Pakistan's appeal against the said order was dismissed and a Federal Excise Reference No.01/2015 against the appellate order is pending adjudication before this Court; that vide order dated 14.01.2015, this Court restrained the Federal Excise Authorities from initiating proceedings against TD Pakistan; and that the Income Tax Authorities adopted contradictory positions by asserting on the one hand that TD Pakistan is TD Ireland's permanent establishment in Pakistan and on the other hand, holding that a relationship of franchisor and franchisee existed between the said parties. Learned counsel for the petitioners prayed for the writ petition to be allowed in terms of the relief sought therein.

14. On the other hand, learned counsel for the respondents submitted that TD Pakistan is not an aggrieved party since it has only been asked to withhold tax while making payments to TD Ireland; that no extra tax liability has been imposed on TD Pakistan; that whether TD Pakistan is the permanent establishment of TD Ireland is a complicated question of fact which cannot be determined in the Constitutional jurisdiction of this Court; that under Section 4 of the 2001 Ordinance, income tax can be charged from every person who has taxable income in Pakistan; that Section 11(6) of the 2001 Ordinance empowers the income tax authorities to take into account "*Pakistan-source income*" of a non-resident for computation of total income and taxable income; that under Section 101(3)(a) of the 2001 Ordinance, the business income of a non-resident person shall be Pakistan-source income to the extent of which it is directly or indirectly attributable to a permanent establishment of a non-resident person in Pakistan; that after TD Pakistan filed an application under Section 152(5) of the 2001 Ordinance seeking exemption from the deduction of withholding tax while making payment of US Dollars 9,146,506.68 to TD Ireland, TD Pakistan was asked vide letter dated 06.08.2011 to explain the nature of the payment along with documentary evidence; that after taking into consideration, TD Pakistan's response dated 16.08.2011, the said application was rejected vide order dated 15.09.2011; TD Pakistan's revision petition under Section 122B of the 2001 Ordinance was dismissed vide order dated 30.06.2016 on the ground that TD Pakistan is TD Ireland's permanent establishment in Pakistan in terms of Article II (1)(k) of the Double Taxation Treaty; that Article II(1)(k)(iii) provides that an enterprise of a contracting State shall be deemed to have a permanent establishment in the other contracting State if it has in that other contracting state an agent or employee who (a) has and habitually exercises a general authority to negotiate and conclude contracts on behalf of the enterprise, and (b) has in that other contracting State a stock of goods or merchandise from which he regularly fills orders on behalf of the enterprise; that clauses 4.5.5, 12.6, 12.7 of the distribution agreement read with its recital make it clear that TD Pakistan is TD Ireland's permanent establishment; that the mere fact that TD Ireland has been held to be TD Pakistan's franchiser under the provisions of the 2005 Act, did not estop respondents No.4 and 5 from holding that

TD Pakistan is TD Ireland's permanent establishment in Pakistan; that the petitioners have adopted a tax avoidance strategy known in the taxation parlance as 'Double Irish Dutch Sandwich' since Ireland is a low taxing jurisdiction. Learned counsel prayed for the writ petition to be dismissed.

15. 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.

16. The application dated 19.07.2011 submitted by TD Pakistan's auditors to respondent No.4 seeking exemption from the deduction of tax from the payments made or to be made to TD Ireland was based on Article III(1) of the Double Taxation Treaty which reads thus:-

*"The industrial or commercial profits of an enterprise of a Contracting State shall not be subject to tax in the other Contracting State unless the enterprise is engaged in trade or business in that other Contracting State through a permanent establishment situated therein. If it is so engaged, tax may be imposed on those profits by that other Contracting State, but only on so much of them as is attributable to that permanent establishment."*

17. The sole ground on which respondents No.4 and 5 concurrently rejected TD Pakistan's application to make payment of US Dollars 9,146,506.68 without the deduction of tax to TD Ireland was that TD Pakistan was TD Ireland's permanent establishment in Pakistan. This conclusion was arrived at on the basis of various clauses of the distributorship agreement read with Article II(1)(k) and Article II(1)(k)(iii) of the Double Taxation Treaty. The said Articles are reproduced herein below:-

**Article II (1) (k)**

*"The term "permanent establishment", when used with respect to an enterprise of a Contracting State, means a fixed place of business in which the business of the enterprise is wholly or partly carried on. It includes an office, a branch, a place of management, a factory, a workshop, a mine, a quarry or other place of natural resources subject to exploitation or a building site or construction or assembly project which exists for more than twelve months."*

**Article II (1) (k)(iii)**

*“An enterprise of a Contracting State shall be deemed to have a permanent establishment in the other Contracting State if it has in that other Contracting State an agent or employee who -*

*(a) has and habitually exercises a general authority to negotiate and conclude contracts on behalf of the enterprise;*

*(b) has in that other Contracting State a stock of goods or merchandise from which he regularly fills orders on behalf of the enterprise.”*

18. As mentioned above, it was from the provisions of the distributorship agreement that respondents No.4 and 5 discerned that TD Pakistan, as an agent or employee of TD Ireland, habitually exercises a general authority to negotiate and conclude contracts on behalf of TD Ireland and that TD Pakistan has in Pakistan a stock of goods or merchandise from which it regularly fills orders on behalf of TD Pakistan so as to treat TD Pakistan as TD Ireland's permanent establishment in Pakistan. In this regard, paragraphs 10 and 11 of the revisional order dated 30.06.2016 passed by respondent No.5 are reproduced herein below:-

*“10. According to the agreement between the two enterprises, Teradata Pakistan Ltd. does exercise general authority to negotiate and conclude contracts on behalf of Teradata Ireland Ltd., thereby fulfilling the condition stated at clause (a) para 8 above.*

*11. Furthermore, Teradata Ireland does have a stock of goods or merchandise in a form of hardware/software, which is regularly filled, as the agreement implies in clause (b) of para 8 above.”*

(Clauses (a) and (b) of para 8 is reference to the two paragraphs of Article II(1)(k) and Article II(1)(k)(iii) of the Double Taxation Treaty reproduced in paragraph 17 above).

19. The petitioners' stance is that the said findings do not take into account the import of clauses 9 and 19.3 of the distributorship agreement. The said clauses are reproduced herein below:-

*“9. Title, Risk of Loss & Rights to Use: Upon Delivery: title passes with respect to all delivered and sold aspects of the Teradata Solutions (e.g., purchased hardware); risk of loss passes for all delivered aspects of the Teradata Solutions; and acceptance of all delivered aspects of the Teradata Solutions occurs.”*

*“19.3 ...Except to the extent, if any, expressly set out in this Agreement, Distributor is not granted, and shall not exercise, the right or authority to assume or create any obligation or responsibility, including without limitation, contractual obligations and obligations based on representations, warranties, guarantees, on behalf of or in the name of Teradata-Ireland.”*



20. True, clause 19.2 of the distributorship agreement provides that TD Pakistan and TD Ireland are independent contractors to one another whereas Clause 19.3 provides that TD Pakistan shall not be considered as TD Ireland's agent or legal representative or employee, and that TD Pakistan cannot create any obligation or responsibility on behalf of TD Ireland. However, the latter clause is not absolute and contemplates certain exceptions. This is apparent from use of the term *"except to the extent expressly set out in this agreement"* employed in clause 19.3 of the distributorship agreement. Additionally, it is well settled that an agreement is to be interpreted by reading it as a whole. Reference in this regard may be made to the law laid down in the cases of Aurangzeb through L.Rs. Vs. Muhammad Jaffar (2007 SCMR 236), Raja Ali Shan Vs. Messrs Essem Hotel Limited (2007 SCMR 741), Abdur Razzaq Vs. Shah Jehan (1995 SCMR 1489), In the matter of Reference by the President of Pakistan (PLD 1957 SC 219), Dr. Abdul Hakim Abrash Vs. ACE Securities (Pvt.) Limited (2009 CLC 731), and Safiuddin Kazi Vs. Moslem Ali Howlader and others (PLD 1960 Dacca 555). In the case of Anwar ul Haq Vs. Federation of Pakistan (1995 SCMR 1505), it was *inter alia* held that in construing a document one has to read the same as a whole and not by picking and choosing a particular paragraph or portion thereof. If indeed after TD Ireland sells hardware and software to TD Pakistan and has no further involvement in the Pakistan market, there would be no reason for TD Ireland to control TD Pakistan's activity in Pakistan through the following provisions of the distributorship agreement:-

***"Clause 4.5.4.***

*"The business and other operations of Teradata-Ireland and/or Affiliates under this agreement, including the provision of Services to the Distributor and the supervision and direction of those performing those Services, shall be solely under the control, direction, and management of Teradata-Ireland (where the Services are performed by an employee of Teradata-Ireland) or the Affiliate (where the Services are performed by an employee of that Affiliate).*

***Clause 4.6.2.***

*"Distributor shall use its best efforts to aggressively promote the sales of Teradata Solutions within the Territory and shall use promotional materials, marketing strategies, and similar assistance provided by Teradata-Ireland. Distributor further agrees to advise Teradata-Ireland of any significant developments which impact or are reasonably expected to impact the marketing, selling, or servicing Teradata Solutions in the Territory."*

***Clause 4.6.6.***

*"Distributor shall provide prompt and effective Service, repair and/or replacement of Teradata Solutions in the Territory, whether or not the*

*Product was purchased from Distributor. Distributor may, however, request assistance with the provision of the Customer Support Services and Professional Services from Affiliates.”*

**Clause 4.6.13.**

*“Teradata-Ireland or its authorized Contractor(s) shall be permitted to examine and audit the books and records of Distributor kept pursuant to this Section, as well as such other records and accounts as may under recognized accounting practices contain information bearing upon the amounts payable to Teradata-Ireland under this Agreement. Any such audit shall be permitted by Distributor within fifteen (15) days after receipt of Teradata-Ireland’s written request, and shall take place during normal business hours at a place agreed upon by the Parties. Unless Teradata-Ireland deems it necessary because of unusual events or circumstances, such audits shall not occur more frequently than semi-annually. The cost of any such audit shall be borne by Teradata-Ireland. Prompt adjustments shall be made by the proper Party to compensate for any errors or omissions disclosed by such examination or audit. The right to examine and audit and the right to receive such adjustments are not waived by an statements to the contrary appearing on checks or otherwise, unless expressly waived in a letter signed by the Party having such right and delivered to the other Party.”*

**Clause 12.2**

*“The amounts paid by Distributor to Teradata-Ireland or Affiliates for Professional Services or Customer Support Services shall be based on Teradata-Ireland or Affiliates Services Costs, plus a mark-up. This mark-up shall be subject to periodic review and revision by Teradata-Ireland on arms’ – length principles, “Services Costs” include all employee costs, in cash or in kind (including stock based compensation), that, based on analysis of the facts and circumstances, are directly identified with the Professional Services or Customer Support Services.”*

**Clause 12.4**

*“The amounts paid by Distributor to Teradata-Ireland for Annuity Services shall be based on the revenues received by Distributor for Annuity Services less the amount of costs incurred by Distributor in providing those Annuity Services, including amounts paid to other Distributors, Affiliates, or Contractors for assistance with those Services, plus a mark-up. This mark-up shall be subject to periodic review and revision based on arms’ – length principles.”*

**Clause 12.6**

*“The parties shall revise and update, not less frequently than annually if deemed necessary by them, the above-referenced Hardware and Software pricing schedules and the above-referenced mark-ups as necessary so that the Distributor earns an Operating Margin for the Year which falls within a reasonable arms’ – length range based upon the applicable facts and circumstances with the intent that the Distributor function as a limited risk distributor and service provider in the Territory. Operating Margin is defined as “Operating Profit” before interest, income tax, and nonrecurring expenses as a percentage of total net sales of Teradata Solutions (including Hardware, Software, Services, Systems and Deliverables) to Customers in the Territory. “Operating Profit” is defined as total as total net sales minus: Teradata Solutions costs paid to Teradata-Ireland by Distributors; costs incurred by Distributor in selling, marketing, and distributing Teradata Solutions and providing Services directly to Customers; and, net costs incurred*

*by Distributor in receiving/providing Professional Services and Customer Support Services from/to other Distributors, Affiliates or Contractors, if any (i.e. fees paid by Distributor to other Distributors, Affiliates, or Contractors for their Services, minus fees received by Distributor from other Distributors, Affiliates, or Contractors for their Services). The reasonable arms' –length Operating Margin shall be determined periodically and be consistent with the arms' – length principles in light of the function, risks and assets employed by the respective Parties. The Parties may compute a range of reasonable Operating Margin consistent with the generally-accepted arms' length principle. Periodically, the Parties shall determine whether the Operating Margin of the Distributor is within the range of reasonable Operating Margins in light of applicable facts and circumstances and, if needed, may make pricing or mark-up adjustments such that Distributor earns an Operating Margin that falls within the reasonable arms' – length Operating Margin range."*

**Clause 13.1.**

*"Teradata-Ireland will invoice Distributor for Hardware and Software upon shipment of shipped Hardware and Software, at or near the beginning of the coverage period for Annuity Services when so agreed-upon by the Parties, periodically as the Services are performed and Deliverables are provided for other Services, and upon Delivery for other aspects of Teradata Solutions. Teradata-Ireland acknowledges that the final sale and distribution of the Teradata Solutions to Customers by Distributor may occur on dates subsequent to the applicable shipment, Delivery and/or invoicing by Teradata-Ireland to Distributor for the Teradata Solutions."*

**Clause 13.6.**

*"Teradata-Ireland may make acceptance of Orders, and its consent to Distributor's assignment of Orders to its Affiliates or their Contractors conditioned upon credit, payment, confidentiality and security arrangements which are reasonably acceptable to Teradata-Ireland being in place."*

**Clause 13.8.**

*"If Distributor defaults on its payment obligations which are not disputed in good faith and in writing before the payment is due, and if Distributor fails to cure such default within 15 days after it receives written notice of default, then Teradata-Ireland may, in addition to all other rights and remedies available to it for such default under this Agreement, repossess the Teradata Solutions for which Distributor is in default and has not passed clear title to or for a Customer, terminate rights to use Software and Deliverables for which Distributor is in default and has not provided to or for a Customer, suspend performing not-yet-fully-paid-for Services, and suspend Delivery of not-yet-fully-paid-for Teradata Solutions which have not yet been delivered to Distributor and/or to a Customer."*

**Clause 13.12.**

*"Immediately after the close of each Fiscal Year, Teradata-Ireland shall determine any pricing and mark-up adjustments as set out above herein and will provide the calculation and proposed adjustments to Distributor. Distributor is allowed fifteen (15) days to dispute the adjustment calculated by Teradata-Ireland in writing. At the earlier of fifteen (15) days or immediately upon resolution of any disagreement in the calculation by both Parties, the payor Party shall invoice the other Party for any amounts due pursuant to this Section. Any amounts due*

*are payable pursuant to the same terms set out above with respect to other invoices.”*

21. In addition to the above, the rights granted to TD Pakistan under the distributorship agreement “apply to both current and future Teradata Solutions.” A conjoint reading of the above-referred clauses of the distributorship agreement cause me to hold that TD Pakistan is not wholly independent of TD Ireland in marketing or selling Teradata Solutions (goods or services) in Pakistan, and therefore, respondents No.4 and 5 did not commit any jurisdictional irregularity or illegality in rejecting TD Pakistan’s application to make payments to TD Ireland without deduction of tax or in holding that TD Pakistan is TD Ireland’s Permanent Establishment in Pakistan.

22. Although payments were sought to be made for tax years 2007, 2008, 2009 and 2010, the application for exempting such payments from the deduction of tax was made in the year 2011. No explanation was advanced by the learned counsel for the petitioners for the inordinate delay in making of the said application. As regards the contention of the learned counsel for the petitioners that the payments made under the distribution agreement by TD Pakistan to TD Ireland have been held to be franchise fee, suffice it to say that this matter is a subject matter of Federal Excise Reference, which is pending adjudication before this Court and shall be decided on its own merits.

23. In the petition at hand, the petitioners are seeking the issuance of a writ of *certiorari*. *Certiorari* is not a writ of right, but one of discretion. Its object is to curb excess of jurisdiction and to keep inferior Courts and Tribunals within their bounds. The High Court, while judicially reviewing the proceedings and judgments of the inferior Courts and Tribunals, cannot substitute its own decision with that of such inferior Courts or Tribunals. The grounds on which *certiorari* may be invoked is where there is an error of law apparent on the face of the record, and not every error either of law or fact which can be corrected by the appellate authority. The High Court, while issuing a writ of *certiorari*, acts in exercise of a supervisory and not appellate jurisdiction. The High Court will not judicially review findings of fact reached by an inferior Court or a Tribunal unless there is manifest error apparent on the face of the proceedings, or where such findings are in disregard of the provisions of law. As regards the concurrent orders passed by

respondents No.4 and 5, I am of the view that the essential prerequisites for issuing a writ of *certiorari* qua the impugned orders dated 15.09.2011 and 30.06.2011 do not appear to be satisfied in this case.

24. However, as regards the impugned notice dated 29.07.2016 issued by the Deputy Commissioner Inland Revenue calling upon TD Ireland to obtain registration under the provisions of the 2001 Ordinance, the 2005 Act and the Sales Tax Act, 1990 and to file its income tax returns under Section 114 of the 2001 Ordinance, the same was issued without affording an opportunity of a hearing to the petitioners. The said notice requires TD Ireland to file its income tax returns in Pakistan. Learned counsel for the tax authorities did not cite any law under which TD Ireland could be required to file its returns regarding income from sources other than the said agreement. Hence, the impugned notice dated 29.07.2016 is liable to be set-aside on account of having been issued in violation of the principles of natural justice. However, the Deputy Commissioner is at liberty to proceed strictly in accordance with the law and requirements of natural justice.

25. In view of the above, the instant petition is partly allowed in that the impugned notice dated 29.07.2016 is set-aside. The petitioners' challenge to the impugned orders dated 15.09.2011 and 30.06.2016 passed by the respondent No.4 and respondent No.5 respectively, fails. There shall no order as to costs.

(MIANGUL HASSAN AURANGZEB)  
JUDGE

ANNOUNCED IN AN OPEN COURT ON \_\_\_\_/2020

(JUDGE)

*Qamar Khan\**