

IN THE HIGH COURT OF SINDH, KARACHI

*Before: Muhammad Junaid Ghaffar &
Mohammad Abdur Rahman, JJ*

ITRA No.318 of 2019

For Hearing of Main Case

Commissioner Inland Revenue, Zone III

Vs.

M/s. MND E&P A.S

ITRA No.319 of 2019

For Hearing of Main Case

PEXCON A.S (Formerly Known as M/s MND E& P A.S.)

Vs.

Appellate Tribunal Inland Revenue Bench-V & others

Appellant in ITRA No.318
of 2019 and Respondent
No. 1 in ITRA No.319
of 2019

: Mr. Imran Ahmed Maitlo assisted by Mr.
Amanat Ali Sahar, Additional
Commissioner Zone V, LTO, Karachi

Appellant in ITRA No.319
of 2019 and Respondent
No. 1 in ITRA No.318
of 2019

: Mr. Salman Aslam Butt assisted by Mr.
Muhammad Shoaib Rashid

Date of hearing : 15 May 2025 and 21 May 2025

Date of Decision :

J U D G E M E N T

MOHAMMAD ABDUR RAHMAN,J: This common order will decide ITRA No. 318 of 2019, maintained by the Commissioner Inland revenue Zone-III, Large Tax Payer Unit, Karachi and ITRA No.319 of 2019 maintained by Pexcon A.S., which was formerly known as MND E&P A.S., (hereinafter referred as “MND”) each against an order dated 20 August 2019 passed by the Appellate Tribunal Inland Revenue Pakistan (Karachi) in ITA No.922 KB 2015 setting aside an order dated 23 April 2015 passed by the Commissioner Inland Revenue (Appeals) in Appeal No. 1314 of 2014 and an Order in Original dated 23 June 2014 passed by the Deputy Commissioner Inland Revenue under Sub-Section (1) of Section 122 of the Income Tax Ordinance, 2001, remanding the matter to the Deputy Commissioner Inland Revenue for conducting a reassessment.

A. Facts

2. MND is private limited company, that is incorporated in the Czech Republic which, inter alia, holds 100% of the shareholding of a company registered in the United Kingdom entitled MND Exploration and Production Limited. MND Exploration and Production Limited was incorporated as a company undertaking oil exploration and production and which holds the right to Petroleum Concessions in both Pakistan and in Yemen.

3. In the Tax Year 2013, the entire shareholding of MND in MND Exploration and Production Limited was acquired by Pakistan Petroleum Limited (hereinafter referred to as “PPL”) through a Share Purchase Agreement dated 30 August 2012 (hereinafter referred to as the “SPA”).

4. While MND is, for taxation purposes, a non-resident in Pakistan, the sale of the shares that it held in MND Exploration and Production Limited to PPL nevertheless was subject to withholding tax under Sub-Section (2) of Section 152 of the Income Tax Ordinance, 2001 read with Clause (2) of Division II of Part III of the First Schedule of the Income Tax Ordinance, 2001 and which mandated that 20% of the purchase price was to be withheld and deposited by PPL. On this basis, a sum of Rs. 2,349,693,757 was deducted and deposited as withholding tax by PPL.

5. MND filed its income tax return in Pakistan for the Tax Year 2013 and while showing a capital gain of Rs. 3,235,661,048 on the sale of the shares held by it in MND Exploration and Production Limited claimed a

refund on the entire amount of Rs. 2,349,693,757 that was treated as withholding tax by PPL.

B. Assessment Order

6. After MND filed its Tax Returns for the Tax Year 2013, it was selected, under Section 177 of the Income Tax Ordinance, 2001, for an audit. In the audit, the “sale of the shares” held by MND in MND Exploration and Production Limited to PPL was treated, by the Commissioner Inland Revenue, as the “sale of an asset” and was assessed under Sub-Section (10) read with Sub-Section (9) of Section 101 the Income Tax Ordinance, 2001 as “Pakistan Source” and on which basis an assessment order was passed on 23 June 2014, under Sub-Section (1) of Section 122 of the Income Tax Ordinance, 2001 determining a tax liability of Rs. 3,050,343,543 as against MND. It was further clarified that as a sum of Rs. 2,349.693,757 was already paid, a demand of Rs.700,649,787 was being made as against MND.

C. Appeal before Commissioner Inland Revenue Appeal (Appeals II) Karachi

7. MND preferred an appeal under Section 129 of the Income Tax Ordinance, 2001 before the Commissioner Inland Revenue Appeals (Appeals II) Karachi bearing Appeal No. 1314 of 2014 and which was dismissed on 23 April 2015 upholding the Order in Original dated 23 June 2014 and maintaining the demand of Rs.700,649,787 being made as against MND.

D. Appeal Before the Appellate Tribunal Inland Revenue (Pakistan) Karachi

8. MND preferred an appeal as against the order dated 23 April 20215 passed by the Commissioner Inland Revenue Appeals (Appeals II) in Appeal No. 1314 of 2014 bearing ITA No. 922-KB of 2015 before the Appellate Tribunal Inland Revenue (Pakistan) Karachi and which after considering the contentions of both MND and the Department on 20 August 2019 and after making certain findings as to whether the sale of shares by MND to PPL was amenable to tax in Pakistan, remanded the matter to the Deputy Commissioner Inland Revenue for conducting a fresh assessment.

E. ITRA No. 318 of 2019 and ITRA No. 319 of 2019

9. Both the MND and the Department have preferred References Applications, under Section 133 of the Income Tax Ordinance, 2001, as against the order dated 20 August 2019 passed by the Appellate Tribunal Inland Revenue (Pakistan) Karachi in ITA No. 922-KB of 2015.

10. Both these Reference Applications were heard by this Court on 23 January 2020 and on which date both the above-mentioned Reference Applications were admitted for answering the following questions:

- “ ... (a) *Whether the ATIR was justified in remanding the case for reassessment when there is adequate evidence on record to decide the case and there exists no factual dispute or questions of fact remaining to be determined?*
- (b) *Whether the ATIR was justified in remanding the case after hearing the matter for four (4) years; and whether remand of the case at this juncture leads to further grievous procrastination and infringement of Petitioners fundamental right to expeditious justice?*
- (c) *Whether the share purchase agreement dated 30.08.2012 (SPA) and resulting transfer by Petitioner of its shares in a UK company to Pakistan Petroleum Limited should legally be classified as a “share transaction” or “asset transaction?”*

(i) Contentions on Behalf of MND

11. Mr. Salman Aslam Butt entered appearance on behalf of MND. After referring to each of the orders passed, as detailed hereinabove, he submitted that the entire transaction revolved around two issues. Elaborating, he identified the first issue being as to whether the Department, while making an assessment, could treat the SPA as between MND and PPL as an agreement reflecting the transfer of the shares held by MND in MND Exploration and Production Limited to PPL or in the alternative by treating the SPA as an agreement reflecting the transfer of the assets held by MND Exploration and Production Limited. Addressing this issue, Mr. Salman A. Butt maintained that the SPA was nothing more than what it was i.e., a transfer by MND of the shareholding held by it in MND Exploration and Production Limited to PPL and to treat the SPA in any other manner would be to interpret that transaction contrary to the intention of the contracting parties to the SPA. The Second issue, Mr. Salman A. Butt contended, was relating to the interpretation of Sub-Section (9) and (10) of Section 101 of the Income Tax Ordinance, 2001 and which reads as hereinafter:

- “ ... (9) Rental income shall be Pakistan-source income if it is derived from the lease of immovable property in Pakistan whether improved or not, or from any other interest in or over immovable property, including a right to explore for, or exploit, natural resources in Pakistan.
- (10) Any gain from the alienation of any property or right referred to in sub-section (9) or from the alienation of any share in a company the assets of which consist wholly or principally, directly or indirectly, of property or rights referred to in sub-section (9) shall be Pakistan-source income.”

Mr. Salman A. Butt submitted that as per Sub-Section (9) of Section 101 of the Income Tax Ordinance, 2001 any income earned from the right to explore for or exploit natural resources in Pakistan, such as the Petroleum Concession that were granted to MND Exploration and Production Limited, was to be considered as rental income and which income would be treated “Pakistan Source”. He further contended that under Sub-Section (10) of Section 101 of the Income Tax Ordinance, 2001, inter alia, any gain from the transfer of shares in a company the assets of which “wholly or principally” constituted of property referred to in Sub-Section (9) of Section 101 of the Income Tax Ordinance, 2001 e.g., a Petroleum Concession, was also to be treated as income and which would be treated as “Pakistan Source”. While conceding that the transfer of the shares held by MND in MND Exploration and Production Limited to PPL would constitute the transfer of an asset as identified in Sub-Section (9) of Section 101 of the Income Tax Ordinance, 2001, he maintained that for the gain from the transfer of the shares to constitute income which would be treated as “Pakistan Source,” it was also necessary for the assets of MND Exploration and Production Limited to “wholly or principally” be constituted of the Petroleum Concession in Pakistan, failing which the gain derived from the transfer of such shares would not be constituted as “Pakistan Source”. In this regard he relied on the interpretation cast on the expressions “wholly or principally” by the Appellate Tribunal Inland Revenue Pakistan (Karachi) in its the order dated 20 August 2019 passed by in ITA No.922 KB 2015 and wherein it held that:

- “ ... 58. The concern i.e. what is meant by the term 'wholly or principally', as used in section 101(10) and in case of a company having immovable properties both inside as well as outside Pakistan, how the prescribed rule of 'wholly or principally' would be applicable? There is no dispute as to the interpretation of term 'wholly' to mean 'in entirety or exclusively'. The issue is what meaning should be assigned to the term principally i.e. whether the word or used after the word wholly is to be interpreted in conjunctive sense disjunctive sense. In this context, we find force in learned AR's arguments that the word 'principally' proceeding the word 'wholly' cannot be assisted independent meaning i.e., the word 'or' joining these two words should be read in conjunctive sense. We are aware that in case of oil/gas E&P sector, this is anormal business practice for foreign exploration companies to undertake joint venture under head-office branch structure in Pakistan with head office being registered under a foreign territory. On the other hand, the Income Tax Ordinance, until 2018 did not tax capital gain accruing on indirect transfer of shares, in Pakistan, with the only exception of E&P sector.

This fortified the argument that the word principally has to be assigned contextual meaning similar to the word 'wholly'. If that holds true, another question arises as to the need for the legislature to add another word 'principally' when the intent was fulfilled by the word 'wholly' preceding it? To us simple answer could be that like any corporate structure, there are business/operational as well as non-operational/common assets. In view of that, one could have argued in the absence of words principally that owing to few assets being held at head office level outside Pakistan, the condition of wholly is not satisfied and accordingly tax incidence in Pakistan does not arise. The has used the word 'principally' to curb such situations. ...

60. In view of the above discussion, we conclude that the scope of word 'principally' used under section 101(10) should be interpreted as almost wholly and not otherwise."

Adopting this contention, Mr. Salman A. Butt submitted that the word "principally" should be construed in the context of the word "wholly" and on which basis, as the assets of MND Exploration and Production Limited also consisted of Petroleum Concessions in Yemen and which, as per the books of accounts of MND Exploration and Production Limited, constituted 49.6 % of the assets of that company, it could not be said that the Petroleum Concession held by MND Exploration and Production Limited in Pakistan "wholly or principally" constituted the assets held by it so as to treat the gain made from the sale of the shares of MND Exploration and Production Limited to PPL as "Pakistan Source. He further clarified that the basis taken by the Department to assess whether the Petroleum Concession in Pakistan "wholly or principally" constituted the assets held by MND Exploration and Production Limited was premised on newspaper articles in local newspapers and which could not constitute the basis for making such an evaluation and in this regard the balance sheet of MND Exploration and Production Limited would be the correct way to make such an assessment.

12. Explaining that financial investments that are to be made in the exploration of oil and gas fields are capital intensive, Mr. Salman A. Butt added that the economic model that is adopted has been designed to allow for the free movement of assets held by companies in this industry without the burden of taxation as to do otherwise would be to frustrate the massive investment required for the development of such petroleum concessions. He stated that on this premise, the Federal Government has amended the law and has inserted Section 101A into the Income Tax Ordinance, 2001¹ and which states as hereinafter:

¹ Through Finance Act, 2018

“ ... 101 A Gain on disposal of assets outside Pakistan. —

(1) Any gain from the disposal or alienation outside Pakistan of an asset located in Pakistan of a non-resident company shall be Pakistan-source.

(2) The gain under sub-section (1) shall be chargeable to tax at the rate and in the manner as specified in sub-section (10).

(3) Where the asset is any share or interest in a non-resident company, the asset shall be treated to be located in Pakistan, if—

(a) the share or interest derives, directly or indirectly, its value wholly or principally from the assets located in Pakistan; and

(b) shares or interest representing ten per cent or more of the share capital of the non-resident company are disposed or alienated.

(4) The share or interest, as mentioned in sub-section (3), shall be treated to derive its value principally from the assets located in Pakistan, if on the last day of the tax year preceding the date of transfer of a share or an interest, the value of such assets exceeds one hundred million Rupees and represents at least fifty per cent of the value of all the assets owned by the non-resident company.

(5) Notwithstanding the provisions of section 68, the value as mentioned in sub-section (4) shall be the fair market value, as may be prescribed, for the purpose of this section without reduction of liabilities.

(6) Where the entire assets by the non-resident company are not located in Pakistan, the income of the non-resident company, from disposal or alienation outside Pakistan of a share of, or interest in, such non-resident company shall be treated to be located in Pakistan, to the extent it is reasonably attributable to assets located in Pakistan and determined as may be prescribed.

(7) Where the asset of a non-resident company derives, directly or indirectly, its value wholly or principally from the assets located in Pakistan and the non-resident company holds, directly or indirectly, such assets through a resident company, such resident company shall, for the purposes of determination of gain and tax thereon under sub-section (8) or, as the case may be, sub-section (9), shall furnish to the Commissioner within sixty days of the transaction of disposal or alienation of the asset by the non-resident company, the prescribed information or documents, in a statement as may be prescribed:

Provided that the Commissioner may, by notice in writing, require the resident company, to furnish information, documents and statement within a period of less than sixty days as specified in the notice.

(8) The person acquiring the asset from the non-resident person shall deduct tax from the gross amount paid as consideration for the asset at the rate of ten per cent of the fair market value of the asset and shall be paid to the Commissioner by way of credit to the Federal Government through remittance to the Government Treasury or deposit in an authorized branch of the State Bank of Pakistan or the National Bank of Pakistan, within fifteen days of the payment to the non-resident.

(9) The resident company as referred to in sub-section (7) shall collect advance tax as computed in sub-section (10) from the non-resident company within thirty days of the transaction of disposal or alienation of the asset by such non-resident company:

Provided that where the tax has been deducted and paid by the person acquiring the asset from the non-resident person under sub-section (8), the said tax shall be treated as tax collected and paid under this sub-section and shall be allowed a tax credit for that tax in computing the tax under sub-section (10).

(10) The tax to be collected under sub-section (9) shall be the higher of—

(a) 20% of A, where A – fair market value less cost of acquisition of the asset; or

(b) 10% of the fair market value of the asset.

(11) Where tax has been paid under sub-section (8) or (9), no tax shall be payable by the non-resident company in respect of gain under sub-section (8) of section 22 or capital gains under section 37 or 37A.

(12) Where any gain is taxable under this section and also under any other provision of this Ordinance, the said gain shall be taxable under other provision of the Ordinance."

He clarified that under this section, for the transfer of shares of a company incorporated outside of Pakistan to be treated as an asset located in Pakistan, the value of the assets held by the company would be considered on the last day of the tax year preceding the date of transfer of the share or an interest and if the value of the assets located in Pakistan, in the books of accounts of the company exceed Rupees 100,000,000 and also represented at least fifty per cent of the value of all the assets owned by the non-resident company, only then would the asset be considered as being located in Pakistan. He reiterated that as against this threshold the value of the assets held by MND Exploration and Production Limited in Pakistan representing 49.6% % of the value of the assets of the company on the relevant date in the books of the companies account, under this provision, the gain on the transfer of the shares held by MND in MND Exploration and Production Limited to PPL would, today, not be treated as "Pakistan Source".

13. To emphasise this point, Mr. Salman A. Butt once again referred us to the decision of the Appellate Tribunal Inland Revenue Pakistan (Karachi) in its the order dated 20 August 2019 passed in ITA No.922 KB 2015 and in which it was observed as hereinunder:

" 59. This interpretation is also supported from subsequent insertion of section 101A through Finance Act, 2018 whereby legislature has now taxed gain arising on disposal of foreign company's shares where such shares derives their value wholly or principally from assets located in Pakistan. The legislature, in that situation, has defined the criteria of 'principal derivation of value' as 50% of value of total assets relating to assets located in Pakistan. In that case, section 101A(6) duly provide that gain to be taxed in Pakistan should only be to the extent it is reasonably attributed to the assets in Pakistan i.e. proper attribution is required to be made to ensure that only so much portion of the gain from sale of shares is taxed in Pakistan that is attributable to the assets located in Pakistan. Whereas no such definition of 'principally' or prescription for allocation of gain to assets located in Pakistan, exist under section 101(9) (10). For ready reference section 101A is reproduced below:

101A. Gain on disposal of assets outside Pakistan.-

(1) Any gain from the disposal or alienation outside Pakistan of an asset located in Pakistan of a non resident company shall be Pakistan-source.

(2) The gain under sub-section (1) shall be chargeable to tax at the rate and in the manner as specified in sub-section (10).

(3) Where the asset is any share or interest in a non-resident company, the asset shall be treated to be located in Pakistan, if_____

(a) the share or interest derives, directly or indirectly, its value wholly or principally from the assets located in Pakistan; and

(b) shares or interest representing ten per cent or more of the share capital of the non-resident company are disposed or alienated.

(4) The share or interest, as mentioned in sub-section (3), shall be treated to derive its value principally from the assets located in Pakistan, if on the last day of the tax year preceding the date of transfer of a share or an interest, the value of such assets exceeds one hundred million Rupees and represents at least fifty per cent of the value of all the assets owned by the non-resident company.

(5) Notwithstanding the provisions of section 68, the value as mentioned in sub-section (4) shall be the fair market value, as may be prescribed, for the purpose of this section without reduction of liabilities.

(6) Where the entire assets by the non-resident company are not located in Pakistan, the income of the non-resident company, from disposal or alienation outside Pakistan of a share of, or interest in, such non-resident company shall be treated to be located in Pakistan, to the extent it is reasonably attributable to assets located in Pakistan and determined as maybe prescribed. ...

61. Applying this proposition to the case in hand, it is clear from bare perusal of audited financial statements of MND UK as well that of MND UK Pakistan Branch as at December 31, 2012 that value of Pakistan assets in MND UK's total assets is far less than to be termed as wholly; i.e. on the basis of carrying amounts / books value derived on accounting principles, Pakistan Branch stood only at 44.79% of total assets of MND UK; resulting that capital gain accruing to the taxpayer on disposal of MND UK's shares would not be taxable at the outset under section 101(9)/(10) of the Ordinance. Regarding DR's reliance on decision of this Tribunal in ITA No. 521/IB/2012 dated January 9, 2013 in the case of Ocean Pakistan (Pvt) Limited, we have gone through that Order and found it distinguishable from instant appeal before us. This is primarily due to the fact that under that case, dispute was over taxability of gain arising on transfer of working interests in Petroleum Concession Agreements [PCAs] in Pakistan and that the fact i.e. transaction_ for sale of working interests in Pakistan (assets) was never disputed between the parties; whereas in the instant case no PCA's have been sold and MND UK has been the concession holder before as well as after the transaction, as admitted by the DR as well."

While concurring with the interpretation cast by the Appellate Tribunal Inland Revenue Pakistan (Karachi) Mr. Salman A. Butt submitted that if the transaction for the sale of shares as contained in the SPA is considered today, it would not be amenable to being treated as an asset in Pakistan. He stated that the order dated 20 August 2019 passed by the Appellate Tribunal Inland Revenue Pakistan (Karachi) in ITA No.922 KB 2015 having specifically decided all the issues, a question of remanding the matter for reassessment was unwarranted and which was not sustainable.

14. Mr. Salman A. Butt concluded by adopting the interpretation cast by the Appellate Tribunal Inland Revenue Pakistan (Karachi) on the expressions “wholly and principally” as contained in Sub-Section (10) of Section 101 of the Income Tax Ordinance, 2001 and submitted that as the assets of MND Exploration and Production Limited held in Pakistan did not “wholly or principally” constitute the assets of the Company the gain from the transfer of shares held by MND in MND Exploration and Production Limited to PPL could not be treated as “Pakistan Source.”

(ii) Contentions on Behalf of the Department

15. Mr. Imran Ahmed Maitlo entered appearance on behalf of the Department and was assisted by Mr. Amanat Ali Sahar, Additional Commissioner Zone V, LTO, Karachi. At the outset it was also contended that there was enough information on record to have decided the matter and the order dated 20 August 2019 passed by the Appellate Tribunal Inland Revenue Pakistan (Karachi) in ITA No.922 KB 2015 remanding the matter for reassessment, was, in the circumstances unwarranted.

16. On behalf of the Department, it was contended that while ***in form***, the transaction was that of a sale of the shares held by MND in MND Exploration and Production Limited to PPL, ***in substance***, the transaction was to sell the assets held by MND Exploration and Production Limited to PPL i.e., the working interest in the petroleum concessions in Pakistan. It was pleaded that in such circumstances the transaction should be considered as a disposal of the assets of MND Exploration and Production Limited to PPL and therefore the gain that arose from the transaction was taxable under clause (a) of Sub-Section (8) of Section 22 read with clause (a) of Sub-Section (8) of Section 24 of the Income Tax Ordinance, 2001 and should be treated as “Pakistan Source”.

17. It was maintained that the valuation of the assets held MND Exploration and Production Limited in Yemen, as produced, were not substantiated by evidence as the audited financial statements of MND Exploration and Production Limited did not make any determination of the valuation of the assets held by that company in Yemen. He further submitted that as the accounts disclosed that the “majority” of the income of the company was derived from the assets in Pakistan, it could therefore only be concluded that the petroleum concessions in Pakistan constituted the “majority” of the assets of MND.

18. It was also asserted that in ancillary proceedings that were instituted by the Department as against PPL in respect of their acquisition of the shares held by MDN in MND Exploration and Production Limited by PPL pursuant to the SPA, the representatives of PPL in those proceedings i.e., A.F. Ferguson & Co. had taken a contradictory plea and had accepted that the gain on the transfer of the shares would amount to a capital gain and which would be treated as "Pakistan Source." It was submitted that inconsistent pleas were being taken in respect of the same transaction and hence the representatives of MND were appropriating and reprobating regarding the assessment to be made on the basis of the same document i.e., the SPA. On this basis it was pleaded that the gain made by MND on the transfer of the shares held by it in MND Exploration and Production Limited by PPL pursuant to the SPA was amenable to tax as being "Pakistan Source."

F. Answer to the Questions framed by the Court in ITRA No. 318 of 2019 and ITRA No. 319 of 2019

19. We have heard Mr. Salman A. Butt and Mr. Imran Ahmed Maitlo, who was assisted by Mr. Amanat Ali Sahar, Additional Commissioner Zone V, LTO, Karachi, and have perused the record.

20. To being with there is no dispute as between the parties regarding the fact that the transaction, as discernable in the SPA, was structured as a transfer of shares held by MND in MND Exploration and Production Limited to PPL and the obligations pursuant to which are identified in that SPA.

21. The relevant provisions relied on by the Department when assessing the tax liability of MND are found Sub-Section (9) read with Sub-Section (10) of Section 101 of the Income Tax Ordinance, 2001 and which is arranged in Part 1 of Chapter VII of the Income Tax Ordinance under the Part heading "Geographical Source of Income" under the main heading "International" and which read as hereinunder:

" ... (9) Rental income shall be Pakistan-source income if it is derived from the lease of immovable property in Pakistan whether improved or not, or from any other interest in or over immovable property, including a right to explore for, or exploit, natural resources in Pakistan.

(10) Any gain from the alienation of any property or right referred to in sub-section (9) or from the alienation of any share in a company the assets of which consist wholly or principally, directly or indirectly, of property or rights referred to in sub-section (9) shall be Pakistan-source income."

There is, again, no dispute, as between MND and the Department, that the assets of MND Exploration and Production Limited constituted of rights, in the form of Petroleum Concessions, as defined in Sub-Section (9) of Section 101 of the Income Tax Ordinance, 2001 to exploit natural resources in Pakistan thereby bringing the provisions of Sub-Section (10) of Section 101 of the Income Tax Ordinance, 2001 into play and which prescribes that the gain on the alienation of any share in a company the assets of which “wholly or principally” constituted rights referred to in Sub-Section (9) of Section 101, such as petroleum Concessions in Pakistan, would be treated as “Pakistan Source”, irrelevant as to whether they were “directly or indirectly” held by that Company. There also no dispute, as between MND and the Department, as to the rights under the Petroleum Concession being “directly or indirectly” held by MND Exploration and Production Limited, the only question that remains to be answered is as to whether the Petroleum Concession in Pakistan constituted “wholly or principally” the assets of the MND.

22. Now what does the expression “wholly or principally” mean? To begin with we have no doubt that this expression relates to a quantification of the proportion of the assets held by the MND Exploration and Production Limited. In this context there can be no doubt that when one is to interpret the expression “wholly” it can be considered to mean the word “completely” and hence being a referral to 100% of the assets held. As that expression has not been considered by our Courts, reference could, in this regard, be made to the definition given in Blacks Law Dictionary² which defines that expression as hereinunder:

“ ... *Not Partially; fully, completely*”

By contrast the word “principally” has not been defined in that Law Dictionary, nor for that matter has that expression been judicially considered by our Courts.³ The Oxford English Dictionary, however, defines that expression to mean:⁴

“ ... 1. *In the chief place, above all, pre-eminently*
2. *In a special or marked degree, especially,*
3. *For the most part, in most cases.*”

² Garner , B.A (2019) **Blacks Law Dictionary**, 11th Edition, St. Paul Minnesota

³ The expression came to be considered in Courts of the United Kingdom in the decision reported as **Ground rent Development Co. vs. West** [1902] 1 Ch. D 674 in the context of the distinction as between the expressions “interested” and “principally interested” but which was specifically not decided in that case.

⁴ Brown,L. (1993) **The New Shorter Oxford English Dictionary**, Oxford

It would therefore seem that on the basis of these definitions, the assets held by the company whose shares are being transferred would have to either “entirely” or for the “most part” be constituted of assets of the nature as indicated in Sub-Section (9) of Section 101 of the Income Tax Ordinance, 2001 for the income derived thereon to be treated as “Pakistan Source”. As the assets held by MND Exploration and Production Limited admittedly are not “wholly” or “entirely” constituted of the Petroleum Concession in Pakistan, the Department has chosen to rely on the expression “principally” so as to ascertain whether the Petroleum Concession in Pakistan owned by MND Exploration and Production Limited in the “most part” constituted the assets of that company. However, it is only when one has to consider the expression “principally” that one realises it is difficult to quantify such an expression. To begin with, to our mind, the expression “principally” cannot mean less than 50% and hence it must be considered that the assets, as indicated in Sub-Section (9) of Section 101 of the Income Tax Ordinance, 2001, held by the company whose shares are being sold must constitute more than 50% of the total assets of a Company before the gain derived from such a transaction can be considered as “Pakistan Source.”

23. But how much more ... would 50.01% suffice? or would the value of the assets held by the company have to be a figure greater than that? Additionally, what should be the basis to assess the value of the assets? In this regard we have compared the expression “Wholly or Principally” with the expression “Wholly or Mainly” that has been opined by the courts in the United Kingdom in the decision reported as **R vs. Radio Authority ex p. Bull**⁵ and in which while considering the expression “Wholly or Mainly” the Court of Appeal opined as hereinunder:

“ ... *“wholly or mainly” is a phrase the meaning of which is not free from ambiguity. Clearly it requires a proposition which is more than half. But how much more? 51% or 99% and anything between are candidates. The issue is not whether the restriction contained in the first rule is justifiable but how the restriction should be construed having regard to its blanket or discriminative effect in relation to a political body. In view of this restriction the ambiguous words “wholly or mainly” should be construed restrictively. By that I mean they should be construed in a way in which limited the application of the restriction to bodies whose objects are substantially or primarily political. Certainly, a body to fall within the provision must be at least midway between the two percentages I have identified i.e. more than 75%.”*

While agreeing with this decision, we do see a similarity as between the words “mainly” and “principally” in the context of their usage with the word

⁵ [1997] 2 All ER 561

“wholly.” To our mind for the income from the sale of shares of a company to be treated as being of “Pakistan Source” the assets, as indicated in Sub-Section (9) of Section 101 of the Income Tax Ordinance, 2001, that are held by the company whose shares are being alienated must constitute either all or a very large portion of the assets of that company. While the expression “mainly” has been considered to represent a figure of 75% and which we think is a good objective standard we do think that the expression “principally” would indicate an intention to mean an even greater percentage than “mainly” therefore taking the percentage value of the assets above the figure of 75%. It is useful that an amendment has now been made by the insertion of Section 101A into the Income Tax Ordinance, 2001 and which now statutorily defines both a quantum and a percentage of the value of the assets so as to once and for all do away with the ambiguity created by this expression.

24. In the context of ascertaining the value we do think that the correct way to assess the value of the assets that were held by MND Exploration and Production Limited is to look at newspaper reports as has been resorted to by the Department but rather to look at the accounts of the company as the basis for such an assessment. Against this threshold the assets of MND Exploration and Production Limited comprising of petroleum concession in Yemen and which are indicated to constitute 49.6% of the assets of the company we are of the opinion that the income derived from the transfer of the shares held by MND in MND Exploration and Production Limited to PPL could not have been considered as “principally” being located in Pakistan and hence could not be treated as “Pakistan Source.”

25. We have also considered the argument raised by the Department that the SPA was in fact a scheme of tax evasion and should be set aside and the transaction should rather be considered as a sale of the assets of MND Exploration and Production Limited. When this argument is considered, in the presence of Sub-Section (9) and Sub-Section (10) of Section 101 of the Income Tax Ordinance, 2001, it is apparent that the threshold in respect of such transaction having been set in those sections an inquiry, under Section 109 of the Income Tax Ordinance, 2001 would not be warranted. Indeed, the Department has, rightly, also not made such a claim in the assessment order and thus all that was required to be done is to interpret the provisions of Sub-Section (9) and Sub-Section (10) of Section 101 of the Income Tax Ordinance, 2001 and which we have made.

26. For the foregoing reasons Questions No. (a) and (b) are, by consent, decided in the negative. With regard to question (c), the threshold in Sub-Section (9) and (10) of Section 101 having not been met, the transaction for the sale of the shares held by the MND in MND Exploration and Production Limited to PPL should be considered a transaction for the sale of shares and not a transaction for the sale of assets and the gain from which cannot be treated as "Pakistan Source." Consequentially, ITRA No. 318 of 2019, maintained by the Commissioner Inland revenue Zone-III, Large Tax Payer Unit, Karachi is hence dismissed and ITRA No.319 of 2019 maintained by MND is allowed. Let a copy of this order be issued to the Appellate Tribunal Inland Revenue Pakistan (Karachi) in terms of Sub-Section (5) of Section 133 of the Income Tax Ordinance, 2001.

JUDGE

CHIEF JUSTICE

Karachi dated 15 August 2025

ANNOUNCED BY

CHIEF JUSTICE

JUDGE

Karachi dated 15 August 2025