JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

CASE NO. : W.P. NO.2380-2022

M/s Pakistan Mobile Communications Limited

Vs.

Federation of Pakistan through Chairman, Federal Board of Revenue, Islamabad etc.

Petitioners by	**:**	M/s Khalid Javed Khan, M. Usman Shaukat, Rashid Hafeez, Barrister Jahanzeb Awan, Muhammad Uzair Bin Shafi & Umar Shehzad, Advocates in their respective writ petitions.
Respondents by	**:**	M/s Ghulam Qasim Bhatti, Barrister Atif Rahim Barki, Swim Raja & Husnain Ali, Advocates with Syeda Itrat Batool, Law Officer, PTA in their respective writ petitions. Mr. Azmat Bashir Tarar, Assistant Attorney General.
Date of hearing	**:**	07.12.2023

AAMER FAROOQ C.J. This consolidated judgment shall decide instant petition as well as petitions mentioned in the Schedule attached herewith, as common questions are involved.

2. The petitioners, in all the petitions, are aggrieved of the notices under section 161(1A)/205 of the Income Tax Ordinance, 2001(the Ordinance) issued to them.

3. The grievance of the petitioners, as spelt out from the pleadings in the writ petitions, is that their suppliers/sellers are not registered in Pakistan; they are involved in their respective trades and for that, purchase equipment/material from overseas sellers. Since these sellers or business partners are overseas companies/entities for the purposes of tax, hence no deduction was made while making payments to them. The notices alleged that petitioners are 'prescribed persons' within the meaning of the words as provided in sections 153(7) and 152(8) along with subsection (2) of section 152 of the Ordinance. It has been alleged that they made payments to non-resident persons for purchase of machinery or equipment yet no tax was withheld as required under subsection

(2) of section 152 ibid. The notice also alleges that on the basis of subsection (2) of section 152 read with section 157 of the Ordinance, the petitioners were required to withhold tax and since they have not done so, they would be liable as principal debtor and pay the tax liability, hence challenge to the notices.

4. Mr. Khalid Javed Khan, Senior Advocate Supreme Court, leading the charge on behalf of petitioners, contended that payments made by the petitioners to non-resident suppliers, was not chargeable to tax in terms of Article 7 of Double Taxation Treaty (DTT), which Pakistan executed with China, Finland, Hong Kong and Sweden and with all other counties, with whom, transaction has been made, hence no question of deduction or withholding tax on this amount under section 152(2) read with section 161 of the Ordinance arises. It was submitted that payments have been made to overseas companies, being the non-resident companies, for purchase of equipment and also providing for the services. It was submitted that petitioners did file reply to the notice along with documents, however, it is apprehended that same shall not be appreciated and demand shall be created of the liability. It was contended that petitioners did comply with the requirements of the relevant law i.e. section 152(5)&(7) of the Ordinance and notice to the Commissioner was sent that payment is being made to non-resident company without deduction of tax. It was submitted that no objection was raised on behalf of Commissioner in response to said notice. It was submitted that reply was filed by the respondents in the Court that companies, with whom the transaction has been made, have permanent establishment, hence liability to withhold tax existed. It was contended that section 152(3)(d) was not applicable in the instant case, as non-residents are chargeable to tax under section 101(3)(a)&(e) and section 152(5) was applicable as exception to section 152(7) of the Ordinance. It was submitted that writ petitions are maintainable, as petitioners have no other remedy available. It was contended that where there is error of any authority or Tribunal and the matter goes to the root of the jurisdiction, the same can be agitated by way of a petition under Article 199 of the Constitution. Reliance was placed on cases reported as Utility Stores Corporation of Pakistan Vs. Punjab

Labour Appellate Tribunal (PLD 1987 SC 447), Riaz Hussain Vs. Board of Revenue (1991 SCMR 2307) and Haji Rehmdil Vs. The Province of Baluchistan (1999 SCMR 1060). It was submitted that Double Tax Treaty is to be given overriding effect and sections 107 and 101 of the Ordinance cannot be invoked to nullify the effect of the Treaty. It was also argued that where it is alleged that party had a permanent establishment of a non-resident, then notice should be issued to the alleged establishment for contesting the matter. Reference was made to Treadata Ireland Ltd. Vs. Federation of Pakistan (2020 PTD 1316). It was submitted that in somewhat similar circumstances, notices under section 161 of the Ordinance were quashed and in this regard, reference was made to cases reported as EFU General Insurance Vs. Federation of Pakistan (2010 PTD 1159) & Commissioner Inland Revenue Vs. Ghazi Barotha Contractors Islamabad (2017 PTD 150). It was submitted that it was never the case of respondents in the notice that non-resident had a permanent establishment, in case they have permanent establishment, notices should be sent to the referred entities. Reliance was placed on cases reported as Commissioner Inland Revenue Vs. Jahangir Khan Tareen (2022 SCMR 92), M/s Pakistan Oil Fields Limited Vs. Federation of Pakistan etc. (2020 PTD 110), M/s Pakistan Oil Fields Limited Vs. Federation of Pakistan etc. (2022 PTD 413), PKP Exploration Ltd. Vs. Federal Board of Revenue (2021 PTD 1644), Indus Motor Company Limited Vs. Federation of Pakistan (2021 PTD 460), Aameer Mustaaly Vs. DCIR (2021 PTD 335) & K.K. Oil and Ghee Mills Federal Board of Revenue (2016 PTD 2601). It was submitted that the respondents cannot go beyond the averments in the notice. Reference was made to cases reported as Commissioner Inland Revenue Vs. Pakistan Tobacco (2022 SCMR 1251) & M/s Fateh Yarn Pvt. Ltd. Vs. Commissioner Inland Revenue (2021 PTD 1392). It was also argued that Double Tax Treaty has an overriding effect. Reference was made to Commissioner Income Tax Vs. Geofizyka Krakow Pakistan Limited (2015 PTD 1169.

5. The other learned counsel for the petitioners adopted the submissions made by Mr. Khalid Javed Khan, Senior Advocate Supreme Court.

6. Learned counsel for the respondents *inter alia* contended that instant petitions are not maintainable inasmuch as the petitioners have adequate and efficacious remedy. It was further contended that petitioners were liable to withhold tax which they did not; that all the questions raised in the petitions, can be raised before the competent officer; that non-residents have permanent establishment in Pakistan, hence withholding tax was liable to be deducted.

7. Submissions made by the parties have been heard and the documents, placed on record, examined with their able assistance.

8. The grievance of the petitioners is spelt out in the preceding paragraphs, hence need not be repeated.

9. In the notice (s), it has been alleged by the Department that companies, with which the petitioners deal, are non-resident persons, however, during course of arguments, a stance was taken that they also have 'permanent establishment'. It is also admitted that companies/entities, with which petitioners in all the petitions had been dealing, belong to the country, with which, Pakistan has Double Taxation Treaty.

10. Before appreciating the arguments made by learned counsel for the parties and rendering findings there-upon, it is essential that relevant provisions of law be reproduced and discussed. Section 152 reads as follows:-

> ***"152. Payments to non-residents.***— *(1) Every person paying an amount of royalty or fees for technical services to a non-resident person that is chargeable to tax under section 6 shall deduct tax from the gross amount paid at the rate specified in Division IV of Part I of the First Schedule.*
>
> *(1A) Every person making a payment in full or part (including a payment by way of advance) to a non-resident person on the execution of –*
>
> > *(a) a contract or sub-contract under a construction, assembly or installation project in Pakistan, including a contract for the supply of supervisory activities in relation to such project; or*
> >
> > *(b) any other contract for construction or services rendered relating thereto; or*
> >
> > *(c) a contract for advertisement services rendered by T.V. Satellite Channels,*
>
> *shall deduct tax from the gross amount payable under the contract at the rate specified in Division II of Part III of the First Schedule.*
>
> *(1AA) Every person making a payment of insurance premium or reinsurance 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.*
>
> *(1AAA)Every person making a payment for advertisement services to a non-resident media person relaying from outside Pakistan shall deduct tax from the gross amount paid at the rate specified in Division II of Part III of the First Schedule.*

(1B) The tax deductible under sub-sections (1A), (1AA) and (1AAA) shall be a minimum tax on the income of the non-resident persons in respect of payments mentioned therein.

(1BA) Every person responsible for making payment directly or through an agent or intermediary to a non-resident person for foreign produced commercial for advertisement on any television channel or any other media, shall deduct tax at the rate of twenty percent from the gross amount paid. The tax deductible under this sub-section shall be final tax on the income of non-resident person arising out of such payment.

(1C) Every banking company or a financial institution remitting outside Pakistan an amount of fee for offshore digital services, chargeable to tax under section 6, to a non-resident person on behalf of any resident or a permanent establishment of a non-resident in Pakistan shall deduct tax from the gross amount paid at the rate specified in Division IV of Part I of the First Schedule.

(1D) Every banking company or a financial institution maintaining special convertible rupee account (SCRA) of a non-resident company having no permanent establishment in Pakistan shall deduct tax from capital gain arising on the disposal of debt instruments and Government securities including treasury bills and Pakistan investment bonds invested through SCRA at the rate specified in Division II of Part III of the First Schedule.

(1DA) Every banking company maintaining a Foreign Currency Value Account (FCVA) or a non-resident Pakistani Rupee Value Account (NRVA) of a non-resident individual holding Pakistan Origin Card (POC) or National ID Card for Overseas Pakistanis (NICOP) or Computerized National ID Card (CNIC) shall deduct tax from capital gain arising on the disposal of debt instruments and government securities and certificates (including Shariah compliant variant) invested through aforesaid accounts at the rate specified in Division II of Part III of the First Schedule.

(1DB) Every special purpose vehicle or a company, at the time of making payment of a return on investment in sukuks to a non-resident sukuk holder shall deduct tax from the gross amount of return on investment at the rate specified in Division IB of Part III of the First Schedule.

(1DC) Every exchange company licensed by the State Bank of Pakistan shall deduct tax at the time of making payment of service charges or commission or fee, by whatever name called, to the global money transfer operators, international money transfer operators or such other persons engaged in international money transfers or cross-border remittances for facilitating outward remittances, at the rates given in Division IV, Part I of the First Schedule:

Provided that where such person retains service charges or commission or fee, by whatever name called from the amount payable to the exchange company on any account, the exchange company shall be deemed to have paid the service charges or commission or fee, by whatever name called and the exchange company shall collect the tax accordingly.

(1DD) Every banking company while making payment to card network company or payment gateway or any other person, of any transaction fee or licensing fee or service charges or commission or fee by whatever name called or interbank financial telecommunication services, shall deduct tax at the rates given in Division IV, Part I of the First Schedule: Provided that where card network company or payment gateway or any other person retains money in relation to aforementioned services from the amount payable to the banking company on any account, the banking company shall be deemed to have paid the amount and the banking company shall collect the tax accordingly.

(1E) The tax deductible under sub-sections (1D), (1DA) (IDB), (1DC) and (IDD) shall be a final tax in respect of persons and income mentioned therein.

(2) Subject to sub-section (3), every person paying an amount to a non-resident person (other than an amount to which sub-section (1) or subsection (1A), (1AA), (1AAA), (1C) or (2A) applies) shall deduct tax from the gross amount paid at the rate specified in Division II of Part III of the First Schedule.

(2A) 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 nonresident person—

(a) for the sale of goods 9 [except where the sale is made by the importer of the goods and tax under section 148 in respect of such goods has been paid and the goods are sold in the same condition as they were when imported;

(b) for the rendering of or providing services; and

(c) 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.

(2AA) sub-section (1AA) shall not apply to an amount, with the written approval of the Commissioner, hat is taxable to a permanent establishment in Pakistan of the non-resident person.

(2B) the tax deductible under sub-section (2A) shall be minimum tax:

Provided that tax deductible under clause (a) of sub-section (2A) shall not be minimum tax where payments are received for sale of goods by a company being a manufacturer of such goods.

(3) Sub-section (2) does not apply to an amount —

(a) that is subject to deduction of tax under section 149, 150, 156 4 or 233;

(b) with the written approval of the Commissioner, that is taxable to a permanent establishment in Pakistan of the non-resident person;

(c) that is payable by a person who is liable to pay tax on the amount as representative of the non-resident person under subsection (3) of section 172; or

(d) where the non-resident person is not chargeable to tax in respect of the amount.

(4) Where a person claims to be a representative of a non-resident person for the purposes of clause (c) of sub-section (3), the person shall file a declaration to that effect with the Commissioner prior to making any payment to the non-resident person.

(4A) The Commissioner may, on application made in the prescribed form by the recipient of payment referred to in sub-section (1A) having permanent establishment in Pakistan, or by a recipient of payment referred to in sub-section (2A), as the case may be, and after making such inquiry as the Commissioner thinks fit, allow by order in writing, in cases where the tax deductable under sub-section (1) or sub-section (2A) is not minimum tax, any person to make the payment without deduction of tax or deduction of tax at a reduced rate.

(4B) The Commissioner may, in case of payment that constitutes part of an overall arrangement of a cohesive business operation as referred to in paragraph (ii) of sub-clause (g) of clause (41) of section 2, on application made by the person making payment and after making such inquiry, as the Commissioner thinks fit, allow by order in writing, the person to make payment after deduction of tax equal to twenty percent of the tax chargeable on such payment under subsection (1A):

Provided that the credit of the tax so deducted shall be available to the permanent establishment of the non-resident accounting for overall profits arising on the overall cohesive business operation.

(5) 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 reduced 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;

(b) the nature and amount of the payment; and

(c) such other particulars as may be prescribed.

(5A) The Commissioner on receipt of notice shall, within thirty days, pass an order accepting the contention or making the order under sub-section 6:

Provided that the Commissioner shall be deemed to have issued the exemption certificate upon the expiry of thirty days and the certificate shall be automatically processed and issued by Iris subject to the condition that in computing the said period of thirty days, there shall be excluded days taken for adjournment by the applicant:

Provided further that the Commissioner may modify or cancel the certificate issued automatically by Iris on the basis of reasons to be recorded in writing after providing an opportunity of being heard.

(6) Where a person has notified the Commissioner of a payment under sub-section (5) and the Commissioner has reasonable grounds to believe that the non-resident person is chargeable to tax under this Ordinance in respect of the payment, the Commissioner may, by order in writing, direct the person making the payment to deduct tax from the payment in accordance with sub-section (2).

(7) Sub-section (5) shall not apply to a payment on account of –

(a) an import of goods where title to the goods passes outside Pakistan and is supported by import documents, except where —

(i) the supply is made in connection with the overall arrangement for the supply of goods, installation, construction, assembly, commission, guarantees or supervisory activities and all or principal activities are undertaken or performed either by the associates of the person supplying the goods or its permanent establishment, whether or not the title passes outside Pakistan and whether or not the goods are imported in the name of the associate or any other person; or

(ii) the supply is made by a resident person or a Pakistan permanent establishment of a non-resident person in connection with the overall arrangement as referred to in sub-clause (i); or

(b) educational and medical expenses remitted in accordance with the regulations of the State Bank of Pakistan.

(8) In this section "prescribed person" means a prescribed person as defined in sub-section (7) of section 153".

In this regard, section 152 of the Ordinance deals with the payments to non-residents; under subsection (2) of section 152 ibid subject to subsection (3), every person paying the amount to a non-resident person, shall deduct from the gross amount paid at the rates specified in Division-II of Part-III of the 1st Schedule; certain exemptions and waivers are provided in subsection (3) of section 152 and where applicable, such deductions are not to be made. As noted above, all the purchasers or persons, with whom the petitioners are dealing, are non-resident persons and countries, in which, they are based, Pakistan has Double Tax Treaty. Where such is the case, whether tax is to be withheld, came up for consideration in case reported as <u>Commissioner Inland Revenue Vs. M/s Geofizyka Krakow Pakistan Limited</u> (2017 PTD 1526), wherein the Supreme Court of Pakistan held that where there is treaty for avoidance of double tax between Pakistan and the country concerned, section 24(1) of the Ordinance provided for avoidance of double taxation prevails over the provisions of income tax law. In this regard, in another case reported as M/s American Express Bank Limited Vs. Commissioner of Income Tax (2009 PTD 1791), Sindh High Court affirmed the position that where there is treaty for avoidance of double taxation, the same carries precedents over the local laws.

11. The petitioners have also challenged the notices on the basis that same are not maintainable under section 161 of the Ordinance, as before issuance of the same, there has to be reconciliation required in this regard. Reference is made to cases reported as Messrs Nishat Chunian Limited Vs. Federal Board of Revenue and others (2014 PTD 2078) & Noor Sugar Mills Ltd. Vs. Federation of Pakistan and others (2015 PTD 1653). In terms of said judgments, it is very clear that where there is treaty for avoidance of double taxation, the same takes precedents over the local laws and in this case, there is a treaty with all the countries, hence under those treaties, it is provided that non-resident persons shall have the option to file tax returns in the country, in which, they are based and tax is not to be paid in Pakistan. During course of arguments, it was submitted that some of the non-resident companies have 'permanent establishment' in Pakistan, learned counsel for the respondents was confronted whether any notice was issued to the referred organizations/entities and the answer was in the negative. In terms of said position as well as case law reported as Treadata Ireland Ltd. Vs. Federation of Pakistan (2020 PTD 1316), respondent Department cannot go beyond the scope of notice.

12. Moreover, as is borne out from the record and submissions of the petitioners, notices were issued to the concerned Commissioners under section 152(5) of the Ordinance to bring to his knowledge that payment to non-residents was being made and same was never objected. In this regard, under section 107(2), which empowers the Commissioner to treat the place of business as 'permanent establish', the same is subject to section 109(1)(e). In view of referred, Double Taxation Treaty exists and the non-resident persons, under the same, can pay tax with respect to the income received by it from the petitioners in the country of its establishment and the Double Taxation Treaty takes

precedence over local laws and the department cannot question in such cases payment of withholding or other taxes. The stance of the respondents that non-resident persons had establishment; the referred fact was not mentioned in the notices nor any justification or basis was made. The respondents could have issued notice to that permanent establishment, but nothing exists on record that such thing was done. Under subsection (2) of section 109A, a controlled foreign company means non-resident company, if non-resident company has a place of business or establishment in Pakistan, but as noted above, nothing was pointed out that companies, with which the petitioners are dealing, have any such establishment.

13. Moreover, a challenge was also made by the respondents to writ petitions that same are not maintainable because only show cause notice has been challenged; such challenge has no force inasmuch as this Court has time and again held that where notice is without jurisdiction or patently suffers from any error, writ petition is maintainable. There is a series of case laws to the effect i.e. cases reported as M/s Pakistan Oil Fields Limited Vs. Federation of Pakistan etc. (2020 PTD 110), Messrs Pakistan Telecommunication Authority Vs. Federation of Pakistan and others (2020 PTD 1683) & PKP Exploration Ltd. Vs. Federal Board of Revenue (2021 PTD 1644).

14. In view of foregoing, instant petitions are allowed. The impugned notices are quashed as being without authority of law and not tenable.

(CHIEF JUSTICE)

Announced in Open Court on 26.04.2024

(CHIEF JUSTICE)

Zawar

Serial No.	CASE NO./YEAR	TITLE
1.	W.P. No.2378-2022	M/s Pakistan Mobile Communications Limited Vs. Federation of Pakistan etc.
2.	W.P. No.2379-2022	M/s Pakistan Mobile Communications Limited Vs. Federation of Pakistan etc.
3.	W.P. No.2381-2022	M/s Pakistan Mobile Communications Limited Vs. Federation of Pakistan etc.
4.	W.P. No.2382-2022	M/s Pakistan Mobile Communications Limited Vs. Federation of Pakistan etc.
5.	W.P. No.2383-2022	M/s Pakistan Mobile Communications Limited Vs. Federation of Pakistan etc.
6.	W.P. No.2466-2022	M/s Pak Telecom Mobile Limited Vs. Federation of Pakistan etc.
7.	W.P. No.2467-2022	M/s Pak Telecom Mobile Limited Vs. Federation of Pakistan etc.
8.	W.P. No.2467-2022	M/s Pak Telecom Mobile Limited Vs. Federation of Pakistan etc.
9.	W.P. No.2469-2022	M/s CMPak Limited Vs. Federation of Pakistan etc.
10.	W.P. No.2470-2022	M/s CMPak Limited Vs. Federation of Pakistan etc.
11.	W.P. No.2471-2022	M/s CMPak Limited Vs. Federation of Pakistan etc.
12.	W.P. No.2472-2022	M/s CMPak Limited Vs. Federation of Pakistan etc.
13.	W.P. No.2473-2022	M/s CMPak Limited Vs. Federation of Pakistan etc.
14.	W.P. No.2474-2022	M/s CMPak Limited Vs. Federation of Pakistan etc.
15.	W.P. No.3437-2022	M/s Pakistan Telecommunication Company Limited Vs. Federation of Pakistan etc.
16.	W.P. No.3438-2022	M/s Pakistan Telecommunication Company Limited Vs. Federation of Pakistan etc.
17.	W.P. No.3439-2022	M/s Pakistan Telecommunication Company Limited Vs. Federation of Pakistan etc.
18.	W.P. No.2080-2023	M/s Telenor Pakistan (Private) Limited Vs. Federation of Pakistan etc.
19.	W.P. No.2081-2023	M/s Telenor Pakistan (Private) Limited Vs. Federation of Pakistan etc.
20.	W.P. No.2082-2023	M/s Telenor Pakistan (Private) Limited Vs. Federation of Pakistan etc.

21.	W.P. No.2083-2023	M/s Telenor Pakistan (Private) Limited Vs. Federation of Pakistan etc.