JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.268 of 2017
M/s Tecnimont SpA
Versus
Pakistan through its Secretary, Ministry of Finance and others

Date of Hearing:	14.07.2020& 20.07.2020
Petitioner by:	M/s Mohammad Akram Sheikh and Natalya Kamal, Advocates.
Respondents by:	Mr. Muhammad Nadeem Khan Khakwani, learned Assistant Attorney-General. Mr. Riaz Hussain Azam Bopara, Advocate for respondents No.2 and 3. Mr. Sajid-ur-Rehman Mashwani, Advocate for respondent No.4.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition the petitioner, M/s Tecnimont SpA, formerly known as M/s Fiat Avio SpA (Italy), seeks a direction to respondent No.2 (Federal Board of Revenue) and respondent No.3 (Commissioner Inland Revenue)to implement the judgment dated 28.05.2015 passed by the Division Bench of this Court in Income Tax References No.178 to 180 of 2011, and refund the amount of Rs.217,061,749/- being the unlawfully withheld tax for the years 1996-97, 1997-98 and 1998-99 from the payments due to the petitioner from respondent No.4 (Habibullah Coastal Power Company **("H.C.P.C.")** in addition to compensation under Section 102 of the Income Tax Ordinance, 1979 **("the 1979 Ordinance")**.

2. Learned counsel for the petitioner submitted that the petitioner is an Engineering, Procurement and Construction **("E.P.C.")** Contractor to whom payments were made by respondent No.4 in accordance with the provisions of the contract dated 26.02.1996; that the petitioner was a foreign entity with no permanent establishment in Pakistan and therefore not liable to pay income tax in Pakistan; that after the notices were issued by respondents No.2 to respondent No.4, the latter in its capacity as a withholding agent withheld Rs.217,061,749/- from the payments due to the petitioner and paid it into the Government Treasury; that the said amount was deducted by respondent No.4 and paid to the Government Treasury on behalf of the petitioner and in

discharge of the petitioner's income tax liability, if any; that the matter as to whether respondent No.4 could withhold tax from the payments made to the petitioner was the subject matter of proceedings before the income tax department which culminated in the order dated 29.09.2010 passed by the Appellate Tribunal Inland Revenue("A.T.I.R."); that respondent No.3 assailed the said order before this Court in Income Tax References No.178 to 180 of 2011 which were decided by this Court on 28.05.2015 in the petitioner's favour; that on 16.11.2012, an appeal effect order was passed by the Inland Revenue Officer entitling the petitioner to a refund of Rs.217,061,749/; that since the said amount was not paid to the petitioner and as a result the petitioner agitated the matter in a complaint before the Federal Tax Ombudsman("F.T.O."), who vide order dated 04.10.2013, directed respondents No.2 and 3 to refund the said amount to the petitioner; and that a representation against the said decision was allowed by the President of Pakistan on 05.03.2015. However, it was ordered that further process was to be initiated and completed in accordance with the decision of this Court in Income Tax References No.178 to 180 of 2011.

3. Furthermore, learned counsel for the petitioner submitted that since the order dated 29.09.2010 passed by the A.T.I.R. and the appeal effect order dated 16.11.2012 still hold the field, respondents No.2 and 3 are under an obligation to refund Rs.217,061,749/- to the petitioner; and that with the decision of this Court in Income Tax References No.178 to 180 of 2011 filed by respondent No.3, there is no lawful excuse available to respondents No.2 and 3 to refuse the refund of the above-mentioned amount along with statutory compensation and interest to the petitioner. 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 on the judgments reported as *2010 PTD 1827, 2002 PTD 87, PLD 2005 SC 605, PLD 1969 SC 223, [2007] 1 All ER 449, [1998 4 All ER 513, [1992] 3 All ER 737* and *[1985] 1 All ER 589*.

4. On the other hand, learned counsel for respondents No.2 and 3 submitted that a sales tax liability can be adjusted against determined income tax refunds in accordance with Section 48 (1) (a) of the Sales

Tax Act, 1990 ("the 1990 Act") read with Rule 71(2)(A) of the Sales Tax Rules, 2006("the 2006 Rules"); that there is no *malafide* intention in the adjustments of income tax determined refunds against respondent No.4's sales tax liability; that respondent No.4's sales tax liability has already been adjusted under Section 48(1)(a) of the 1990 Act; that in case respondent No.4's sales tax liability is reversed by the competent appellate authority, respondent No.4 will have to file a refund claim under Section 66 of the 1990 Act; that since the refund payable to respondent No.4 has already been adjusted against its sales tax liability, therefore the question of paying any compensation for delayed refund under Section 102 of the 1979 Ordinance does not arise; that respondent No.4 had been treated as an assessee in default for not deducting income tax from the payment due to the petitioner; and that no determination of a refund has ever been made in the petitioner's favour. Learned counsel for respondents No.2 and 3 prayed for the writ petition to be dismissed.

5. Learned counsel for respondent No.4 supported the relief sought by the petitioner in its petition. He further submitted that if the amounts deducted from the payments due to the petitioner and paid into the Government treasury by respondent No.4 is refunded to respondent No.4, the latter would be liable to pay forward the refunded amounts to the petitioner under the terms of the indemnification agreement executed between respondent No.4 and the petitioner; and that although the recovery notice dated 23.01.2013 was issued to respondent No.4, till date no adjustment against respondent No.4's sales tax liability has been made. Learned counsel for respondent No.4 submitted that respondent No.4 would have no objection if the prayer sought in the writ petition is allowed.

6. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

7. Respondent No.4 is a company incorporated under the provisions of the erstwhile Companies Ordinance 1984, and engaged in the business of electric power generation. On 26.02.1996, respondent No.4 entered into a contract with the petitioner, a company established under the laws of Italy, for the manufacture and supply of equipment.

No tax was deducted at source from the payments made by respondent No.4 to the petitioner on the basis of the provisions of the Avoidance of Double Taxation Treaty between Pakistan and Italy read with Section 163 of the 1979 Ordinance and the fact that the petitioner, being a foreign supplier had no permanent establishment in Pakistan.

8. For not deducting tax at source from the payments made by respondent No.4 to the petitioner under the said contract dated 26.02.1996, the Assessing Officer vide three orders dated 15.09.1998 for the tax years 1997 to 1999 treated respondent No.4 as an assessee in default under Section 52 of the 1979 Ordinance. It is not disputed that pursuant to the said orders, respondent No.4 deducted Rs.217,061,749/- from the amounts due to be paid by respondent No.4 to the petitioner under the terms of the contract dated 26.02.1996, and deposited the said amount in the Government treasury. Respondent No.4's appeals against the said orders dated 15.09.1998 were dismissed by the Commissioner Income Tax (Appeals) vide orders dated 07.01.1999. Subsequently, respondent No.4's appeals before the Income Tax Appellate Tribunal ("I.T.A.T.") were allowed vide orders dated 20.04.1999 and the assessments were annulled on the basis of the law laid down by the Hon'ble High Court of Sindh in the case of Tapal Energy Vs. Federation of Pakistan (1999 PTD 4037). The said orders dated 20.04.1999 were questioned by the department in the Income Tax References filed before the Hon'ble Balochistan High Court. Vide order dated 22.09.1999, the Hon'ble High Court set-aside I.T.A.T.'s order dated 20.04.1999 and remanded the matter to I.T.A.T. with the direction to pass a speaking order. Thereafter I.T.A.T., vide order dated 11.09.2001, further remanded the matter to the Assessing Officer with the direction to carry out a fresh adjudication in accordance with the law. Aggrieved by the said order dated 11.09.2001, respondent No.4 filed the Income Tax References before the Hon'ble Balochistan High Court. Vide order dated 23.06.2005, the Hon'ble High Court set-aside I.T.A.T.'s order dated 11.09.2001 and again remanded the matter to I.T.A.T. with a direction to decide the appeals in accordance with the directions contained in the Hon'ble High Court's earlier order dated 22.09.1999. I.T.A.T. allowed the said appeals vide order dated 29.09.2010.

9. In the said order dated 29.09.2010, I.T.A.T. held *inter alia* that on 15.09.1998, when the original assessments were framed, only the Assessing Officer of the recipient and not that of the payer was vested with the jurisdiction under Section 52 of the 1979 Ordinance in terms of the law laid down in the case of Tapal Energy Vs. Federation of Pakistan *(supra)*. Since the assessment orders dated 15.09.1998 had been framed by the Assessing Officer of respondent No.4 (i.e. the payer) and not the recipient (i.e. the petitioner) and since the jurisdiction under Section 52 of the 1979 Ordinance was with the Assessing Officer of the recipient, I.T.A.T. declared the assessment orders dated 15.09.1998 to be void.

10. An explanation to Section 52 of the 1979 Ordinance was inserted through the Finance Act, 1999 which came into force on 01.07.1999. The said explanation was interpreted by the Hon'ble High Court of Sindh in the judgment reported as Continental Chemical Vs. Pakistan (2001 PTD 570) wherein it was held *inter alia* that after the enactment of the Finance Act, 1999, the jurisdiction to treat a person as an assessee in default under Section 52 of the 1979 Ordinance lay with the Assessing Officer of the payer and not the recipient.

11. I.T.A.T., in its order dated 29.09.2010, also held that since the assessments had been framed on 15.09.1998 (i.e. prior to the insertion of the explanation to Section 52 of the 1979 Ordinance through Finance Act, 1999), the said assessments were to be dealt with in accordance to the law laid down in the case of Tapal Energy Vs. Federation of Pakistan *(supra)*.

12. The *proviso* to Section 50(4)(a) of the 1979 Ordinance was inserted on 01.07.1998. Under the said *proviso*, tax was required to be deducted at source from payments made to non-residents. It is not disputed that all the payments had been made by respondent No.4 to the petitioner prior to the insertion of the said proviso on 01.07.1998. At the time when the payments were made, Section 50(4)(a) of the 1979 Ordinance did not require any tax to be deducted at source from the payments made to non-residents. Since it is also not disputed that the petitioner was a non-resident, there was nothing in the 1979 Ordinance which required deduction at source with respect to payments made to non-residents. It was so observed in I.T.A.T.'s order dated 29.09.2010.

13. In the said order dated 29.09.2010, I.T.A.T. also observed that the department had failed to come up with any evidence to show that at the time when payments were made by respondent No.4 to the petitioner for the supply of equipments under the contract dated 26.02.1996, the latter had any permanent establishment in Pakistan.

14. Aggrieved by the I.T.A.T.'s order dated 29.09.2010 allowing respondent No.4's appeals and to cancel the assessment orders dated 15.09.1998, respondent No.3 filed Income Tax References No.178 to 180 of 2011 before this Court. These references were dismissed vide judgment dated 28.05.2015 passed by the Division Bench of this Court. In the said judgment, it was unequivocally held that the explanation to Section 52 of the 1979 Ordinance inserted through the Finance Act, 1999 could not operate retrospectively, and therefore was not applicable to the assessment orders dated 15.09.1998. It was also held that the law applicable at the time when the said assessment orders were passed was the one as laid down by the Hon'ble High Court of Sindh in the case of Tappal Energy Vs. Federation of Pakistan *(supra).*There is nothing on the record to show that the operation of the judgment dated 28.05.2015 has been suspended.

15. On 25.10.2011, respondent No.4 filed an application for the issuance of an appeal effect order on the basis of I.T.A.T.'s said order dated 29.09.2010. Respondent No.4 also filed an application for refund of Rs.45,208,403/- (with respect to assessment year 1996-97), Rs.81,005,258/- (with respect to assessment year 1997-98), and Rs.90,848,088/- (with respect to assessment year 1998-99). The total amount of refund claim was for Rs.217,061,749/-. Vide order dated 16.11.2012, the Inland Revenue Officer (Enf-II) Zone-III, LTU, Islamabad, gave appeal effect order pursuant to I.T.A.T.'s order dated 29.09.2010 under Section 124 of the 2001 Ordinance read with Sections 52, 86 and 135 of the 1979 Ordinance. Furthermore, directions were given to issue a demand notice. Despite the fact that this Court had dismissed respondent No.3's income tax references vide judgment dated 28.05.2015 and an appeal effect order having been passed on 16.11.2012, till date nothing out of Rs.217,061,749/- has been refunded by respondents No.2 and 3.

16. The plea taken on behalf of respondents No.2 and 3 is that the said amount of Rs.217,061,749/- stands adjusted against respondent No.4's sales tax liability. In support of this plea, respondents No.2 and 3 placed reliance on the recovery notice dated 23.01.2013 issued by the Deputy Commissioner Inland Revenue (Enf-II), LTU, Islamabad. As per the contents of the said notice, government dues amounting to Rs.570,367,795/- were outstanding against respondent No.4 on the basis of Order-in-Original No.17/2012, dated 31.10.2012 and Order-in-Appeal No.68/2012, dated 14.12.2012. Through the said notice, the Deputy Commissioner Inland Revenue (Enf-II), LTU, Islamabad was required to deduct Rs.570,367,795/- from any money owed to respondent No.4.

17. Now against the said Order-in-Appeal No.68/2012, dated 14.12.2012, respondent No.4 had preferred an appeal before the A.T.I.R. which was dismissed vide order dated 13.12.2013.Against the said order dated 13.12.2013, respondent No.4 filed Sales Tax Reference No.6/2014 before the Division Bench of this Court. Vide order dated 31.03.2014, this Court suspended the operation of the order assailed in the said sales tax reference. Till date, the said order dated 13.12.2013 passed by the A.T.I.R. remains suspended. It may be mentioned that during the pendency of respondent No.4's appeal before the A.T.I.R., this Court had restrained respondent No.3 from effecting recovery from respondent No.4 vide order dated 24.01.2013 passed in writ petition No.293/2013 titled M/s Habibullah Coastal Power Company (Pvt.) Ltd. Vs. Deputy Commissioner Inland Revenue etc. By virtue of the said injunctive orders, it cannot be said that Rs.217,061,749/- which was liable to be refunded to respondent No.4 had been adjusted against the latter's sales tax liability of Rs.570,367,795/-.

18. It ought to be borne in mind that the recoveries sought to be made against respondent No.4 on the basis of (i) Order-in-Original No.17/2012, dated 31.10.2012, (ii) Order-in-Appeal No.68/2012, dated 14.12.2012, and (iii) the order dated 13.12.2013 passed by the A.T.I.R. have nothing to do with the contract dated 26.02.1996 executed between the petitioner and respondent No.4 or any payments made thereunder. The demand against respondent No.4 on the basis of the

above-referred orders was on account of respondent No.4's failure to make apportionment of input tax in respect of amounts received against Capacity Purchase Price from WAPDA during the financial period from July 2007 to December 2009. The department's stance in the said case was that *"if a registered person deals in taxable supplies and non-taxable supplies, he can re-claim only such proportion of input tax as is attributable to taxable supplies in such manner as may be specified."*

19. It is an admitted position that Rs.217,061,749/- deposited by respondent No.4 in the Government treasury was the amount withheld or deducted from the payments due from respondent No.4 to the petitioner under the terms of the contract dated 26.02.1996. The withholding or deduction of the said amount and its payment into the Government treasury was made pursuant to proviso to Section 50(4)(a) of the 1979 Ordinance, and was thus in partial discharge of the petitioner's tax liability (if any) and not that of respondent No.4. At best, respondent No.4 was the withholding agent on behalf of the tax department and would become an assessee in default if it did not withhold the said amount from the payments due to the petitioner under the terms of the said contract. By paying the said amount into the Government treasury, respondent No.4 did not discharge its own tax liability but that of the petitioner by acting as a withholding agent. Since the said amount of Rs.217,061,749/- paid into the Government treasury was not in discharge of respondent No.4's own tax liability, I am of the view that the said amount (with respect to an appeal effect order had been passed against the tax department) could not have been adjusted against respondent No.4's own sales tax liability created on the basis of the aforementioned three concurrent orders. In the case of Federation of Pakistan Vs. Metropolitan Steel Corporation (2002 PTD 87), the Division Bench of the Hon'ble High Court of Sindh held as follows:-

> ***"11. It may be noticed that even prior to the enforcement of the 1990 Act, section 30-A of the Sales Tax Act, 1951 also provided that the amount collected by a person by way of sales tax under some misapprehension of the provisions of the Act or otherwise, which is not payable as tax or in excess of the tax payable is to be paid to the Federal Government it obviously implies that a claim for refund could only be made by the person eventually paying the tax and not the one who had collected it."***

20. The adjustment was sought to be made by respondent No.3 pursuant to Section 48(1) of the 1990 Act and Rule 71(1) of the 2006 Rules. Section 48(1) of the 1990 Act provides *inter alia* that where any amount of tax is due from any person, the officer of Inland Revenue may deduct the amount from any money owing to the person from whom such amount is recoverable and which may be at the disposal or in the control of such officer or any officer of Income Tax, Customs or Central Excise Department. Rule 71(1) of the 2006 Rules provides that on expiry of thirty days from the date on which the government dues are adjudged, the referring authority shall deduct the amount from any money owing to the person from whom such amount is recoverable and which may be at the disposal or in the control of such officer.

21. The basis for passing the original assessment dated 15.09.1998 against respondent No.4 was that under the *proviso* to Section 50(4)(a) of the 1979 Ordinance (which was inserted after the payments in question had been made by respondent No.4 to the petitioner), it was under an obligation to deduct tax from the sum paid to the petitioner (i.e. a non-resident company) which sum was said to be chargeable under the provisions of the 1979 Ordinance. Failure on the part of respondent No.4 to make such a deduction would make it an assessee in default in terms of Section 52 of the 1979 Ordinance. The deduction of Rs.217,061,749/- from the amounts payable to a non-resident company and its payment into the Government treasury by respondent No.4 was not in discharge of respondent No.4's own liability to pay tax but in fulfillment of its obligation under the proviso to Section 50(4)(a) of the 1979 Ordinance. Failure to make such deduction would render respondent No.4 as an assessee in default. Such deduction and payment would discharge the petitioner's tax liability, if any. While deducting tax from the sum paid to the petitioner, respondent No.4 acted as withholding agent. Since the deduction of tax was made from the payments due to the petitioner, the rightful ultimate recipient of the refund of such amount, in my view, would also be the petitioner.

22. When tax is deducted by a payer from the payments due to an assessee, such deduction of tax and its payment in the Government treasury is in partial discharge of the assessee's tax liability, if any. This is implicit in Section 50(8) of the 1979 Ordinance which provides *inter*

alia **that any sum deducted under Section 50** ***ibid*** **shall be treated as payment of tax on behalf of the assessee. Even the 2001 Ordinance caters to this situation. Section 168(2) of the 2001 Ordinance provides** ***inter alia*** **that where an amount of tax has been deducted from a payment made to a person, the person shall be allowed a tax credit for that tax in computing the tax due by the person on the taxable income of the person for the tax year in which the tax was deducted. As a natural corollary, where it is found that tax was deducted from the payments made to a person from whom no tax could be deducted on account of him being a non-resident with no permanent establishment in Pakistan, the ultimate recipient of the refund would be such person from whom the tax was deducted and not the withholding agent who had deducted the tax.**

23. It also ought to be borne in mind that Section 78(2) of the 1979 Ordinance provides that every agent who pays any tax under the said Ordinance shall be entitled to recover the tax so paid from the person on whose behalf it was paid or to retain an equivalent amount out of any monies due or belonging to the said person which may be in his possession or come into his possession at any time. Section 78(3) of the 1979 Ordinance provides ***inter alia*** **that any agent, or any person who apprehends that he may be assessed as an agent, may retain out of any money payable by him to the person on whose behalf he is liable to pay tax a sum equal to his estimated liability under the said Ordinance. The explanation to the said Section provides** ***inter alia*** **that** ***"agent includes any person in Pakistan from or through whom the non-resident is in receipt of any income, whether directly or indirectly."*** **Learned counsel for respondent No.4 did not dispute the fact that Rs.217,061,749/- deposited in the Government treasury was deducted from the amounts payable by respondent No.4 to the petitioner under the terms of the contract dated 26.02.1996. It was also not disputed that this deduction was made by respondent No.4 in its capacity as a withholding agent. This is an added reason why the petitioner is to be the ultimate beneficiary of a refund made by respondents No.2 and 3 to respondent No.4 pursuant to the appeal effect order dated 16.11.2012. Since the deduction of the said amount and its payment to the government treasury was out of the funds which would otherwise have belonged or**

have been paid to the petitioner, such amount could not be adjusted against respondent No.4's independent sales tax liability.

24. In the indemnification agreement between the petitioner and respondent No.4, it was agreed that the former shall be entitled to any amount withheld by latter and subsequently recovered in case of successful litigation from the Government of Pakistan or any instrumentality thereof. Respondent No.4, in its written comments, had pleaded that any refund arising out of the order dated 28.05.2015 passed by this Court in Income Tax ReferencesNo.178 to 180 of 2011 would be owed to respondent No.4. It has also been pleaded that if the amount previously withheld by it and deposited to the Government treasury is recovered from respondent No.2/Federal Board of Revenue, respondent No.4 shall pay forward the recovered amounts to the petitioner in accordance with the terms of the indemnification agreement between respondent No.4 and the petitioner. What can be discerned from the said pleadings is that if the appeal effect order dated 16.11.2012 is implemented and the amount of Rs.217,061,749/- is refunded to respondent No.4, the latter would hold the said amount in trust for the benefit and for further payment to the petitioner. It is perhaps for this reason that respondent No.4 requested in its parawise comments for its transposition as a co-petitioner in this petition.

25. Now, the petitioner had not assailed the original assessments framed on 15.09.1998 and the order dated 07.01.1999 passed by the Commissioner Income Tax (Appeals) whereby respondent No.4's appeal against the said original assessments was dismissed. The petitioner was not a party in respondent No.4's appeals before I.T.A.T. filed by respondent No.4 against the said orders dated 15.09.1998 and 07.01.1999. The petitioner was also not a party in the Income Tax References No.178 to 180 of 2011 decided by this Court vide the judgment dated 28.05.2015. The application for the issuance of the appeal effect order was filed by respondent No.4 and not the petitioner. Since the prayer sought by the petitioner in the instant petition is for the implementation of this Court's judgment dated 28.05.2015 passed in the said income tax references, the refund pursuant to the appeal effect order dated 16.11.2012 is to be made to respondent No.4 and not to the petitioner. After such refund to respondent No.4, the latter would

pay the refunded amount further to the petitioner as admitted in paragraph 7 of respondent No.4's written comments.

26. In view of the above, it is declared that the amount of Rs.570,367,795/- sought to be recovered by respondent No.3 from respondent No.4 on the basis of (i) Order-in-Original No.17/2012, dated 31.10.2012, (ii) Order-in-Appeal No.68/2012, dated 14.12.2012, and (iii) the order dated 13.12.2013 passed by the A.T.I.R., (which orders presently stand suspended vide order dated 31.03.2014 passed by the Division Bench of this Court in sales tax reference No.6/2014) cannot be adjusted against Rs.217,061,749/- liable to be refunded to respondent No.4 on the basis of the appeal effect order dated 16.11.2012 read with the judgment dated 28.05.2015 passed by the Division Bench of this Court in Income Tax References No.178 to 180 of 2011. Respondents No.2 and 3 are directed to forthwith implement the appeal effect order dated 16.11.2012 by refunding Rs.217,061,749/- to respondent No.4. Upon such refund, respondent No.4 shall hold the said amount in trust for onward payment to the petitioner in furtherance of the position taken by the former in paragraph 7 of its written comments. This petition is disposed of in the above terms. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**