

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

W.P. No. 3343 of 2015

M/s Three Gorges First Wind Farm Pakistan (Pvt.) Limited.

Versus

Government of Pakistan through Secretary Finance, Islamabad and others.

Petitioners By : Barrister Syed Mudassar Ameer,
Advocate.

Respondents By : Mr. Manzoor Hussain, Advocate.
Mr. Shams Ul Hadi, Chief Commissioner,
Inland Revenue.
Ms. Reema Masud, Commissioner
Corporate, Inland Revenue.

Date of hearing : 30.04.2019

AAMER FAROOQ, J. - The petitioner is a company incorporated in Pakistan and engaged in the business of establishment of wind power unit. For the said purpose petitioner obtained finance/loan from M/s China Development Bank; in order to secure the loan extended by M/s China Development Bank and insurance policy was obtained in favour of the Bank issued by M/s China Export & Credit Insurance Corporation. In this behalf, the petitioner pays premium on the insurance policy obtained by it. The petitioner made an application to respondent No.4 for providing exemption from deduction of withholding tax with respect to the premium to be made to the insurance company, the referred application was turned down vide order dated 24.11.2014. Revision Petition was filed before respondent No.3, which was allowed and the order by Commissioner Inland Revenue was set aside; consequently, the matter was remanded for decision a fresh after providing an opportunity of hearing to the petitioner. Respondent No.4, again dismissed the application of the petitioner vide order dated 29.04.2015, hence, the petition.

2. Learned counsel for the petitioner, *inter alia*, contended that there is Avoidance of Double Taxation Treaty between China and Pakistan and under the same the business profits/Income of any company is exempted from being taxed in Pakistan. It was submitted that under Section 152(1) of the Income Tax Ordinance, 2001, the insurance premium paid to any insurance company, which is a non-resident withholding tax is to be deducted, however, since there is treaty between Pakistan and China and withholding tax is to be deducted only if the insurance company has a permanent establishment within the concept as provided in Article 5 Para 6 of the referred treaty. It was submitted that under the said Article the insurance company is deemed to have a permanent establishment only if the payment is made in Pakistan or the risk insured is in Pakistan. It was pointed out that the impugned order does not take into account the referred aspect of the matter, hence is not tenable.

3. Learned counsel for the respondents, *inter alia*, contended that the conjunctive reading of Section 152(1AA) of the Income Tax Ordinance, 2001, Article 5(6) of the treaty alongwith Article 24 (2A) of the same clearly indicate that withholding tax is to be deducted. It was submitted that the controversy has been caused due to interpretation rendered to Article 5(6) which is to be resolved in favour of the department. It was also submitted that the petitioner has no locus standi inasmuch as the tax is to be deducted of the insurance company, which can be adjusted subsequently in the return filed by the said company in China.

4. Arguments advanced by learned counsel for the parties have been heard and documents placed on record examined with their able assistance.

5. The relevant facts have been mentioned hereinabove therefore need not be reproduced.

6. Before embarking upon discussion of the law and the Articles of the Treaty between Pakistan and China, it is convenient that the same be reproduced.

Article 5 (6) is reads as follows:-

“6. Notwithstanding the preceding provisions of this Article, an insurance enterprise of a Contracting State shall, except in regard to reinsurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies”.

Article 7 is read as follows:-

***“1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to:
(a) that permanent establishment;
(b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or
(c) other business activities (other than activities referred to in paragraph 3 of Article 5) carried on in that other State of the same or similar kind as those carried on through that permanent establishment.”***

7. Under Section 152(1AA) of Income Tax Ordinance 2001, every person making a payment of insurance premium or re-insurance premium to a non-resident person shall deduct tax from the gross amount paid at the rate specified in Division II of Part III of the First Schedule.

8. Under Article 5(6) of the tax treaty between Pakistan and China, an insurance enterprise of a contracting state shall, except in regard to reinsurance, be deemed to have a permanent establishment in the other contracting state if it collects premiums in the territory of that other state or insures risks situated therein, through a person other than an agent of an independent status.

9. Under Article 24(2)(A) of the tax treaty, in case of China, double taxation shall be eliminated as follows: where a resident of China derives income from Pakistan, the amount of tax on that income payable in Pakistan in accordance with the provisions of Treaty may be credited against the Chinese tax imposed on that resident. The amount of credit, however, shall not exceed the amount of the Chinese tax on that income computed in accordance with the taxation laws and regulations of China.

10. The conjunctive interpretation of the above sections of law and the Articles of Treaty is that under Section 152(1AA) withholding tax is to be deducted from the premium paid to an insurance company in respect of premium to a non-resident person, however, since under Section 107 of the Income Tax Ordinance, 2001, the treaties are to have an overriding effect over the provisions of the Income Tax Ordinance, 2001, hence, they shall take precedence. Clearly, under the terms of the treaty no tax is to be deducted from any payment made to a non-resident company. The effect is otherwise, if the company has establishment in Pakistan; in case of the insurance company, it shall be deemed to have a permanent establishment in Pakistan, if the premium is paid to it in Pakistan or the risk is insured in Pakistan through a person other than an agent of an independent status. The stance of the department is that with respect to the withholding tax deduction credit can be obtained by the insurance company while payment of tax and filing returns is in China.

11. Respondents No.3&4, while interpreting Article 5(6) of the treaty between Pakistan and China have not given it a holistic interpretation inasmuch as whether the payment has been made in Pakistan to the insurance Company and the risk was insured through a person other than an agent of an independent status. It is only when the referred criteria is met with the insurance company shall be deemed to have a permanent

establishment and the withholding tax could be deducted. The impugned orders since do not take into account the mandatory requirements of the Article 5(6) *ibid*, hence are not tenable. Respondents No.3&4 need to examine the criteria of permanent establishment as provided in Article 5(6) comprehensively even asking for documents from the petitioner and/or all concerned to reach to just conclusion.

12. As noted above the impugned orders do not interpret Article 5(6) in its proper prospective, hence are liable to be set aside.

13. For the abovementioned reasons, the instant petition is **allowed** and the impugned orders dated 24.11.2014 & 29.04.2015 passed by respondents No.3&4 are set aside. Consequently, application for exemption filed by the petitioner shall deemed to be pending with respondent No.4 and be decided in accordance with law and the provisions of Treaty shall be taken into account and observations made hereinabove. The matter is pending since long, hence respondent No.4 shall endeavor to decide the application expeditiously preferably within a period of 60 days from the date of this order.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 19.07.2019.

JUDGE

Shakeel Afzal/.