JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.T.R No. 32 of 2020

Pakistan Mobile Communications Limited (PMCL)
Vs.
The Commissioner Inland Revenue (Zone-IV) Large Taxpayers Unit, Islamabad and others

APPLICANT BY:	Sardar Ahmed Jamal Sukhera and Mr. Sikandar Sukhera, Advocates
RESPONDENTS BY:	M/s Asma Hamid, Mustafa Khalid, Saima Kamila, Zulqarnain Bhatti, Shehr Yar Khan and Khayyam Mushir, Advocates Dr. Ishtiaq Ahmed Khan, D.G (Law) FBR. Mr. Amjad Zubair Tiwana, Commissioner Inland Revenue.
DATE OF HEARING:	19.03.2025

==========

BABAR SATTAR, J.- The applicant has impugned a judgment rendered by the Appellate Tribunal Inland Revenue **("Tribunal")** dated 22.09.2020, pursuant to which the applicant's appeal against Order-in-Appeal No. 248 of 2020 dated 03.02.2020, was dismissed. The questions framed for our consideration were recorded in order dated 22.10.2020, as follows:

i. *Whether on facts and in the circumstances of the case, the Appellate Tribunal Inland Revenue has erred in law in upholding that the Commissioner had the jurisdiction to pass the amended assessment order as the Commissioner retains concurrent powers of amendment of assessment under S. 122(5A) and of passing an amended assessment order under S. 122(6), despite delegation of both powers by him to the Additional Commissioner?*

ii. *Whether on facts and in the circumstances of the case, the Appellate Tribunal Inland Revenue erred in law in failing to remand the question of jurisdiction to the Commissioner (Appeals-I)?*

iii. *Whether on facts and in the circumstances of the case the Appellate Tribunal Inland Revenue has blatantly erred in holding that all shares of the applicant are held by a non-resident company, International Wireless Communications Pakistan Limited (IWCPL), and in turn upholding that the applicant does not fulfill the requirement of S.97(1)(a) of the transaction to fall within the ambit of S.97 of the Income Tax Ordinance, 2001?*

iv. *Whether on facts and in the circumstances of the case, the Appellate Tribunal Inland Revenue has erred in law in relying upon the alleged admission of the applicant before the Commissioner (Appeals-I) and failing to decide the matter in terms of the written position on record to the contrary before the fora below and also before the Tribunal in writing?*

v. *Whether on facts and in the circumstances of the case the Appellate Tribunal Inland Revenue has erred in holding that the provisions of S. 97(4)(b) of the Ordinance are applicable in this case?*

vi. *Whether on facts and in the circumstances of the case the Appellate Tribunal Inland Revenue has erred in law in failing to decide the following ground of appeal:*

"Section 148 (7) Applies Only to Income from Imports

3.4 The Learned CIR Appeals has erred in upholding the learned Commissioner's contention that the imports made by the Appellate Company fall within the ambit of Final Tax Regime under section 148 (7) of the Ordinance."

vii. *Whether on the facts and in the circumstances of the case, the Appellate Tribunal Inland Revenue has erred in law in failing to appreciate that the applicant has not earned any income on import of equipment installed and used by the Applicant to provide Telecommunication Services to its customers and that the tax deducted at the import stage is final only on income of the importer arising from imports in terms of S. 148(7)?*

viii. *Whether on facts and in the circumstances of the case the Appellate Tribunal Inland Revenue has erred in law in holding that the provision of telecommunication services by the applicant does not fall within the ambit of Industrial Undertaking?*

ix. *Whether on facts and in the circumstances of the case, the Appellate Tribunal Inland Revenue has erred in law in failing to remand to the Commissioner the factual determination as to whether the business of the applicant falls within the ambit of Industrial Undertaking as defined in Section 2(29C) of the Income Tax Ordinance, 2001 and thus depriving the applicant of the statutory fora below?*

x. *Whether on facts and in the circumstances of the case, the Appellate Tribunal Inland Revenue has erred in law in failing to decide the following ground of appeal:*

Inapplicability of Section 113C

"3.2 The Learned CIR Appeals has erred in upholding the learned Commissioner's contention that the accounting gain received by the Appellant Company from the disposal of assets to its subsidiary does not fall within the ambit of "gain or loss" which "shall not be taken to arise" under Section 97 of the ordinance and in upholding his decision to subject the transaction to tax".

xi. *Whether on facts and in the circumstances of the case the order passed by the Appellate Tribunal Inland Revenue despite knowledge of status quo order in Writ Petition No. 480/2020 dated 14.02.2020 is void?*

xii. *Whether on facts and in the circumstances of the case the Appellate Tribunal Inland Revenue has erred in law in failing to hold that in case earlier tax years of the applicant currently under litigation get decided in favour of the applicant any benefit ensuing therefrom should be available for the tax year 2018 to the applicant as consequential relief?*

2. The manner in which the aforementioned questions have been framed creates an overlap amongst them. The questions of law to be addressed by us can be simplified as follows.

i. *Whether the reassessment order suffered from jurisdictional defect as it had been passed by Commissioner Inland Revenue, even though power for purposes of section 122(5A) had been delegated to the Additional Commissioner?*

ii. *Whether the applicant was entitled to the benefit of section 97(1) of the Income Tax Ordinance* ***("ITO")*** *by virtue of the transaction undertaken by Pakistan Mobile Communication Limited* ***("PMCL")*** *being a transaction for disposal of assets between wholly owned companies?*

iii. *Whether a demand in view of alternative corporate tax in terms of section 113C of the ITO could be raised against PMCL in the event that its asset disposal transaction qualified for the benefit of section 97(1) of the ITO?*

iv. *Whether PMCL qualified as an industrial undertaking for purposes of section 2(29C) of the ITO and could*

be treated as such for purposes of section 148(7) of the ITO?

v. *Whether the Tribunal ought to have passed any consequential directions in relation to amortization and/or depreciation etc. sought by PMCL in relation to previous tax years?*

3. The matter was heard at length and was reserved for judgment. It was then re-fixed for further arguments and assistance in relation to questions framed by the Court by order dated 07.03.2025.

4. Sardar Ahmed Jamal Sukhera ASC, learned counsel for the applicant, and Ms. Asma Hamid ASC, learned counsel for the tax department, made extensive arguments, which were documented and filed in the form of written submissions as well. For the assistance of the Court, they also submitted almost two dozen paper books comprising case law and legal literature on the questions to be adjudicated, including the question of interpretation of fiscal statutes from Pakistan and other jurisdictions. In order not to burden this judgment, the arguments will be dealt with in relation to each question being addressed, to the extent that engaging with such argument is essential for the conclusions drawn. Otherwise, for purpose of record, written arguments of their parties are appended to their pleadings and can be taken note of, if required.

Can the Commissioner concurrently exercise the power under section 122(5A) of the ITO, which has also been delegated to the Additional Commissioner?

5. Mr. Sukhera submitted that section 211(2) of the ITO provided that the exercise of a power by an Officer of Inland

Revenue would not prevent the exercise of such power by the Commissioner. This provision was misinterpreted by the Tribunal to hold that despite delegation of power by the Commissioner, he retained concurrent power to exercise the delegated power. He submitted that section 211(2) of the ITO did not deal with delegated powers, but was a provision introduced in the context of the power of the Federal Board of Revenue **("FBR")** or the Chief Commissioner Inland Revenue to assign powers of the Commissioner to any officer of Inland Revenue in terms of section 209(2) of the ITO. Even to the extent that section 211(2) of the ITO was relatable to delegated power, it was only relevant where a delegated power had been exercised by an officer of Inland Revenue. But where power had been delegated to an Additional Commissioner, the Commissioner did not retain concurrent power, as by virtue of the delegation the function and power essentially stood vertically transferred. He relied on ***Muhammad Rafiq vs. State (2019 SCMR 846)*** for the proposition that the principles of contract law in relation to delegation of power between a principal and an agent were not applicable when it came to delegation of powers within a statutory scheme. The power to amend an assessment order in terms of section 122(5A) could only be exercised by the delegatee (i.e. Additional Commissioner), and not by the Commissioner himself, as had been done in the instant case. The reassessment order was, therefore, *coram non judice*.

6. Ms. Asma Hamid, submitted on behalf of tax department that a combined reading of sections 209, 210 and 211 clearly established that the purpose of delegation of power to an Additional Commissioner and/or Officers of Inland Revenue was

administrative convenience. The scheme of the ITO was now well understood. By virtue of a legal fiction, the assessment orders under the ITO were deemed to have been passed by the Commissioner. Section 209 through 211 granted statutory authority to delegate the power of the Commissioner to Officers of Inland Revenue. Such delegation, however, did not mean that the Commissioner was bereft of the power vested in him under provisions of the ITO. Section 211(2) clarified that the Commissioner could continue to exercise delegated power, as had correctly been held by the Tribunal.

7. Since the enactment of the ITO, one of the most litigated aspects of the said law has been its scheme of delegation. A tax return filed by a taxpayer in terms of section 114 of the ITO is deemed to be an assessment made by the Commissioner by virtue of the legal fiction incorporated within section 120 of the ITO. Section 209(2) vests authority in the FBR or the Chief Commissioner to *"confer upon or assign any officer of Inland Revenue all or any of the powers and functions conferred upon or assigned to the Commissioner, under this Ordinance..."* Section 209(8) provides that, *"Notwithstanding anything contained in the section, every Commissioner shall have all the powers conferred by, or under, this Ordinance on him in respect of any income arising within the area assigned to him."* Section 210(1) authorizes the Commissioner to *"delegate to any Officer of Inland Revenue, subordinate to the Commissioner all or any of the powers or functions conferred upon or assigned to the Commissioner under this Ordinance, other than the power of delegation."* Section 210(1A) provides that the powers of assessment under section 122(5A) cannot be delegated to an

officer below the rank of Additional Commissioner Inland Revenue. Section 211(1) clarifies that where by virtue of an order under section 210, power has been exercised by an Officer of Inland Revenue, such power shall be deemed to have been exercised by the Commissioner. Section 211(2) then provides that, *"[t]he exercise of a power, or the performance of a function, of the Commissioner by an Officer of Inland Revenue shall not prevent the exercise of the power, or the performance of the function, by the Commissioner."* The language of section 211(2) does not limit the scope of the clarification provided therein in any way or link it either to the power conferred on an Officer of Inland Revenue in terms of section 209(2) or pursuant to section 210(1) of the ITO. The broader contention of the applicant has been that a statutory power, once delegated, can no longer be exercised by the delegator. It can only be exercised by the delegatee, unless the order of delegation is withdrawn and the power is resumed by the delegator.

8. Mr. Sukhera while making such argument cited ***Muhammad Rafiq v. State (2019 SCMR 846)***, which had cited an excerpt from *Administrative Law (Eleventh Edition) by H.W.R. Wade and C. F. Forsyth* implying that where public authority delegates its power, it may not retain the power to act concurrently in view of controversy surrounding such question within the jurisprudence produced in UK. In **Muhammad Rafiq** the question before the Supreme Court was whether a reference filed by Director General NAB was competent where the authority to file such reference had been delegated by Chairman NAB, but the office of Chairman NAB was vacant at the time when the reference was filed. The Supreme Court distinguished

the nature of delegation under agency law with that under statutory provisions and cited the following text from the *Administrative Law*:

> *"although there are similarities between the two concepts, the differences should be noted ..... an authorised act of an agent may be generally ratified by the principal but the unauthorised act of the delegate, in the absence of statutory authority, cannot be ratified by the delegator ... in appointing an agent a principal does not divest himself of his powers in the same matter, but whether the public authority that delegates its powers retains the power to act concurrently with its delegate is a matter of controversy"*

9. The Supreme Court cited this in order to create a distinction between the principles of delegation as applicable in the context of contract law versus those applicable in administrative law. It held that *"restricting the validity of the said delegated authority to the Director General, NAB to file a reference till the Chairman, NAB holds office would be reading beyond the letter of the law."* Dicta from ***Al-Jehad Trust vs. Federation of Pakistan (PLD 2011 SC 811)*** was relied upon wherein it was held that, *"Under the law of contract a delegation comes to an end when the delegator vanishes from the scene and an agent loses his authority to act on behalf of his principal when such principal is removed from the picture"* but *"the delegation of powers involved in the present case is a statutory delegation which, in an appropriate case, can survive a vacancy in the office of the delegator."* It was in this context that the Supreme Court held in ***Muhammed Rafiq*** that the authority delegated to a delegatee survived a vacancy in the office of the delegator, while clarifying that such survival of authority can

otherwise not be contemplated in terms of agency law. The Supreme Court noted that while construing the statutory authority to delegate, the legislative purpose of administrative convenience must also be borne in mind. It held that, *"[T]here is nothing in the language of the statute which requires the conclusion that a delegation should cease to operate in such an event [i.e. the Office of Chairman NAB becoming vacant]. And convenience of administration suggests that a statutory power to delegate should not be construed so as to produce such an inconvenient result unless that construction is compelled by clear and unambiguous language, language which is nowhere to be found in the provisions now under consideration."*

10. The oft-cited English precedent in relation to the scope of delegation is ***Huth vs. Clarke [25, QBD 391]***, in which Coleridge, C.J., observed that, *"Delegation does not imply denudation, and to my mind the very expression implies that the powers which are the subject of the delegation are always, or as a rule, subject to resumption. Unless controlled by statute, or by particular words, any body, which entrusts another with the exercise of a power belonging to itself, has from time to time the right to resume the power which it has delegated."* Wills, J., in his opinion, observed that, *"The word 'delegation', as generally used, in my opinion does not imply any parting with the power or authority which is the subject of the delegation, but merely implies that the person to whom the power is delegated has authority to do that which the person delegating may do himself."* In ***Gordon, Dadds & Co v. Morris*** **[1945] 2 All E.R. 616 Chancellery Division**, the principle laid down in ***Huth*** was reiterated. The question of whether delegation of authority

amounted to denudation of the powers of the delegator came before the Sindh High Court in ***Abdullah vs. Crown*** ***(PLD 1955 Sindh 384)***, in which it was held that, *"We therefore have no hesitation to come to the conclusion that the delegation of powers does not amount to renunciation or abdication of powers on the part of the delegator. It is inherent in every delegation that the delegator can at any time revoke the delegation and the power reverts to him."* The same question was then considered by the Lahore High Court in ***Nasim Fatima vs. Governor of West Pakistan*** ***(PLD 1967 Lahore 103)***, where while considering the law laid down in ***Daya Shankar Malaviya v. Emperor*** ***(AIR 1948 All. 321)***, ***Huth*** and ***Abdullah***, it held that by delegating powers under provisions of the Security of Pakistan Act, 1952, neither the Central Government nor the Provincial Government was denuded of the power delegated to the Chief Commissioner.

11. It has also been settled in our jurisdiction that once delegated power has been exercised, it stands exhausted and the delegator cannot exercise the same in a different manner. It was held by the Supreme Court in ***W.P. Land Commission vs. Fatehullah*** **(PLD 1971 SC 393)** that, *"[T]he ordinary incident of delegated authority is that if once it is competently exercised by the delegatee, it gets exhausted and there is no power left in the delegator to exercise the same authority in a different manner. If both were allowed to exercise their co-ordinate powers independently of each other simultaneously or successively, the possibility of a conflict between the two, leading to an insoluble contradiction is unavoidable."* It was similarly held in ***Majid vs. Qutb-ud-Din*** ***(1982 SCMR 212)***

that, *"[T]he revisional powers having been once exercised by the Additional Settlement Commissioner and exhausted, the other, delegatee, namely, the Settlement Commissioner could not exercise this power..."* It was held in ***Haji Muhammad Ismail vs. Government of Punjab*** ***(1987 MLD 2457)*** that in the context of delegation, *"[I]t is one of the basic principles that the delegators by delegating their powers do not get denuded of those powers… The powers vested in a delegator by a statute can always be exercised by it unless on being already exercised by the delegatee they stand exhausted."* It was held in ***Tanvir Ahmed Khan vs. Deputy Commissioner, Islamabad*** ***(1992 MLD 2146)*** that, *"After delegation, the delegator is not divested of his powers or authority under the law."* This body of case law was then relied upon in ***Dilshad Kausar vs. Azad Jammu and Kashmir Government*** ***(2005 PLC (CS) 1048)*** and it was concluded that, *"By now it is well-settled law that a delegator by delegating his powers does not get denuded of those powers. Nor the delegation implies a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself."*

12. There are some English precedents which suggest that delegation is tantamount to temporary divestment of the powers by the delegator (see for example ***Blackpool Corporation v. Locker*** **[1948] 1 KB 349** and ***Department for Environment, Food and Rural Affairs v. Robertson and others*** **[2004] ICR 1289; [2005] EWCA Civ 138)**. ***Locker*** was cited before the Sindh High Court in ***Abdullah***. It did not impress the Sindh High Court, which held that delegation did not constitute

denudation of power while relying on ***Huth***, as has already been discussed above. The reasoning from ***Abdullah*** has since prevailed in Pakistan.

13. The scheme of ITO wherein by virtue of a legal fiction any authority exercised in terms of section 122(5A) of the ITO is deemed to be a decision rendered by the Commissioner, was endorsed most recently in ***Allied Bank Limited vs. CIR (2023 SCMR 1166)***. In view of the case law cited above, the general principle that emerges is that delegation means the entrustment of a power or responsibility by a person who is vested with such power/responsibility to another who is to exercise such power/responsibility in the stead of the delegator. Statutory delegation is different from contractual delegation to the extent that in case of the former even a vacancy in the office of the delegator does not denude the delegatee of the power or responsibility duly delegated. Further, in exercise of delegated authority, the delegatee is not bound to act on the instruction of the delegator. Once the delegatee has exercised delegated power, it stands exhausted and the delegator cannot resume such power and exercise it all over again in a manner different from how it stands exercised by the delegatee.

14. In interpreting section 211(2) of the ITO, there is no textual basis to hold that the Commissioner may itself exercise a power or perform a function conferred on an officer of Inland Revenue has been rendered either in relation to conferral of power under section 209(2) of the ITO or in relation to section 210(1) of the ITO. The scheme of delegation and conferral of powers in terms of section 209 and 210 of the ITO are meant for

purposes of administrative convenience, in view of the legal fiction under the ITO that all assessment orders are passed by the Commissioner. The fact that the power of the Commissioner can be conferred on another officer of Inland Revenue, in terms of section 209(2) and/or 210(1) of the ITO, does not mean that such conferral or delegation denudes the Commissioner of his/her powers under the ITO. Section 209(8) and 211(2) affirm this reading of provisions of the ITO. Contrary to the argument made by Mr. Sukhera, once an officer of Inland Revenue has exercised the power delegated to him/her, the same stands exhausted and can no longer be exercised by the Commissioner himself by taking a fresh view of the matter, as explained by the Supreme Court in ***Fatehullah***. However, till such time the delegated power remains to be exercised or has not been conclusively exercised, there is nothing preventing the Commissioner from exercising such power and performing a function vested in him under the provisions of the ITO. The statutory clarification provided in section 211(2) of the ITO, is in the nature of express statutory retention of the delegated authority in the office of the Commissioner, should he/she choose to exercise it directly. The Commissioner thus need not pass a formal order to recall a delegation order to signify that he/she is resuming delegated power. To reiterate, the delegation for purposes of sections 209 and 210 of the ITO are to be seen not as a transfer or divestment of power, but as entrustment of power to a subordinate officer that does not denude the Commissioner himself/herself of the power that he/she remains vested with despite the delegation order.

15. In the instant matter, it is not the applicant's claim that the Commissioner sought to simultaneously or successively exercise the powers and functions delegated to the Additional Commissioner for purposes of section 122(5A) of the ITO. The delegation of 122(5A) powers in an Additional Commissioner was for purposes of administrative convenience. As explained above, such delegation did not and could not denude the Commissioner himself of the power vested in him to undertake a reassessment for purposes of section 122(5A) of the ITO. The argument that the reassessment order was *coram non judice* as it was passed by the Commissioner and not the Additional Commissioner is therefore misconceived.

16. Before we address the questions of law in relation to the merit of the demand generated by the tax department, there are two conceptual issues that need to be addressed. The first relates to the principle of interpretation that is to be followed while construing provisions of the ITO and whether purposive interpretation can be adopted for purposes of re-characterizing a transaction where the taxpayer is claiming the benefit of section 97 of the ITO. The second relates to the distinction between financial accounting and tax accounting and whether the Commissioner can take into account the financial statements and financial accounts prepared by a taxpayer for purposes of determining the tax due from the taxpayer.

Interpretation of Fiscal Statutes: Textual or Purposive Interpretation

17. Ms. Hamid, learned counsel for tax department has invited this Court to undertake purposive interpretation of

section 97 to determine whether the legislature had intended the transaction undertaken by PMCL to be granted the benefit of section 97 of the ITO. She cited ***Bank of Punjab vs. Haris Steel Industries (Pvt.) Ltd.*** ***(PLD 2010 SC 1109)***, ***Saif-ur-Rehman vs. Additional District Judge*** ***(2018 SCMR 1885)***, *and* ***Commissioner for Her Majesty's Revenue and Customs vs. UBS AG and another*** ***(2016 SCMR 1098)*** decided by the UK Supreme Court, for the proposition that purposive rather than literal construction is to be adopted while interpreting provisions of the ITO. Mr. Sukhera, on the other hand, contested the argument and submitted that textual interpretation of a fiscal statute is a well-entrenched principle and there is no occasion for this Court to depart from it in the present case.

18. The short answer to the submission on behalf of the tax department that section 97 of the ITO be given purposive interpretation is that the same is not warranted in terms of the settled principles of statutory interpretation that are applicable in view of the law laid down by the Supreme Court. This Court will, however, address the debate around purposive interpretation in other common law jurisdictions as well as in Pakistan (the question came before the Sindh High Court in ***Commissioner Inland Revenue vs. IGI Insurance Company Ltd.*** ***(2018 PTD 114)***, which will be considered in some detail later in this judgment).

Debate in the context of Tax Avoidance

19. Within the realm of tax law, the distinction among tax deferment, tax avoidance and tax evasion, is fairly well understood. While addressing the questions of law, we will

enumerate the scope of section 97 of the ITO, which is a tax deferral provision. In the instant case we are not concerned with tax evasion. Chapter 8 of the ITO, comprises anti-avoidance provisions and encapsulates what have come to be known within tax law as General Anti-Avoidance Rules (GAAR).

20. In the reference before us, the tax department has not invoked its powers under section 109 of the ITO. However, a brief discussion of when purposive interpretation may be permissible under the ITO necessarily requires consideration of section 109 of the ITO. The rule that a taxing statute is to be accorded literal interpretation is generally traced back in ***Cape Brandy Syndicate vs. Inland Revenue Commissioner [1921] KB 64*** in which it was held that, *"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."* ***Cape Brandy Syndicate*** was cited with approval in ***Commissioner of Agriculture Income Tax vs. B.W.M. Abdul Rahman (1973 SCMR 445)***, ***Government of Pakistan vs. Hashwani Hotel Ltd. (PLD 1990 SC 68)*** *and* ***A&B Food Industries Ltd. vs. Commissioner of Income Tax (1992 SCMR 663)***. The Sindh High Court in ***IGI Insurance*** traced the history of adoption of the rule of textual interpretation in Pakistan and noted, in view of the law laid down by the Supreme Court, the Sindh High Court, the Lahore High Court and the Islamabad High Court, that the principle applicable while interpreting fiscal legislation is that of textual and literal interpretation of the words used.

21. The debate with regard to the appeal of purposive interpretation has continued in relation to GAAR and the manner in which a line is to be drawn between permissible tax planning and impermissible tax avoidance. The most cited precedent in favor of tax structuring leading to minimal tax liability is ***Inland Revenue Commissioners vs. Duke of Westminster [1936], AC 1***. In the said matter, the Duke of Westminster had executed annuity deeds to pay his employees certain annual payments while reducing their salaries, yet maintaining their total annual income. The legal question that arose was whether such structuring was permissible as it had the effect of reducing the tax liability of the Duke of Westminster. Lord Tomlin delivering the majority judgment observed that, *"Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of 'the substance' seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable."* In holding so, the House of Lords held that the form of a transaction undertaken to structure one's tax affairs could not be disregarded under the garb of giving effect to the substance of such transaction. Lord Atkin who had written a dissent, had emphasized that the economic reality of the transaction in question was that the payments made constituted remuneration for services and were not independent annuities.

In ***W.T. Ramsay Ltd. v. Inland Revenue Commissioners [1982] A.C. 300,*** the UK House of Lords reviewed the Westminster principle and articulated certain exceptions, while holding the following:

> *"Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of Inland Revenue Commissioners versus Duke of Westminster, 1936 AC 1. This is a cardinal principle but it must not be overstated or overextended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs…It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."*

22. It was noted that the Commissioners of Inland Revenue were not precluded from considering whether a transaction was a sham in view of the documentation of such transaction or the manifested intention of the party. It was emphasized that transactions for tax purposes are structured to operate in *"the real world, not that of make-belief"* and that, *"[w]hile the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still. Such immobility must result either in loss of tax, to the prejudice of other taxpayers, or to Parliamentary congestion or (most likely) to both."*

23. In ***Furniss v. Dawson* [1984] AC 474**, the House of Lords reiterated the principle laid down in ***Ramsay*** and held that ***Ramsay*** had decided three things:

> *"First, it established that there is nothing in the Inland Revenue Commissioners v. Duke of Westminster [1936] AC 1, principle which compels a consideration of individual transactions separately from a preconceived chain or series of transactions of which they form merely a part. Secondly, it established that where one finds a series of preconceived transactions which are entered on solely for fiscal purposes and are clearly interconnected and mutually dependent on one another one should look at the overall transaction to ascertain what has been and what was intended to be achieved. Thirdly, it established that if what you find on such a consideration is that nothing whatever has been achieved because the individual steps taken cancel one another out, you are entitled then to ignore the fiscal consequences which might otherwise have resulted from each of those individual steps considered in isolation."*

24. Within the U.S., the judgment in ***Gregory v. Helvering*, *293 U.S. 465, 55 S.Ct. 266 [1935]*** brought focus on the need to undertake economic substance analysis under provisions of the U.S. Internal Revenue Code. In ***Gregory***, the U.S. Supreme Court emphasized that where the form of a corporate reorganization was used as a disguise to conceal the real character of the transaction, the court would look at the substance of such transaction to determine whether such transaction fell outside the plain intent of the statute. In ***Rice's Toyota World, Inc. v. Commissioner, 752 F.2d 89 (4th Cir. 1985)***, a two-part test was laid down to determine whether a transaction had economic substance or whether it was a sham

that ought not to be recognized for income tax purposes as follows:

> *"To treat a transaction as a sham, the court must find that the taxpayer was motivated by no business purposes other than obtaining tax benefits in entering the transaction, and that the transaction has no economic substance because no reasonable possibility of a profit exists."*

25. The test applicable for purposes of determining the substance of a transaction was codified in the United States pursuant to IRC section 7701(o), which holds that a transaction has economic substance only if *"(1)(A) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, and (B) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction."*

26. A similar debate in the context of distinguishing good tax planning from bad tax planning has transpired in India as well. In ***McDowell & Co. Ltd. v. CTO* (AIR 1986 SC 649),** it was held that, *"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."* The Indian Supreme Court while denouncing *"[t]he evil consequences of tax avoidance"* in moralistic terms held that, *"In our view the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether a provision should be construed*

liberally or principally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it." It was subsequently clarified by the Indian Supreme Court in ***Union of India vs. Azadi Bachao Andolan (AIR 2004 SC 1107)*** that, *"[T]he decision in **McDowell** cannot be read as laying down that every attempt at tax planning is illegitimate and must be ignored, or that every transaction or arrangement which is perfectly permissible under law, which has the effect of reducing the tax burden of the assessee, must be looked upon with disfavour."* It was clarified that taxpayers were free to plan their affairs within the framework of law, *"unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity."* In ***Vodafone International Holdings B.V. vs. Union of India (2012) 341 ITR 1 SC***, wherein it was held while analyzing English case law discussed above that, *"Ramsay did not discard Westminster but read it in the proper context by which 'device' which was colourable in nature had to be ignored as fiscal nullity. Thus, Ramsay lays down the principle of statutory interpretation rather than an over-arching anti-avoidance doctrine imposed upon tax laws."* For purposes of India, it was held that, *"Whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction. It is in the above cases that the principle of lifting the corporate veil or the doctrine of substance over form or the concept of beneficial*

ownership or the concept of alter ego arises…Revenue cannot tax a subject without a statute to support and in the course we also acknowledge that every tax payer is entitled to arrange his affairs so that his taxes shall be as low as possible and that he is not bound to choose that pattern which will replenish the treasury."

27. There has been a similar debate in Australia, New Zealand, Canada, Hong Kong and Singapore with regard to laying down tests to distinguish good tax planning from bad tax planning. The judgments from such jurisdictions have been reproduced and analyzed at length by the Sindh High Court in ***IGI Insurance*** and this judgment need not be burdened with recapitulation of the relevant judgments in view of the detailed and incisive analysis undertaken in ***IGI insurance.*** After recognizing the trend in other common law jurisdictions in favour of purposive interpretation of taxing laws in the context of drawing a line between good tax planning and bad tax planning, it was held in ***IGI Insurance*** that in view of the principle of literal textual interpretation of taxing statutes, well entrenched in Pakistan, it is only the Supreme Court that can consider whether it is time to move away from a literal interpretation of taxing statutes to a purposive interpretation. ***IGI Insurance*** recognized that section 109 of ITO is in the nature of GAAR within our jurisdiction and vested in the Commissioner the authority to re-characterize transactions where the same had been entered into as part of a tax avoidance scheme that was devoid of any substantial economic effect. It was noted that while section 109 created explicit textual authority for purposes of undertaking a substance analysis, the application of such

authority would create some tension as while section 109 required bringing focus on the purpose of a transaction, the literalist approach to statutory interpretation of ITO otherwise did not permit purposive interpretation of provisions of the ITO.

28. The Sindh High Court went ahead to lay down guidelines as to the manner in which section 109 of ITO was to be understood and applied within a legal architecture that was still committed to textual interpretation of fiscal statutes. We need not engage with such guidance, as it will become apparent later in the judgment that for our present purposes there arises no need to purposively interpret section 97 or section 113C of the ITO to decide the questions of law before us. There are two reasons why such analysis is not required. One, in the instant matter, the Commissioner has not invoked section 109 of the ITO or sought to re-characterize the transaction undertaken by PMCL and consequently, in terms of the test laid down in ***IGI Insurance***, there is no occasion to move away from a literal interpretation of the said provisions to a purposive one. Two, the questions that have been framed for our consideration can be answered by according the plain and textual meaning to provisions of sections 97 and 113C, and there exists no ambiguity within such provisions that ought to be addressed by inferring the legislative intent behind such provisions other than manifest in the words used by the legislature. We, however, agree with the Sindh High Court in terms of the analysis undertaken in ***IGI Insurance***, that the applicable principle for undertaking statutory interpretation of fiscal statutes in Pakistan remains the literal one. Unless binding precedents of the Supreme Court are set aside by the Supreme Court itself, a

purposive interpretation can only be adopted where the Commissioner has invoked the GAAR provisions in the ITO including, *inter alia,* section 109, and it falls upon the court to determine whether the transaction sought to be re-characterized by the Commissioner was conceived as falling within the four corners of the law without such re-characterizing, in terms of the legislative intent behind the provisions of the ITO the benefit of which is sought by the taxpayer.

29. What emerges from the case law from other jurisdictions is that there is some form of an economic substance test applied to determine (a) the actual purpose of the transaction and whether such purpose constitutes a legitimate purpose other than tax avoidance, and (b) whether the transaction significantly changes the taxpayer's economic position. This economic substance doctrine has also been codified in terms of section 109 of the ITO which will be discussed later in this judgment. It is imperative to reiterate here that the Supreme Court in ***Commissioner of Income Tax vs. Pakistan Industrial Engineering Agencies Ltd. (1992 PTD 954),*** while endorsing the ***Duke of Westminster*** principle, held that, *"an assesses[ee] is entitled to manage his own affairs to the best of his benefit even by adopting legal modes which may result in reduction of tax and the same if covered by the provisions of law cannot be challenged on the ground of prudence, advisability or business practice."* It can therefore safely be concluded for purposes of our present discussion that tax planning to minimize tax liability is not prohibited under the ITO. The exception to this rule is where a transaction is structured such that it falls foul of provisions of the ITO, including, *inter alia*, section 109 of the

ITO, for being designed to indulge in tax avoidance in an impermissible manner.

Financial Accounting vs. Tax Accounting

30. The distinction between accounting income and taxable income has arisen in the present case as the demand generated by the tax department is based on receipts declared by PMCL in its financial statements, wherein it has been declared that PMCL has received a consideration in the amount of approximately Rs.98.5 billion upon disposal of its tower business to Deodar.

31. Mr. Sukhera submitted on behalf of PMCL that the company was obliged to comply with IFRS 3 in preparing its financial statements, which required that the market value of the disposal transaction be recorded in the financial statements of PMCL. But that the financial statements are not to be taken into account while calculating the taxable income of PMCL, for which purpose income is to be calculated in view of section 97(1) of the ITO, which provides that no gain or loss will be taken to arise on the disposal of an asset by a parent to a subsidiary that forms a wholly owned group.

32. Ms. Hamid, on behalf of the tax department, on the other hand, submitted that taxable income was to be calculated while considering the books of accounts of the taxpayer maintained in accordance with the method of accounting chosen by the taxpayer in terms of section 32(1) of the ITO. As PMCL recorded in its financial statements a receipt of approximately Rs.98.5 billion as consideration for disposal of assets to Deodar, the taxpayer could not refuse to offer such receipt for taxation on the basis that the Commissioner could only take into account the

written down value of the asset for purposes of determining the income of PMCL.

33. To state the obvious, Section 220(1) of the Companies Act, 2017 **("Companies Act")** requires every company to *"…prepare and keep at its registered office books of account and other relevant books and papers and financial statements for every financial year which give a true and fair view of the state of the affairs of the company…"* Section 225 of the Companies Act further requires that the financial statements of the company must give *"…a true and fair view of the state of affairs of the company"*. Section 228 of the Companies Act requires a holding company to file consolidated financial statements of the group presented as a single enterprise. The requirement that a company's financial statements present a true and fair view of its state of affairs is coupled with an additional requirement in case of a holding company, which is required to ensure that the financial statements of its subsidiary or subsidiaries also comply with such requirement. It cannot therefore be fathomed that in case of an intra-group transfer, the cost of a disposal transaction as recorded by the parent may be different from the cost of such acquisition as recorded by the subsidiary.

34. There is nothing to gainsay that financial accounting and tax accounting are guided by different objectives and rules. Accounting income or 'book income', as it is often referred to, is determined in accordance with Generally Accepted Accounting Principles (GAAP) or International Financial Reporting Standards (IFRS). The accounting standards seek to provide a true and fair view of the company's financial performance to its stakeholders,

especially the shareholders. Taxable income, on the other hand, is the income calculated under provisions of the relevant tax statute. The provisions of a tax statute often require adjustments to be made to the accounting income to derive the taxable income payable by a taxpayer.

35. It was held in ***B.S.C. Footwear Ltd. v. Ridgway (Inspector of Taxes) [1972] 83 I.T.R. 269*** that income tax does not necessarily *"march step by step in the divergent footprints of the accountancy profession."* The House of Lords, in appeal, upheld the view of Russell, L.J. and noted that, *"Whatever merits there may be in the company's accountancy methods for the purposes of its internal affairs I am not persuaded that Cross J. and the Court of Appeal were wrong in finding them unacceptable for tax purposes."*

36. The distinction was cogently described in ***J.K. Industries Ltd. v. Union of India (2007) 13 SCC 673,*** wherein the following was noted:

> *"The core of accountancy is book-keeping. The rules of book-keeping are clear. For example, the value of a fixed asset mentioned in a balance sheet is based on cost which may involve subjective estimation of the amount to be apportioned. Similarly, the quantum of depreciation is again an estimate, which can vary depending on the persons preparing the accounts as to when and at what stage he wants to record the depreciation. Accounting standards are an attempt to overcome some of these deficiencies of accountancy…Accounting standards basically attempt to reduce the subjectivity and lay down rules so as to arrive at the best possible estimates… Accounting income is the real income. Tax laws lay down rules for valuation of inventories, fixed assets,*

> *depreciation, bad debts, etc. based on artificial rules and not on the basis of accounting estimates, which results in mismatch between accounting and taxable incomes. For example, a fixed rate of depreciation may, for some companies, result in computing lower than the actual income if the actual erosion in the value of the asset is lower than the depreciation calculated at the fixed rate and higher than actual income for others where assets erode faster. Accounting income is normally used as a relevant measure by most stakeholders. However, on account of artificial set of rules used in computation of taxable income one finds that accounting income differs from taxable income."*

It was held in ***Commissioner of Income Tax vs. Shoorji Vallabhdas and Co. [1962] 46 ITR 144(SC)*** (which was cited in ***C.I.T Central vs. M/s Excel Industries Ltd. 2014(13) SCC 459)*** that:

> *"Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialize. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable."*

37. **Excel Industries** cited with approval ***State Bank of Travancore v. Commissioner of Income Tax [1986] 158 ITR 102 SC***, wherein it was held that, *"What has really accrued to the assessee has to be found out and what has accrued must be considered from the point of view of real income taking the probability or improbability of realisation in a realistic manner*

and dovetailing of these factors together but once the accrual takes place, on the conduct of the parties subsequent to the year of closing an income which has accrued cannot be made 'no income'."

38. There is useful discussion in ***Mashreq Bank vs. C.I.R. 2012 PTD (Tribunal) 1544***, where the Appellate Tribunal Inland Revenue in its judgment cited some Indian case law. It relied in its judgment on ***Sutlej Cotton Mills Limited vs. C.I.T. West Bengal (1979) 116 I.T.R. 1 (SC)***, in which decision of the Calcutta High Court was upheld by the Supreme Court of India, by noting that, *"It is now well settled that the way in which entries are made by an assessee in his books of account is not determinative of the question whether the assessee has earned any profit or suffered any loss… What is necessary to be considered is the true nature of the transaction and whether in fact it has resulted in profit or loss to the assessee."*

39. Section 4 of the ITO, which is a primary charging section, seeks to tax the taxable income of a person. Section 9 defines taxable income and Section 11(2) provides that, *"…the income of a person under a head of income for a tax year shall be the total of the amounts derived by the person in that year that are chargeable to tax…"*

40. Notwithstanding the financial income or book income as calculated in accordance with the relevant accounting standards, it is the income derived by a person in a tax year, as calculated in accordance with the provisions of the ITO, that becomes chargeable to tax as a general rule under the ITO (the scheme of advance tax as well as Minimum Tax, in terms of section 113,

and Alternative Corporate Tax, in section 113C, are exceptions to the general rule, which will be discussed later in this judgment). Section 20 of the ITO regulates the deductions that are allowed for any expenditure and section 21 of the ITO lists the deductions that are not allowed. Section 22 of the ITO provides for depreciation that is allowed for purposes of tax accounting. The rules applicable for purposes of permissible deductions and depreciation etc., as prescribed under the ITO, may not be the same as those applicable for purposes of financial accounting. There are other provisions that vest in the Commissioner the authority to adjust the financial income as determined by the taxpayer for purposes of deriving taxable income. Section 108, which falls within the GAAR of ITO, provides, in relation to a transaction between associates, that income must be reflected such as it would have been recognized in an arm's length transaction. Section 109 prescribes a three-part test for re-characterization of income and deductions where, (i) the transaction is found to be a part of tax avoidance scheme i.e., the main purpose of which is tax avoidance, (ii) the transaction does not create a substantial economic effect for the taxpayer, and (iii) the form of the transaction is contrived and masks its substance. Under section 111 of the ITO, the Commissioner can take into account *"any amount as entered in a person's books of account"* for which the person offers no reasonable explanation about its nature or source or why it does not constitute income.

41. While section 32 grants freedom to a taxpayer to elect a method of accounting, the provisions of the ITO create an obligation for the taxpayer to maintain proper books of account

and preserve financial statements, which the Commissioner can procure and scrutinize for purposes of determining a person's taxable income in terms of the ITO. Section 174 of the ITO requires the taxpayer to maintain books of account, financial statements and records for a period of six years from the end of the tax year to which they relate. Section 176 grants the Commissioner the power to require a taxpayer to produce books of account and financial statements, which can then be subjected to an audit in terms of section 177 of the ITO. What emerges from the scheme of the ITO is that there is a distinction between financial accounting and tax accounting, which is recognized by the tax regime established under the provisions of the ITO. The ITO also allows a taxpayer to choose the appropriate accounting method that it wishes to follow. However, accounting statements prepared by taxpayers in accordance with the standards set out by FASB or IFRS are not determinative of the tax liability of the taxpayer. Under the ITO, a taxpayer is obliged to maintain its books of account and financial statements and furnish them to the Commissioner to enable him/her to determine the tax liability of the taxpayer while taking into account such financial statements. In other words, the Commissioner is not blind to the financial accounting of a taxpayer as the ITO vests in him/her the power to consider the books of account and financial statements of the taxpayer while determining the tax liability in accordance with the provisions of the ITO. What can, thus, not be argued by a taxpayer is that the Commissioner cannot take into account the financial statements of a taxpayer or the receipt declared therein while calculating the taxable income of a person under the provisions of the ITO.

42. With these conceptual issues out of the way, we can now revert to the questions framed for our consideration.

Can PMCL claim the benefit of Section 97(1) of the ITO?

43. As a factual matter, PMCL declared approximately Rs.91.2 billion as accounting income for tax year 2018, which included approximately Rs.59.3 billion as accounting gain arising from the disposal of assets to Deodar (Pvt.) Limited **("Deodar").** The applicant claimed that there was no tax payable from the disposal of the Tower Business to Deodar, which was a wholly-owned subsidiary of PMCL, and no loss or gain arose from such disposal of assets in terms of section 97(1) of the ITO.

44. Mr. Sukhera submitted on behalf of PMCL that the Tribunal's finding that the PMCL was not entitled to any benefit, in terms of section 97(1) of the ITO, was factually and legally incorrect. He submitted that the Tribunal incorrectly concluded that PMCL was a subsidiary of International Wireless Communication of Pakistan Limited **("IWCPL"),** such that PMCL's disposal of assets to Deodar attracted section 97(4)(b) of the ITO, with IWCPL, which was a non-resident company, together with PMCL and Deodar, which were both resident companies, constituting a wholly-owned group in terms of Section 97(4)(b) of the ITO. This was factually incorrect, as IWCPL owned 84.6% shares of PMCL, and consequently PMCL was not the wholly-owned subsidiary of any other company, even if a majority of its shares were owned by IWCPL. He submitted that the Commissioner, as well as the Tribunal, confused the concept of a subsidiary with that of a wholly-owned subsidiary in reaching the factually incorrect conclusion that

PMCL was the wholly-owned subsidiary of another legal person. The finding was legally incorrect as while interpreting the definition of a wholly-owned group provided in section 97(4) of the ITO neither the Commissioner nor the Tribunal appreciated that sub-clauses (a) and (b) of Section 97(4) were to be read disjunctively, and further that the resident status of a shareholder of a resident company had no bearing on the resident status of the company itself or on the status of two resident companies comprising a wholly-owned group in terms of section 97(4)(a) of the ITO. He submitted that PMCL and Deodar were both resident companies and Deodar was the wholly-owned subsidiary of PMCL. PMCL and Deodar, therefore, constituted a wholly-owned group in terms of section 97(4)(a) of the ITO. As the disposal of assets by PMCL to Deodar satisfied all the requirements mentioned in section 97(1), such transaction enjoyed tax deferral status and no gain or loss could be taken to arise from such disposal for tax purposes, notwithstanding any accounting gain reflected by PMCL in its books of account.

45. Ms. Asma Hamid ASC, on behalf of the Revenue, submitted that section 97 of the ITO was to be accorded purposive interpretation, and its benefit could only flow to a taxpayer that gained no immediate economic advantage from the disposal of assets. She submitted that the legislative intent behind section 97 was to defer the taxing event in the case of disposal of assets within a wholly owned group where such disposal created no economic benefit for the transferor. Section 97 required that the disposed of assets be booked at their written down value to ensure that such transfer created no gain or loss. However, in the instant case, PMCL had declared a gain

of Rs.59.3 billion in its books of account. The obvious question was, wherefrom did PMCL make a gain of Rs.59.3 billion and why should such gain not be offered for taxation? She submitted that a requirement of section 97(1) was that there must not be any gain or loss resulting from the transaction and where any gain was recorded, the benefit of section 97(1) of the ITO would not flow to the transferor. She submitted that any gain declared as part of the accounting income constituted *"income"* and was accordingly liable to tax. She submitted that the structuring of the transaction was aimed at tax avoidance, which was not permissible in terms of Section 97(1) of the ITO, when purposively interpreted. She further submitted that the real owner who controlled both PMCL and Deodar was a non-resident parent company called VEON, which owned Global Telecom Holding **("GTH")**, which owned IWCPL, which, in turn, owned PMCL. The reorganization of PMCL by virtue of disposal of its tower business to Deodar was approved and announced by VEON. This reflected that it was VEON that had effective control over PMCL. This made PMCL a subsidiary of VEON, which was a non-resident company. She submitted that section 97(1)(a) was amended by Finance Act, 2003, to introduce the word *"resident"* within the phrase *"wholly-owned group of companies"*, to ensure that the benefit of the disposal of assets between wholly-owned resident companies does not flow to a non-resident company. She submitted that PMCL not only declared an accounting gain of Rs.59.3 billion, but also sought to dividend out such gain to its non-resident shareholders, which established that the purpose of structuring the transaction as a disposal of assets between wholly-owned companies was to derive income from the

transaction and distribute it amongst non-resident owners of PMCL without offering such income for taxation.

46. This Court by order dated 07.03.2025, had framed additional questions and the learned counsels for the parties were asked to assist the Court as to when the provisions of the ITO could be accorded purposive interpretation, whether the provisions of the ITO recognized the difference between accounting income and taxable income, and the business purpose behind the asset disposal transaction undertaken by PMCL, by spinning off its tower assets to Deodar.

47. Mr. Sukhera submitted, on behalf of PMCL, that in view of the law laid down in ***Commissioner of Inland Revenue v. Messrs IGI Insurance Company Ltd. (2018 PTD 114),*** section 97 of the ITO could not be accorded purposive interpretation. He submitted that the provisions of the ITO recognized the distinction between accounting income and taxable income, and it was only the latter that was to be offered for taxation. He submitted that PMCL was under an obligation to record the disposal of assets in terms of their fair market value, in view of the requirements of International Financial Reporting Standard 3 (**"IFRS 3"**), which was the relevant accounting standard that was applicable for accounting purposes. The recording of accounting income in accordance with IFRS 3 required the reflection of accounting gain of Rs.59.3 billion by PMCL upon disposal of the Tower Business to Deodar. Such compliance with accounting standards and declaration of accounting gain, however, did not transform the accounting gain into taxable income. As the language of section 97(1) recognized

that no gain or *loss "shall be taken to arise"* on the disposal of an asset where the conditions mentioned in the said section were satisfied. The language itself meant that the legislature recognized that there may be an accounting gain, but notwithstanding such gain, no gain or loss would be deemed to arise from a transaction for disposal of assets within a wholly-owned group. This was because section 97(1) was a tax deferral provision, which merely provided that a transaction that qualified in terms of section 97(1) did not create a taxable event, but deferred the taxable event by recording the transfer of assets to a wholly-owned subsidiary on the same tax basis as that of the transferor, where the transferor and transferee were both part of a wholly-owned group. He submitted that the manner in which the asset disposal transaction between PMCL and Deodar was structured was driven by a legitimate business purpose. Telecom Industry had entered the age of specialization, and the business of owning and operating towers was being separated from that of providing telecommunication services across the industry. It was, therefore, decided that PMCL would focus on the business of providing telecommunication services. Under provisions of the IT Policy of 2015, tower sharing had been incentivized, and there was a cost incentive for telecom companies to share tower services, as opposed to rolling out towers for expansion of their individual services. While it had been decided to dispose of the tower assets previously owned by PMCL, doing so through a share sale, as opposed to an asset sale, was more efficient from a corporate reorganization point of view, especially given that there were regulatory licences involved, which would otherwise be hard to transfer in an asset sale.

48. Ms. Hamid, for the tax department, submitted that the intent of the legislature while incorporating section 97(1) could not be disregarded. Such provision provided for tax deferral and not tax avoidance. If PMCL was allowed the benefit of section 97(1), it would result in the accounting gain being converted into dividend income of foreign shareholders of PMCL, without such income being offered for tax. She submitted that section 97(4) of the ITO, while defining the wholly-owned group, stated that the transferor and transferee companies must *"belong to a wholly-owned group"* as opposed to using the word *"comprise"*. The use of such language suggested that all entities in a wholly-owned group must be resident companies, and that the transferor and transferee companies may not be owned by a non-resident company that was the parent of such wholly-owned group. She submitted that, while determining what constituted the taxable income of a company, the accounting income as declared could not be disregarded altogether. She further submitted that the structuring of the transaction undertaken by PMCL was not driven by a legitimate business purpose but in order to avoid payment of tax on the income generated and booked as a consequence of disposal of assets to Deodar.

49. For purpose of convenience let us reproduce section 97 of the ITO:

> ***97. Disposal of asset between wholly-owned companies.—*** *(1) Where a resident company (hereinafter referred to as the "transferor") disposes of an asset to another resident company (hereinafter referred to as the "transferee"), no gain or loss shall be taken to arise on the disposal if the following conditions are satisfied, namely:-*

(a) (Both companies belong to a wholly-owned group of [resident] companies at the time of the disposal;

(b) the transferee must undertake to discharge any liability in respect of the asset acquired;

(c) any liability in respect of the asset must not exceed the transferor's cost of the asset at the time of the disposal; and

(d) the transferee must not be exempt from tax for the tax year in which the disposal takes place.

(2) Where sub-section (1) applies —

(a) the asset acquired by the transferee shall be treated as having the same character as it had in the hands of the transferor;

(b) the transferee's cost in respect of the acquisition of the asset shall be —

(i) in the case of a depreciable asset or amortized intangible, the written down value of the asset or intangible immediately before the disposal;

(ii) in the case of stock-in-trade valued for tax purposes under sub-section (4) of section 35 that value; or

(iii) in any other case, the transferor's cost at the time of the disposal;

(c) if, immediately before the disposal, the transferor has deductions allowed under sections 22, 23 and 24 in respect of the asset transferred which have not been set off against the transferor's income, the amount not set off shall be added to the deductions allowed under those sections to the transferee in the tax year in which the transfer is made; and

> *(d) the transferor's cost in respect of any consideration in kind received for the asset shall be the transferor's cost of the asset transferred as determined under clause (b), as reduced by the amount of any liability that the transferee has undertaken to discharge in respect of the asset.*
>
> *(3) In determining whether the transferor's deductions under sections 22, 23 or 24 in respect of the asset transferred have been set off against income for the purposes of clause (c) of sub-section (2), those deductions shall be taken into account last.*
>
> *(4) The transferor and transferee companies belong to a wholly-owned if—*
>
> *(a) one company beneficially holds all the issued shares of the other company; or*
>
> *(b) a third company beneficially holds all the issued shares in both companies.*

50. Let us state the background facts before construing the provisions of section 97(1) of ITO and applying them to the case at hand. It is the Commissioner's case that PMCL and Deodar do not constitute a wholly-owned group for purposes of section 97(4) of the ITO, as PMCL is a subsidiary of IWCPL, which is a non-resident company, which, in turn, is a subsidiary of VEON Ltd., also a non-resident company. As the ultimate beneficial owner of PMCL is VEON Ltd., notwithstanding that PMCL and Deodar are resident companies and Deodar is wholly-owned by PMCL, PMCL and Deodar would not constitute a wholly-owned group. The Commissioner's second argument is that PMCL does not meet the requirements of section 97(1), as it has disposed of its Tower Business to Deodar on fair market value, and has recorded the receipt of consideration in the amount of USD 940

million as consideration and has also sought to remit part of such consideration as dividend to its foreign shareholders. It is in this context that Ms. Hamid argued on behalf of the tax department that section 97 be given a purposive interpretation, as it does not envisage income derived from disposal of assets to be distributed amongst foreign shareholders without being offered up for tax. Mr. Sukhera, on the other hand, argued on behalf of PMCL that the Commissioner has no business with the financial accounting of PMCL, which has been done in accordance with the requirements of IFRS 3. PMCL and Deodar were required to record the costs of the transaction in terms of its fair market value. However, the receipt in lieu of such fair market value is not liable to tax, as the value of the disposal transaction is to be gauged by the Commissioner in terms of section 97(1) of the ITO, which provides that in a transaction for such disposal *"no gain or loss shall be taken to arise"* if the conditions prescribed in section 97(1) are satisfied, which they are in the instant case. Mr. Sukhera has further submitted that PMCL and Deodar constitute a wholly-owned group in terms of section 97(4)(a) of the ITO and section 97(4)(b), which has been applied by the Commissioner, has no relevance in the facts of the case, as there is no non-resident company that wholly owns PMCL.

51. The first requirement of section 97(1) is that the company disposing of an asset (transferor) and the company receiving the asset (transferee) must both be resident companies. A question could arise in terms of section 97(1)(a) as to whether the benefit of such section would be available in the event that IWCPL owned all the shares of PMCL, transforming IWCPL, PMCL and

Deodar into a wholly owned-group in terms of section 97(4)(b) of the ITO. The question can, however, be left open to be decided in an appropriate case as in our fact pattern PMCL is not the wholly-owned subsidiary of IWCPL.

52. Let us first consider the manner in which the wholly-owned group is defined for purposes of section 97 of the ITO. Section 97(4), which has been reproduced above, defines a wholly-owned group, and includes therein two sets of companies provided under sub-clauses (a) and (b) of section 97(4) that qualify as a wholly-owned group. Companies that qualify under either of those categories constitute a wholly owned group for purposes of section 97(4). Sub-clause (a) of Section 97(4) defines two companies, with one resident company holding all the issued shares of another resident company, as a wholly-owned group. Clause (b) of section 97(4) considers a situation where there are more than two companies and a third company holds all the issue shares of both subsidiary companies. It is possible in view of the manner in which section 97(4) defines a wholly-owned group, that there can be identified more than one wholly-owned group within a group of companies. Section 97(4) does not require tracking the entity that ultimately holds the issued shares of a company. Further, a wholly owned group is limited to companies where a parent holds all the issued shares of its subsidiary or subsidiaries. Therefore, where a parent company does not hold all the shares of a subsidiary company, such parent, even where it holds more than three-fourths of the shares of the subsidiary company, cannot be considered a part of a wholly owned group. Section 97(4) also does not concern itself with the non-resident shareholders of a wholly-owned

group. The fact that a non-resident company largely owns and controls a resident company does not disqualify such resident company and its wholly-owned subsidiaries from constituting a wholly-owned group. In the facts of the present case, PMCL and Deodar are both resident companies in terms of section 81 of the ITO. It is also not in contention that PMCL owns all the issued shares of Deodar, and PMCL is not wholly owned by any other resident or non-resident company (learned counsel for PMCL has established through record that IWCPL, which is a non-resident company, owns 84.6% of the shares of PMCL, and not all the issued shares of PMCL). PMCL and Deodar amongst themselves constitute a wholly-owned group in terms of section 97(4)(a) of the ITO. As the category of companies mentioned in sub-clauses (a) and (b) of section 97(4) of the ITO are to be treated as disjunctive categories, even if IWCPL owned all the issued shares of PMCL as a non-resident company, such fact pattern would still not disqualify PMCL and Deodar comprising a wholly-owned group in terms of section 97(4)(a) of the ITO. Such hypothetical scenario need not however be considered in the present case as IWCPL does not wholly own PMCL. The finding of the Commissioner as well as the Tribunal that PMCL and Deodar do not constitute a wholly owned-group was, therefore, not in accordance with section 97(4) of the ITO. We find that PMCL and Deodar do constitute a wholly-owned group in terms of section 97(4)(a) of the ITO.

53. It has been argued before us on behalf of the Commissioner, and has also been recorded in the assessment order as well as in the order of the Tribunal, that Deodar did not undertake to discharge the liabilities in respect of the disposed

asset for purposes of section 97(1)(b) of the ITO and consequently the transaction cannot derive the benefit of such section. We have not been impressed by this argument. Mr. Sukhera has referred to the relevant representations filed by Deodar for purposes of assuming any liability in respect of the Tower Business for purposes of section 97(1)(b) of the ITO. It is also not in contention that Deodar, as a transferee, was not exempt from tax in tax year 2018, and consequently the requirement of section 97(1)(d) also stood satisfied. There could have been a possible argument made by the Commissioner that the transaction does not satisfy the condition in section 97(1)(c) of the ITO, as Deodar has declared that it has paid consideration in the amount of USD 940 million to PMCL by virtue of a receivable note (which has been issued on the basis of a loan received by Deodar from PMCL). The liability that remains to be discharged by Deodar, in terms of such receivable note, exceeds the transferor's cost of the asset, which, in terms of section 97(2) of the ITO, could not exceed the written down value of the transferred asset. This argument was not made by the Commissioner. But we have taken into account the requirement of section 97(1)(c) of the ITO, while considering the manner in which section 97(2) is applicable in the facts of the present case, as will shortly become evident.

54. The requirements mentioned in section 97(1) are not applicable on a standalone basis. Section 97(2) provides that where section 97(1) is applicable the sub-provisions of section 97(2) stand attracted. The general import of section 97(2) is that the character of the asset transferred, as well as the tax basis of such asset, must not change when transferred from one

company to another in a wholly-owned group. In this manner the requirements of section 97(2) stand incorporated within section 97(1). Section 97(2)(a) requires that the transferred asset must retain the same tax characteristics in the hands of the transferee as it possessed while in the hands of the transferor. Section 97(2)(b) provides that the cost in respect of the asset (which, in the present case, being a depreciable asset, was required to be the written down value of the asset immediately before disposal) in the hands of the transferee shall be equal to the cost of the asset in the hands of the transferor. For the transaction to garner the benefit of section 97(1), the character of the asset as well as its tax basis could not have changed from when it was sitting on the books of PMCL to when it was transferred onto the books of Deodar.

55. Section 97(1) is a tax deferral provision that allows intra-group transfer between resident companies constituting a wholly owned group in a tax-neutral manner. As the transfer takes place between companies comprising a wholly-owned group, there is no real change in the ownership of the transferred asset. The transferred asset also undergoes no change in terms of its character and tax basis by virtue of the requirement of section 97(2)(b) that the transfer of a depreciable asset must be recorded by the transferee as the written down value of the asset in the hands of the transferor (even in case of an asset that is not depreciable, the transferee's cost must be the same as the transferor's cost at the time of disposal, in terms of section 97(2)(b)(iii) of the ITO). Often, in cases of tax-neutral intra-group transfers, shares of the subsidiary company are issued in lieu of consideration for the transfer, which is catered

for by clause (d) of section 97(2) of the ITO, requiring that any consideration in kind received by the transferor may not be greater than the transferee's cost in respect of the acquisition (which, in turn, is the written down value of the asset in the hands of the transferor or the cost of the transferor). The principle applicable here is that where an asset changes hands between wholly-owned resident companies, in circumstances where the character and tax basis of the asset undergoes no change, and the transaction is recorded in terms of the written down value or the transferor's cost at the time of disposal, such transaction gives rise to no taxable event. Any gain or loss by virtue of such transaction is neither booked by the transferor nor by the transferee. Consequently, any gain or loss by virtue of such transfer is not realized at the time of the transfer and is deferred to be realized at a subsequent time, when the asset is disposed of, if at all, by the transferee company at its fair market value.

56. The obvious question that arises is: what is the purpose of the deeming provision in section 97(1) of the ITO, which states that in relation to such disposal, *"no gain or loss shall be taken to arise"?* It is by virtue of this deeming provision that the disposal transaction becomes tax neutral. But the deeming provision only becomes applicable when the conditions prescribed in section 97 are satisfied, including, *inter alia*, that the cost of the transaction, as recorded by the transferor and the transferee, is identical and is no greater than the written down value of the asset in the hands of the transferor in case of a depreciable asset or the transferor's cost at the time of disposal in case of a non-depreciable asset. The general rule with regard

to disposal of assets is prescribed in section 77(1) of the ITO, which states that, *"The consideration received by a person on disposal of an asset shall be the total amount received by the person for the asset or the fair market value thereof, whichever is the higher, including the fair market value of any consideration received in kind determined at the time of disposal."* Under section 78, where a disposal of asset takes place through a non-arm's length transaction, the transferor is treated as having received the fair market value of the asset, and the transferee is treated as having received the asset at a cost equal to the fair market value payable to the transferor. The scheme of deferral of tax deferral articulated in sections 95, 96, 97 and 97A makes it evident that deferral of tax is permitted where the transaction in question creates no economic value resulting in a receipt of income that would otherwise be liable to tax. In case of a sole proprietorship transferring an asset to a single member company, the ownership of the asset does not change and neither does the tax basis of the asset in question. As no gain or loss results from the transaction and the overall ownership of the asset also does not change, ITO treats it as a tax neutral event. The same analysis applies in relation to an AOP transferring an asset to a company where the ultimate ownership of the asset does not change. Section 97A which permits tax neutral mergers and amalgamations is a similar scheme where contribution of assets, on the same tax basis on which the amalgamating companies hold the assets, does not generate any receipt and does not change the valuation of such assets. And such transaction creating no additional economic value (any value created due the synergy created by virtue of

the merger is to be disregarded for this purpose) is, therefore, treated as tax neutral in terms of section 97A of the ITO. The underlying rationale of section 97 is no different from that of sections 95, 96 and 97A. Section 97 is also a tax deferral provision because it is an exception to the requirements prescribed under sections 77 and 78 of the ITO. The written down value of a disposed asset, while being less than the fair market value, is acceptable as the value of the asset being disposed by virtue of section 97, where the conditions prescribed under it are met. Section 97 grants recognition to an exchange between members of wholly-owned group of resident companies on the written down value of the asset, where the tax characteristics and basis of the asset do not change. Section 97, by prescribing that no gain or loss shall be taken to arise in case of such disposal, defers taxing the difference between the written down value of the asset and its fair market value, which, but for section 97, would otherwise be taken into account in view of sections 77 and 78 of the ITO and would require to be offered up for taxation.

57. In the instant case, PMCL has declared the following in its financial statement for the year ending 31.12.2017:

> *During the year, the Company has entered into agreement with its wholly owned subsidiary Deodar (Private) Limited dated January 27, 2017 for transfer of its tower business i.e. 12,991 telecom tower sites and related passive infrastructure of sites along with associated assets and liabilities for consideration of USD 940 million and recognizes a gain on sale of such asset of Rs 59,298 million. As per agreement the transfer of tower business was completed on February 2, 2017 and purchase*

> *consideration amounting to USD 940 million was satisfied by the issuance of Mobilink Receivable Note to the Company.*

Similarly, Deodar in its financial statement for the year ending 31.12.2027 disclosed the acquisition of the tower business as follows:

> *During the year the Company has entered into the Business Transfer Agreement with the Parent Company dated January 27, 2017 for acquisition of tower business i.e 12,991 telecom tower sites and related passive infrastructure of sites along with associated assets and liabilities for consideration of USD 940 million. The acquisition of tower business was completed on February 2, 2017 and purchase consideration amounting to USD 940 million was satisfied by the issuance of Mobilink Receivable Note to the Parent Company.*

58. It is evident from disclosures in the financial statements of both PMCL and Deodar that the transaction for disposal of the tower business was recorded by PMCL and Deodar on the basis of the fair market value of the tower business, in accordance with the requirements of IFRS 3. The valuation of the tower business was carried out by EY Rhodes Chartered Accountants as independent professional consultants. On the basis of the determined fair market valuation of the tower business, Deodar purchased it for a consideration of USD 940 million, which translated into PKR 98,504,198,000. It was this fair market value that was recorded by PMCL in its financial statements as consideration received for the disposal of the tower business, and by Deodar as the cost of acquisition of the tower business. The consideration of USD 940 million was paid through a receivable note on the basis of debt received by Deodar from

PMCL, and the liability in relation to such loan remained on the books of Deodar. The liability in relation to the USD 940 million of consideration paid by Deodar exceeds the transferor's cost of the asset at the time of its disposal in terms of section 97(1)(c) of the ITO, which ought not have been greater than the written down value of the tower business in the hands of PMCL at the time of disposal. The exchange at fair market value on the basis of a loan transaction, the liability to repay which remains outstanding on part of Deodar, therefore, falls foul of section 97(1)(c) of the ITO.

59. Let us assume that Deodar was cash rich and could have paid the consideration for the tower business without assuming any liability in excess of PMCL's cost of the tower business (i.e. the written down value of such tower business at the time of disposal). Even such transaction involving disposal of an asset at fair market value, which consideration is paid by the transferee to the transferor at the time of disposal, and the payment and receipt of such consideration is booked by both companies in their financial statements, automatically falls foul of section 97(1) and (2) of the ITO, for the transaction not having been undertaken at the transferor's cost at the time of disposal or the written down value of the asset, as the case may be. What a transaction undertaken at fair market value does is that it generates a receipt or loss, in lieu of consideration, in the hands of the transferor, which is then recorded as gain or loss in the financial statements of the transferor. Simultaneously, the consideration paid is recorded as the cost of acquisition in the financial statements of the transferee, which makes the tax basis of such asset different from the tax basis of the asset in the

hands of the transferor prior to disposal. Such a transaction, which involves a payment of consideration by the transferee at fair market value and its receipt by the transferor, creates a taxable event as there remains nothing that can be deferred for taxation to a subsequent time.

60. It is PMCL's argument that the deeming provision of *"no gain or loss"* in terms of section 97(1) must be read such that notwithstanding an exchange of consideration on the basis of fair market value at the time of disposal of an asset between two resident companies of a wholly-owned group, the Commissioner must ignore the payment and receipt of consideration as recorded in the financial statements while computing taxable income. This simply cannot be in view of the plain language of Sections 97(1) and 97(2) of ITO. Section 97(1) is a tax deferral provision and not an exemption provision. If the legislature were minded to exempt the receipt of consideration upon such disposal or sale undertaken on fair market value basis, it would have provided so in terms of section 53 of the ITO, which deals with exemptions. Section 97 can, therefore, not be construed as an exemption provision, which it would naturally become if it were to be read such that despite two companies recording the payment and receipt of consideration upon disposal of an asset on fair market value basis, such a receipt must be ignored by the Commissioner while determining the income derived by the transferor in the relevant tax year. While the distinction between financial accounting and tax accounting has been discussed above, as has been explained, the distinction does not require the Commissioner to apply provisions of the ITO in a make-belief manner, divorced from the economic reality that emerges in

view of the financial statements of the taxpayer. If PMCL's reading of section 97 were to be accepted, it would not only make section 97 an exemption provision, but would also render section 97(2) redundant.

61. As PMCL has accepted consideration of USD 940 million for transfer of its tower business, the receipt, as recorded in its financial statements, was required to be offered for tax. If such receipt is not offered for tax, there would be no occasion at a subsequent time to tax the amount received by PMCL thereby making such amount exempt from taxation and transforming section 97 into an exemption provision. This cannot be allowed. We, therefore, find that the receipt in lieu of consideration as reflected in the financial statements of PMCL (and also reflected in the financial statements of Deodar as consideration paid), was liable to be taxed in the hands of PMCL and was neither exempt nor subject to deferred taxation, in the facts and circumstances of the case, by virtue of section 97 of the ITO.

Can accounting income be taxed by virtue of Section 113C of the ITO?

62. The short answer to the question is yes. Section 113C is reproduced below for convenience:

> ***113C. Alternative Corporate Tax.***- *(1) Notwithstanding anything contained in this Ordinance, for tax year 2014 and onwards, tax payable by a company in respect of income which is subject to tax under Division II of Part I of the First Schedule or minimum tax under any of the provisions of this Ordinance shall be higher of the Corporate Tax or Alternative Corporate Tax*.
>
> (2) For the purposes of this section.-

(a) "Accounting Income" means the accounting profit before tax for the tax year, as disclosed in the financial statements or as adjusted under sub-section (7) or sub-section (11) excluding share from the associate recognized under equity method of accounting;

(b) "Alternative Corporate Tax" means the tax at a rate of seventeen per cent of a sum equal to accounting income less the amounts, as specified in sub-section (8), and determined in accordance with provisions of sub-section (7) hereinafter;

(c) "corporate tax" means higher of tax payable by the company under Division II of Part I of the First Schedule and minimum tax payable under any of the provisions of this Ordinance.

(3) The sum equal to accounting income, less any amount to be excluded there from under sub-section (8), shall be treated as taxable income for the purpose of this section.

(4) The excess of Alternative Corporate Tax paid over the Corporate Tax payable for the tax year shall be carried forward and adjusted against the tax payable under Division II of Part I of the First Schedule, for following year.

(5) If the excess tax, as mentioned in sub-section (4), is not wholly adjusted, the amount not adjusted shall be carried forward to the following tax year and adjusted as specified in sub-section (4) in that year, and so on, but the said excess cannot be carried forward to more than ten tax years immediately succeeding the tax year for which the excess was first computed.

(6) If Corporate Tax or Alternative Corporate Tax is enhanced or reduced as a result of any amendment, or as a result of any order under the Ordinance, the excess amount to be carried forward shall be reduced or enhanced accordingly.

(7) For the purposes of determining the "Accounting Income", expenses shall be apportioned between the amount to be excluded from accounting income under sub-section (8) and the amount to be treated as taxable income under subsection (2).

(8) The following amounts shall be excluded from accounting income for the purposes of computing Alternative Corporate Tax:-

(i) exempt income;

(ii) income which is subject to tax other than under Division II of Part I of the First Schedule or minimum tax under any of the provisions of this Ordinance.

(iii) income subject to tax credit under section 65D, 65E and 100C.

(9) The provisions of this section shall not apply to taxpayers chargeable to tax in accordance with the provisions contained in the Fourth, Fifth and Seventh Schedules.

(10) Tax credit under sections 64B and 65B shall be allowed against Alternative Corporate Tax.

(11) The Commissioner may make adjustments and proceed to compute accounting income as per historical accounting pattern after providing an opportunity of being heard.

63. Mr. Sukhera for PMCL contended that accounting income while defined in section 113C(2) of the ITO could not be subjected to tax except where such accounting income reflected the income liable to tax under Division-II of Part 1 of the First Schedule in terms of Section 113C(1) of the ITO. Where income by virtue of Section 97(1) of the ITO was not liable to tax, the corresponding accounting income could also not be subjected to tax.

64. Ms. Hamid for the tax department submitted that section 113C was an exception to the general rule that it is only income determined in terms of Division II of Part 1 of the ITO that is to be taxed in terms of provisions of the ITO. By virtue of section 113C, the accounting income was used as a proxy for purposes of calculating tax payable, income as was evident from a collective reading of subsections 1, 2, 3 and 8 of section 113C. In the event that accounting income generated by an asset disposal transaction between resident companies comprising a wholly owned group in terms of section 97(1) of the ITO was to be ignored for purposes of section 113C, such exclusion would have been mentioned in section 113C(8) of the ITO.

65. We agree with the learned counsel for the tax department. What is taxable in terms of section 4 read with sections 9 and 11 of the ITO, and other related provisions, is the income of a taxpayer. Section 113 and 113C are exceptions to the rule that only income as determined in accordance with provisions of the ITO can be subjected to tax. Sections 113 and 113C are in the nature of deeming provisions, where under section 113 the turnover of a taxpayer is used as a measure to determine the tax liability on a deeming basis, and under section 113C the accounting income of a taxpayer is used as a measure to determine the tax liability on a deeming basis. Sections 113 and 113C are, therefore, artificial rules that impose a liability on a taxpayer to pay tax even where no real income arise in the hands of the taxpayer. Section 113C accordingly provides that a taxpayer is liable to pay taxes calculated in terms of the income of the company subject to tax under Division II of Part 1 of the First Schedule or the minimum tax due in terms of section 113

or the alternative corporate tax determined on the basis of accounting income in terms of section 113C, whichever is greater. The exclusions for purpose of calculating Alternative Corporate Tax are mentioned in section 113C(8) of the ITO and do not state that any accounting income in relation to a section 97(1) disposal of asset transaction is required to be excluded therefrom.

66. We, however, find that there is no reason to undertake a detailed analysis of section 113C in the instant case and such analysis can be left open for an appropriate case as the demand generated by the tax department is not on the basis of application of section 113C of the ITO. In the event that we had come to the conclusion that PMCL was entitled to the benefit of section 97(1) of the ITO, the question of whether the accounting income in relation to the asset disposal transaction was taxable in terms of section 113C of the ITO would have become relevant. As we have found that the PMCL–Deodar transaction before us does not qualify for the benefit of section 97(1) of the ITO, nothing turns on the interpretation of section 113C in the instant case.

Does PMCL qualify as an Industrial Undertaking?

67. Mr. Sukhera for PMCL contended that the conclusion drawn by the Tribunal that PMCL does not qualify as an industrial undertaking in terms of section 2(29C) of the ITO was based on a misconception that the law laid down by this Court in ***Telenor Pakistan (Pvt.) Ltd. vs. Appellate Tribunal Inland Revenue (2017 PTD 1181)*** was no longer in the field as the matter had gone before the Supreme Court and had been remanded back to

the High Court. He submitted that while remanding the matter the judgment of this Court in ***Telenor Pakistan*** had not been set aside and consequently the law laid down in such case bound the Tribunal at the time when it rendered the impugned judgment.

68. Ms. Hamid on behalf of the tax department submitted that at the time of adjudication of ***Telenor Pakistan*** it had been held by Islamabad High Court that a telecommunication service provider could possibly qualify as an industrial undertaking in terms of section 2(29C)(a)(ii)(i) of the ITO. The Court had not conclusively decided whether while discharging telecommunication services a telecommunication service provider subjected "*materials to any process which substantially changes their original condition".* The Court had remanded the matter to be determined by the Tribunal as a factual matter. She submitted that subsequently by virtue of Finance Act, 2021, sub-clause (c) had been added to 2(29C) to include *"telecommunication companies operating under the license of Pakistan Telecommunication authority (PTA)"* within the definition of industrial undertaking. In view of the inclusion of telecommunication companies licensed by PTA within the definition of industrial undertaking, PMCL became an industrial undertaking with effect from 01.07.2021, but was not an industrial undertaking in tax year 2018, which is in issue in the present reference.

69. We agree with the learned counsel for the tax department. The debate in ***Telenor Pakistan*** with regard to whether or not telecommunication companies fell within the

definition of industrial undertaking for purpose of section 2(29C) of the ITO was around the category mentioned in sub-clause (i) of section 2(29C)(a)(ii) of the ITO, which related to undertakings engaged in *"the manufacture of goods or materials or the subjection of goods or materials to any process which substantially changes their original condition".* It was held by this Court in ***Telenor Pakistan*** that it would need to be determined by the Tribunal as a fact-finding adjudicator as to whether in provision of telecom services the materials used were subjected by the telecom company to any process that substantially changed their original condition. Notwithstanding the obiter comments of the Court in ***Telenor Pakistan***, it was not conclusively held that telecommunication companies fell within the definition of industrial undertaking for purpose of section 2(29C) of the ITO.

70. Learned Counsel for PMCL is also correct in pointing out that ***Telenor Pakistan*** was not set aside by the Supreme Court while remanding a question back to the Islamabad High Court, which was decided through judgment dated 13.10.2022 by this Court in ***M/s Telenor Pakistan (Pvt.) Ltd. vs. Appellate Tribunal Inland Revenue (I.T.R No. 63 of 2015)*.** In the said judgment, it was held in the context of section 148(7) of the ITO that for purposes of determining whether any advance tax charged in terms of section 148(1) of the ITO was final or adjustable, a two-step inquiry was required to be undertaken in the following terms:

> *14. In view of the above reading of section 148(7), the first question to be determined by the tax department is whether an importer is deriving income that arises from*

the imports against the value of which advance tax has been collected. If the answer to such question is in the affirmative, the department is then required to determine whether the imports in relation to which the advance tax has been collected fall within clauses (a) to (e) of section 148(7). If answer to the second question is in the negative, then income of the importer would not fall within the two carve-outs provided under section 148(7) and the advance tax collected from such imports would be deemed to be a final tax. If however the tax department comes to the conclusion that no income accrues to the importer from the imports against which advance tax has been collected, the tax collected would be adjustable tax and not a final tax. Likewise, even if there is income arising to the importer from the imports against which advance tax has been collected, but such imports fall within the category mentioned in clauses (a) to (e) of section 148(7), the advance tax collected would still be an adjustable tax.

71. It was in terms of the second step in the analysis mentioned above that the question of whether an entity generating income from imports qualifies as an industrial undertaking or not becomes relevant. If it is determined by the Commissioner that PMCL generates income from imports in relation to which advance tax has been collected in terms of section 148(1) of the ITO, only then the question of PMCL being an industrial undertaking would become relevant. In such case, we agree with the tax department that PMCL would not qualify as an industrial undertaking for purposes of tax year 2018. The meaning of the definition of industrial undertaking in terms of section 2(29C) of the ITO, in the context of telecommunication companies, has now become evident in view of the subsequent amendment introduced by addition of sub-clause (c) to section

2(29C) through Finance Act, 2021. If the legislature's understanding of section 2(29C) of the ITO before the amendment was that telecommunication companies fell within the definition of industrial undertaking, as contemplated by this Court in ***Telenor Pakistan***, while leaving the matter open, there would be no requirement to bring about a legislative amendment and introduce clause (c) to section 2(29) and specifically include within the definition of industrial undertaking telecommunication companies licensed by PTA. In view of the subsequent legislative amendment, it can no longer be argued that the legislative intent behind section 2(29C) of the ITO, as it existed in tax year 2018, was to include telecommunication companies within the definition of industrial undertaking.

72. We, however, remand the question of whether PMCL has derived any income from imports in relation to which advance tax has been collected in terms of section 148(1) of the ITO to be decided by the Commissioner after a factual inquiry in terms of the law laid down by this Court in **I.T.R No. 63/2015**.

Amortization and Depreciation: Did the Tribunal err by not passing any directions in this regard?

73. Mr. Sukhera for PMCL did not address detailed arguments re this question. He, however, contended that the question of depreciation and amortization for previous tax years is pending adjudication before various forms, and to the extent that any decision in favor of PMCL is rendered, it may be held that such beneficial treatment would be available for purposes of tax year 2018. Ms. Hamid for tax department contended that in the event that any favorable decision was issued in a previous tax year,

the effect of such decision in relation to year 2018 would be determined in accordance with law.

74. We are not convinced that there is an actual question of law with regard to depreciation or amortization that arises from the proceedings that have been impugned before us in the instant reference. We cannot comment on the possible decisions that may be rendered in relation to previous tax years and can, therefore, not issue any directions in such regard for purposes of tax year 2018. To the extent that a favorable decision is rendered and the benefit of such decision is due for purposes of tax year 2018 in accordance with provisions of the ITO, and such benefit is not accorded by the tax department to PMCL, PMCL would have an appropriate remedy under ITO at such time.

75. For the aforementioned reasons recorded in relation to the questions framed for our consideration, we decide the reference in favor of the tax department and against PMCL, except in relation to any demand generated in terms of section 148(7) of the ITO, which matter we are remanding to the Commissioner for a factual inquiry. We have held that the impugned order is not *coram non judice* for having been issued by the Commissioner as opposed to Additional Commissioner to whom powers for purposes of section 122(5A) of the ITO had also been delegated. We have further held that the transaction of disposal of tower business by PMCL to Deodar did not qualify for tax deferral in terms of section 97 of the ITO. While holding that PMCL did not qualify as an industrial undertaking in terms of section 2(29C) of ITO in tax year 2018, we have held that the Commissioner shall undertake an analysis re advance tax

collected under section 148 of the ITO in terms of the law laid down in **ITR No. 63/2015,** before generating any demand in terms of section 148(7) of the ITO. The appeals effect order passed in terms of section 124 of the ITO will include no demand in relation to section 148(7) read with section 148(1) of the ITO, without such prior inquiry.

76. Let a copy of this judgment be sent to the Registrar of the Tribunal under the seal of this Court.

(SAMAN RAFAT IMTIAZ)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in the open Court on 11.06.2025.

JUDGE **JUDGE**

Approved for reporting

Saeed