IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

Bench-II:
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Athar Minallah
Mr. Justice Aqeel Ahmed Abbasi

Civil Review Petitions No.988 to 1001 of 2023
in
Civil Appeals No.94 to 106 of 2008 & 550/2011.
(For review of the judgment of this Court dated 08.9.2023)

M/s Inter Quest Informatics Services (in all cases)

……. Petitioners

Versus

The Commissioner of Income Tax, etc (in all cases)

….Respondent(s)

For the Petitioners: Mr. Makhdoom Ali Khan, Sr. ASC
(through video-link) & Mr. Saad Mumtaz Hashmi, ASC.

For the respondent(s): Mrs. Misbah Gulnar Sharif, ASC.
Mr. Fayyaz Hussain Abro, Addl.Comm.FBR.
(through video-link from Karachi).
Dr. Ishtiaq Ahmed Khan, DG Law, FBR.

Date of hearing: 28.11.2024

ORDER

Syed Mansoor Ali Shah, J. - Through the present petitions, the petitioner seeks a review of the majority judgment (authored by Mr. Justice Qazi Faez Isa and concurred by the Hon'ble Chief Justice Mr. Justice Umar Ata Bandial) dated 8 September 2023 ("majority judgment"). By the majority judgment, the civil appeals filed by the respondent with leave of the Court against the judgments of the Sindh High Court, dated 12 October 2007 and 11 November 2010, were allowed. Consequently, the said judgments were set aside and the decision of the Income Tax Appellate Tribunal ("Tribunal") was restored. In disagreement, the minority judgment authored by one of us (Syed Mansoor Ali Shah, J.) dismissed the appeals of the respondent and upheld the judgments of the Sindh High Court. Both the majority and minority judgments have been reported as *CIT v. Inter Quest Informatics Services* (2023 SCMR 1803).

2. As two members of the Bench that delivered the majority judgment under review have since retired, two of us (Athar Minallah and Aqeel

Ahmed Abbasi, JJ.) now form part of the Bench. We are fully cognizant that we sit in review jurisdiction and that majority of us on this Bench were not part of the majority judgment under review. We are therefore not approaching this case influenced by our own perspective which may not necessarily align with those who originally decided the case. But we have endeavoured to approach these review petitions with the utmost objectivity by adopting the perspective of the Judges who delivered the judgment under review, treating it as our own, and then carefully considering the grounds raised for its review. In our view, one of the most effective ways to ensure an objective approach in this regard is to first identify the settled principles upon which a judgment may be reviewed and then evaluate the grounds raised for review of the majority judgment in light of those principles.

3. A petition for review is neither an appeal nor a revision petition to a superior court but rather a request made to the same court to reconsider its decision on the limited grounds prescribed for review. It does not entail a rehearing or re-argument of the case adjudicated in the judgment under review. Since in the present review petitions the petitioner has invoked the ground of "error apparent on the face of the record" for the review of the majority judgment, it is essential to outline the settled principles governing this ground. The error, whether of fact or law, must be self-evident and readily discernible on the face of the record. It should not require meticulous examination or detailed analysis to uncover, nor should it need to be demonstrated through extensive or intricate arguments, or established through a lengthy process of reasoning on points where reasonable divergence of opinion may exist. Established instances falling within the scope of "error apparent on the face of the record" include judgments passed on an erroneous assumption of material facts or by overlooking a material question of fact or law or an important aspect of the matter, which, if noticed and considered earlier, would have direct bearing on the conclusions reached by the Court.[1]

4. Since the judgment under review, encompassing the facts of the case, the arguments advanced by learned counsel for the parties and the questions of law involved, has already been reported,[2] their reiteration is

[1] Abdul Ghaffar v. Asghar Ali (PLD 1998 SC 363); Pakistan v. Fecto Belarus Tractors Ltd (PLD 2002 SC 208); Muhammad Boota v. Member, BOR (2010 SCMR 1049); Govt. of Punjab v. Aamir Zahoor-ul-Haq (PLD 2016 SC 421) and Justice Qazi Faez Isa v. President of Pakistan (PLD 2022 SC 119).
[2] CIT v. Inter Quest Informatics Services (2023 SCMR 1803).

unnecessary. We shall, however, briefly state them to the extent required for the decision of the present review petitions.

5. The petitioner, a company incorporated in the Netherlands and thus a non-resident for income tax purposes in Pakistan, entered into two agreements with Schlumberger Seaco, Inc., a company operating in Pakistan. These agreements were titled the "Agreement for Lease of FLIC Tapes", dated 1 February 1986, and the "Software Rental Agreement" dated 1 January 1995 ("the Agreements"). The petitioner, in its tax returns, declared the receipts under the Agreements as "business profits" and sought exemption from income tax in Pakistan under Article 7 of the *Convention Between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* ("the Convention"). However, the tax department treated these receipts as "royalties" under Article 12 of the Convention and subjected them to income tax at the rate of fifteen percent. The Income Tax Officer, Commissioner of Income Tax (Appeals) and the Tribunal concluded that the payments received by the petitioner fell within the definition of "royalties" under paragraph 3(a) and (b) of Article 12 of the Convention and were therefore liable to income tax in Pakistan. The petitioner challenged the assessment orders, appellate orders and Tribunal judgments before the High Court through references. The High Court ruled in favour of the petitioner, holding that the amounts received by the petitioner for leasing FLIC tapes (software programs) under the Agreements did not qualify as "royalties" under the Convention and were not subject to income tax in Pakistan. The respondent appealed to this Court and the majority judgment under review allowed the appeals, setting aside the High Court's judgments and restoring the Tribunal's judgments as well as the original and appellate orders of the Income Tax Officers. The minority judgment, however, dismissed the respondent's appeals and upheld the High Court's judgments. Hence, these review petitions.

6. Having heard the arguments of the learned counsel for the parties and examining the available record of the case, we find that by the majority judgment under review the Court decided the matter against the petitioner mainly for the following reasons: (i) it would not really matter to the petitioner if, under Article 12 of the Convention, it had to pay income tax in Pakistan, because the petitioner could, with the tax

authority of the Netherlands, claim an adjustment of the tax amount paid in Pakistan;[3] (ii) the High Court did not note that the petitioner had an alternative remedy under Article 24 of the Convention to present its case to the competent authority of its own country, the Netherlands, which, if agreed with the respondent's stance, could take up the matter with the competent authority of Pakistan;[4] (iii) the petitioner did not explain and prove the nature of the receipts for which it claims tax exemption before the Income Tax Officer, the Commissioner (Appeals) and the Tribunal—the fact-finding forums—and it was unwarranted for the High Court to have delved into the nature of the receipts;[5] (iv) the High Court incorrectly assumed the applicability of the OECD MC, as Article 12 of the Convention adheres to Article 12 of the UN MC and not to Article 12 of the OECD MC;[6] and (v) the full definition of "royalties" in paragraph 3(a) of Article 12 of the Convention included payments for "*information concerning industrial, commercial, or scientific experience*".[7]

7. As to grounds (i) and (ii), we find an error which is apparent on the face of the record. The possibility of adjustment of tax paid by the petitioner in Pakistan by the competent authority in the Netherlands or the availability of an alternate remedy before the competent authority in the Netherlands, was no ground for the High Court to decline to answer the questions of law referred to it in the reference application filed by the petitioner. In this regard, this Court mistakenly regarded the two different jurisdictions of the High Court to be interchangeable: one under Article 199 of the Constitution and the other exercised in the present case, the reference jurisdiction under the Income Tax Ordinance. Under Article 199, the High Court may decline to exercise its jurisdiction if it finds that the petitioner has an alternate adequate remedy. However, it escaped notice of this Court that a reference application is akin to an appeal and the reference jurisdiction is similar to appellate jurisdiction, as held by this Court in *M/s Squibb Pakistan v. CIT* (2017 SCMR 1006).[8] Therefore, neither a reference application can be dismissed, nor can the exercise of reference jurisdiction be declined, on the ground of availability of some alternate remedy.

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[3] Ibid, para 16.
[4] Ibid, para 19.
[5] The majority judgment under review, para 27.
[6] Ibid, paras 11 and 12.
[7] Ibid, para 23.
[8] Later followed in CIR v. Rafeh Limited (PLD 2020 SC 518).

8. So far as ground (iii) is concerned, it has been contended on behalf of the petitioner that this is the result of an erroneous assumption of a material fact. We find substance in this contention, as the error in this regard is also apparent on the face of the record. The nature of the receipts was explained by the petitioner in its tax returns, and there was no dispute regarding this fact before the Income Tax Officer,[9] the Commissioner (Appeals)[10] or the Tribunal.[11] It was, and remains, an admitted fact that the receipts were rentals received by the petitioner for the lease of FLIC tapes containing computer software programs. The Tribunal, in its well-reasoned and considered orders,[12] referred the following questions of law to the High Court:

i. Whether the Tribunal was right in holding that receipts of the applicant [petitioner] from the leasing FLIC Tapes were not "business profits".

ii. Whether the learned Appellate Tribunal was right in holding that receipts of the Applicant [petitioner] from leasing FLIC Tapes were income from "Royalty" and were not business profits.

It is self-evident from reading the above questions referred to the High Court by the Tribunal that the nature of the receipts was an admitted fact, and the questions referred were questions of law. Therefore, the observations made by this Court in the majority judgment, that it was unwarranted for the High Court to have delved into the nature of the receipts, appear to have overlooked the said orders of the Tribunal. The High Court only dealt with and answered the aforementioned questions of law and did not determine the nature of the receipts, which was an admitted fact.

9. As for ground (iv), it has been contended on behalf of the petitioner that, in the majority judgment, it escaped the notice of this Court that there is no significant difference in the definition of "royalties" provided in Article 12 of the UN MC and Article 12 of the OECD MC; therefore, the reference to Article 12 of the OECD MC, instead of Article 12 of the UN MC, by the High Court was inconsequential. This contention, we find, is

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[9] The assessment order for the assessment year 1987-88. The subsequent assessment orders simply followed this order.

[10] The appellate order dated 31.10.1988 relating to the assessment year 1987-88. The subsequent appellate orders simply followed this order.

[11] The Tribunal's common order dated 22.12.1992 relating to three assessment years 1987-90. The subsequent Tribunal's orders simply followed this order.

[12] The Tribunal's common order dated 25.10.1993 relating to three assessment years 1987-90. The subsequent Tribunal's orders simply followed this order.

supported by a plain reading of the two definitions. The only material difference between the definitions of “royalties” in the UN MC and the OECD MC is that the former includes payments received as consideration “*for the use of, or the right to use, industrial, commercial or scientific equipment*” in its definition. However, since neither the Income Tax Officer, the Commissioner (Appeals), the Tribunal, nor the respondent before this Court relied upon this clause of the definition of “royalties” as FLIC tapes containing computer software programs are admittedly not “equipment”, this difference was immaterial to the decision of the case.

10. As to ground (v), it has been contended on behalf of the petitioner that, in the majority judgment, this Court totally overlooked the question of law that was referred by the Tribunal to the High Court and decided in favour of the petitioner. Instead, the majority judgment only cursorily observed that the full definition of “royalties” in paragraph 3(a) of Article 12 of the Convention included payments for “*information concerning industrial, commercial or scientific experience*”, but did not clearly and decisively hold that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs involved in the present case are covered by that clause of the definition of “royalties”. In contrast, it has been contended that the minority judgment, after a detailed discussion, rightly held that the receipts involved in the present case do not fall within the scope of the said clause of the definition of “royalties”.

11. Since this was, to our understanding, the most significant ground for review, we carefully read the majority judgment to evaluate its substance. We find that in the majority judgment this Court failed to determine whether the questions of law referred to and decided by the High Court were correctly resolved and whether the receipts received by the petitioner fall within the definition of “royalties”, and if so, under which clause of the definition. We find the contention to be correct that the majority judgment cursorily observed that the full definition of “royalties” in paragraph 3(a) of Article 12 of the Convention includes payments for “*information concerning industrial, commercial or scientific experience*”. However, it did not clearly or decisively hold that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs, as involved in the present case, are covered by that clause of the definition of “royalties”.

12. The minority judgment, after a detailed examination of all clauses of the definition of "royalties" that could possibly bring the receipts received by the petitioner within the scope of "royalties" and thereby taxable in Pakistan, concluded that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs fall neither within the clause "*information concerning industrial, commercial or scientific experience*" nor within any other clause of the definition of "royalties". It is reiterated that if a payment is in respect of rights to use the copyrights in a program, (e.g. by reproducing it and distributing it) then such a payment would be considered as a royalty. Other payments, however, only give a user the right to operate the program, where a consumer pays for a copy of computer program to use, this is not royalty payment[13]. Since both the majority and minority judgments have already been reported as *CIT v. Inter Quest Informatics Services* (2023 SCMR 1803), we find it unnecessary to reiterate all the discussions made in the minority judgment, especially when we fully agree with it and endorse the same. We are sure that had this Court considered the aspects of the definition of "royalties" as discussed in the minority judgment, it would not have rendered the majority judgment under review. For the same reasons as recorded in the minority judgment, we hold that the Tribunal was not correct, and the High Court was correct, in determining that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs were not income from "royalties" but were "business profits", as claimed by the petitioner in its tax returns.

13. For the above reasons, we find that the majority judgment under review suffers from errors apparent on the face of the record. It proceeded on an erroneous assumption of a material fact and overlooked the material question of law and important aspects of the matter involved. Had this Court noticed and considered them earlier, it would not have passed the majority judgment under review. Therefore, we accept the present review petitions, recall the majority judgment under review and dismiss the appeals of the respondent, upholding the judgments of the High Court.

14. Before parting with the judgement, we wish to reiterate that Double Taxation Treaties (DTTs) provide a crucial framework for fostering international economic cooperation, facilitating cross-border

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[13] *Lynne Oats & Emer Mulligaan* - Principles of International Taxation, 7th edition. Bloomsbury Professional Tax. p.141.

investments, and avoiding the dual taxation of income that can impede global commerce. Klaus Vogel[14] emphasizes that these treaties serve as "bridges between nations," designed to encourage economic collaboration while preventing conflicts over taxing rights. They achieve this by allocating taxing authority between the source and resident states, promoting predictability for businesses and individuals engaged in international activities. Courts in developing countries must interpret these treaties as dynamic instruments that balance the need for economic growth with the protection of their tax base. Vogel argues that treaties should not be interpreted rigidly but should reflect their "object and purpose," ensuring they serve the broader goal of equitable economic development globally.

Judge

Judge

Islamabad,
28th November, 2024.
Approved for reporting Judge
Iqbal

[14] Klaus Vogel on Double Taxation Conventions -5th edition. Wolters Kluwer