JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.T.R.No.38 of 2017
Commissioner Inland Revenue (Appeals–II) and another
Versus
Pak Telecommunication Employees Trust

Dates of Hearing:	25.11.2021, 22.12.2021, 12.01.2022 and 13.01.2022
Applicants by:	Mr. Adnan Haider Randhawa, Advocate for the applicants (C.I.R.) in I.T.R.s No.38 to 43 of 2017 and for the respondents (C.I.R.) in I.T.Rs.No.30 to 35 of 2017
Respondents by:	M/s Raashid Anwar and Muhammad Latif Saeedi, Advocates for the applicant (P.T.E.T.) in I.T.Rs. No.30 to 35 of 2017 and for the respondent (P.T.E.T.) in I.T.Rs. No. 38 to 43 of 2017 along with Matee ur Rehman, Manager (Legal), P.T.E.T.

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, we propose to decide Income Tax References No.30/2017, 31/2017, 32/2017, 33/2017, 34/2017, 35/2017, 38/2017, 39/2017, 40/2017, 41/2017, 42/2017 and 43/2017 since they entail common questions of law and fact.

2. The questions of law proposed for our consideration are as follows:-

"a) Whether on the facts and in the circumstances of the case the Pakistan Telecommunication Corporation Employees Fund (PTEPF) which was created through a separate trust deed on 02.4.1994, ceased to exist on 31st December, 1996?

b) Whether a new entity Pakistan Telecommunication Employees Trust (PTET) which took birth on 13th October, 1996 through section 44 of Pakistan Telecommunication (Re-Organization) Act, as a separate entity, was required to obtain approval from CIR.

c) Whether the newly created entity namely PTET with re-organizational changes and a separate and distinct Trust Deed could avail exemption available to erstwhile PTEPF?

d) If the approval granted to applicant fund PTEPF on July 11, 1994 stood withdrawn on 13th October, 1996 then seventeen (17) exemption certificates issued by the department from 6.6.1999 to 14.4.2014 in favour of predecessor (PTEPF) and not the applicant fund, have any legal value as the same were issued to an entity, which, in fact, did not exist at the time of issuance of those exemption certificates.

e) Whether on the facts and in the circumstances of the case the learned ATIR was justified or not to rely on section 53 of Pakistan Telecommunication (Re-Organization) Act, 1996 to infer the continuity of the predecessor fund (PTEPF) where section 53 deals with revocation/winding up of a Trust which means that the applicant fund has been created as a revocable trust contrary to the provisions of Rule 2(a) of Part-II of the Sixth Schedule to Income Tax Ordinance, 1979 which requires that a superannuation / pension fund shall be a fund under an irrevocable trust."

3. The Pakistan Telecommunication Corporation Act, 1991 ("the 1991 Act") was enacted on 25.11.1991. By operation of Section 9(1) of the said Act, the employees of the Pakistan Telegraph and Telephone Department, Government of Pakistan ("T&T Department") were transferred to the Pakistan Telecommunication Corporation ("P.T.C.") on the same terms and conditions to which they were entitled immediately before such transfer. Section 9(2) of the 1991 Act provided that the terms and conditions of service of the departmental employees transferred to P.T.C. shall not be varied to their disadvantage. The terms and conditions of service to which such employees were entitled before their transfer were to continue to be applicable to them notwithstanding their transfer to P.T.C.

4. The Pakistan Telecommunication Corporation Employees Pension Fund ("P.T.C.E. Pension Fund") was created by a Trust Deed dated 02.04.1994 ("the Trust Deed"). It is a matter of record that clause 2 of the Trust Deed provided that *"all departmental employees transferred to the Corporation as defined in Section 9 of the Pakistan Telecommunication Corporation Act, 1991 shall be entitled to benefits as defined under the Federal Government Pension Rules as applicable to such employees before the formation of P.T.C."*

5. Clause 3 of the Trust Deed provided that the Employer (i.e., P.T.C.) proposes to create a pension fund under an irrevocable trust for the benefit of all those employees who are / or shall be eligible for the membership in the Fund under the Employees Pension Fund Rules, and certain sums shall be contributed by the Employer in accordance with the provisions in the Trust Deed and in terms of the said Rules. Clause 4 of the Trust Deed makes it clear that the sole purpose of the P.T.C.E. Pension Fund was the provision of pension annuities for eligible employees upon their retirement or upon their

becoming incapacitated prior to such retirement, or for widows, children or dependents of such employees on their death. The Trust Deed also expresses the desire of the trustees that the P.T.C.E. Pension Fund shall receive and thereafter retain approval from the Commissioner Income Tax under the Income Tax Ordinance, 1979 (“the 1979 Ordinance”).

6. It is not disputed that the P.T.C.E. Pension Fund created by the Trust Deed was a superannuation fund.

7. Section 14(1)(a) of the 1979 Ordinance provided that the incomes or classes of income, or persons or classes of persons, specified in the Second Schedule shall be exempt from tax under the said Ordinance, subject to the conditions and to the extent specified therein. Clause 56(2)(ii) in Part-I of the Second Schedule to the 1979 Ordinance makes the income of an approved superannuation fund exempt from tax. Section 2(5) of the 1979 Ordinance defined an “approved superannuation fund” to mean a superannuation fund, or any part of a superannuation fund, which has been, and continues to be, approved by the Commissioner in accordance with the rules contained in Part-II of the Sixth Schedule to the said Ordinance.

8. Rule 1(1) of the Sixth Schedule to the 1979 Ordinance provided *inter alia* that the Commissioner may accord approval to any superannuation fund or any part of a superannuation fund which, in his opinion, complies with the requirements of Rule 2. The conditions provided in Rule 2 in order for a superannuation fund to receive and retain approval are set out herein below:-

> ***“(a) the fund shall be a fund established under an irrevocable trust, in connection with a trade or undertaking carried on in Pakistan, and not less than ninety per cent of the employees shall be employed in Pakistan;***
>
> ***(b) the fund shall have for its sole purpose the provision of annuities for employees in the trade or undertaking on their retirement at or after a specified age or on their becoming incapacitated prior to such retirement, or for widows, children or dependents of persons who are or have been such employees on the death of these persons;***
>
> ***(c) the employer in the trade or undertaking shall be a contributor to the fund; and***
>
> ***(d) all annuities, pensions and other benefits granted from the fund shall be payable only in Pakistan.”***

9. Vide letter No.CIT-16(10)/93-94/J.Br/91 dated 11.07.1994, the Commissioner of Income Tax / Wealth Tax, Islamabad Zone accorded approval and recognition to the P.T.C.E. Pension Fund in terms of Part-II of the Sixth Schedule of the 1979 Ordinance on the conditions mentioned in the said letter.

10. The Pakistan Telecommunication (Re-organization) Act, 1996 (“the 1996 Act”) was enacted on 13.10.1996. Section 34 of the said Act provided *inter alia* that the Federal Government shall establish a company to be known as Pakistan Telecommunication Company, limited by shares, and cause it to be incorporated under the erstwhile Companies Ordinance, 1984. The principal object of this company was to be the provision of the domestic and international telecommunication and related services consistent with the provisions of the 1996 Act.

11. Section 35(2) of the 1996 Act provided *inter alia* that the employees of P.T.C., specified in an order issued by the Federal Government, shall be transferred to and become employees of either Pakistan Telecommunication Company Limited (“P.T.C.L.”), the National Telecommunication Corporation, the Pakistan Telecommunication Authority, the Pakistan Telecommunication Employees Trust, or the Frequency Allocation Board referred to in such order. Under the *proviso* to Section 36(1) of the said Act, the Federal Government was under an obligation to guarantee the existing terms and conditions of service and rights including pensionary benefits of the employees transferred pursuant to Section 35(2) of the 1996 Act.

12. Under Section 36(2) of the said Act, the terms and conditions of service of any such transferred employees could not be altered adversely by P.T.C.L. except in accordance with the laws of Pakistan or with the consent of such transferred employees and the award of appropriate compensation. Section 36(5) of the 1996 Act provided as follows:-

> ***"36(5) Under the order vesting property of the Corporation in the Company, the Federal Government shall require the Company to assume the responsibility of pensionary benefits of the telecommunication employees and the Company shall not alter such***

pensionary benefits without the consent of the individuals concerned and the award of appropriate compensation."

13. Section 44(1) of the 1996 Act provided *inter alia* that the Federal Government shall establish a trust to be called the Pakistan Telecommunication Employees Trust (“P.T.E.T.”). This trust was to be a body corporate, having perpetual succession and a common seal with power to acquire and hold property, both moveable and immovable. Section 44(3) of the said Act provided that P.T.E.T. shall be managed by a Board of Trustees consisting of six trustees, three to be appointed by the Federal Government and three by P.T.C.L. for a period of three years. Vide Notification No.5(3)/93-PTC dated 01.01.1996 issued by the Ministry of Communication, P.T.E.T. was established.

14. Section 45(1) of the 1996 Act provided *inter alia* that the Federal Government shall, by notification in the official Gazette, order that all assets and liabilities of the P.T.C.E. Pension Fund as created by the Trust Deed dated 02.04.1994 and such liabilities as specified in the notification shall vest in and shall become the assets and liabilities of the P.T.E.T. established by the Federal Government pursuant to Section 44(1) of the said Act.

15. Through notification (SRO 116(I)/96) dated 07.02.1996, the Federal Government directed *inter alia* that with effect from 31.12.1995, all properties and assets of the P.T.C.E. Pension Fund shall vest and become the assets, properties, rights and liabilities of the P.T.E.T. The Schedule to the said notification shows that when the said notification was issued, the P.T.C.E. Pension Fund had an investment of Rs.2,999,999,829/- in government securities and a commercial plot in Blue Area, Islamabad, measuring 5,600 square yards, among other assets.

16. Under Section 45(2) of the 1996 Act, P.T.C.L. was to contribute to the Pension Fund the amount determined by the Actuary (appointed by the trustees) representing the unfunded proportion of the accrued pension liabilities which were to be assumed by P.T.C.L. The Pension Fund administered by P.T.E.T. was to consist of (a) amounts received from the P.T.C.E. Pension Fund; (b) contributions to be paid by P.T.C.L.; (c) annual contribution to be paid

by P.T.C.L. at the commencement of each financial year; (d) investments and profits, gains and other returns accrued on such investments; and (e) donations and other contributions by individuals or any aid-giving agencies.

17. The functions and powers that the Board of Trustees can exercise are set out in Section 46 of the 1996 Act. One of the functions of P.T.E.T. was to make provision for the payment of pension to the telecommunication employees to the extent of their entitlement. In the performance of its functions, the Board of Trustees had *inter alia* the exclusive right to determine the amounts, if any, payable in respect of pensionary benefits to the telecommunication employees. Under Section 46(2)(e) of the said Act, the Board of Trustees can enter into contracts whereas under Section 46(2)(f), it can acquire, lease, encumber, dispose of, exchange, invest or otherwise deal with any movable or immovable property or any interest therein.

18. Section 53(1) of the said Act provided that the trust shall be wound up by the Federal Government on the recommendation of the Board of Trustees and the certification by the Actuary that no pension payment is required to be made from the pension fund whereas Section 53(2) provided that the balance of the pension fund shall, on the winding up of P.T.E.T., be paid to the Federal Government and P.T.C.L. *pro-rata* of the assets of the P.T.C.E. Pension Fund and contributions made from time to time by P.T.C.L.

19. After the enactment of the 1996 Act, P.T.E.T. was exempt from the payment of all kinds of taxes, duties, levies, charges and fees payable under or pursuant to any Federal or Provincial law, on its investment, income, assets, or wealth. This was by virtue of Section 51 of the 1996 Act, which read thus:-

> ***"51. Notwithstanding anything contained in any other law for the time being in force, the Trust shall not be liable to pay, and shall be exempt from the payment of, all kinds of taxes, duties, levies, charges, and fees payable under or pursuant to any Federal or Provincial law, on its investments, income, assets or wealth"***

20. Section 51 of the 1996 Act was omitted in its entirety by Section 26 of the Finance Act, 1999. It was in the year 1999 that P.T.E.T. first applied for and was granted a certificate by the Commissioner

exempting it from the payment of tax under the provisions of the 1979 Ordinance.

21. The record shows that vide letter dated 15.04.1999, P.T.E.T. had applied to the Commissioner for the issuance of a certificate exempting it from tax under the 1979 Ordinance. On 09.06.1999, the Commissioner of Income Tax / Wealth Tax, Companies Zone, Islamabad issued an exemption certificate under Section 50(2A) of the 1979 Ordinance. The said certificate reads as follows:-

> ***"This is to certify that income of M/s Pakistan Telecommunication Employees Trust Islamabad is exempt from levy of tax. The tax deductible under sub-section (2A) of section 50 of the Income Tax Ordinance, 1979 from the profit / interest to be paid on the account of deposits maintained by the M/s Pakistan Telecommunication Employees Trust Islamabad, may not be deducted.***
> **(Emphasis added)**

22. The validity period of the said certificate dated 09.06.1999 was up to 30.06.1999. On 07.07.1999, 27.06.2000 and 25.07.2001 P.T.E.T. was granted similar exemption certificates valid up to 30.06.2000, 30.06.2001 and 30.06.2002, respectively. These exemption certificates were granted under the provisions of the 1979 Ordinance.

23. The 1979 Ordinance was repealed by the Income Tax Ordinance, 2001 (the 2001 Ordinance"). Section 21(e) of the 2001 Ordinance provides *inter alia* that no deduction shall be allowed in computing the income of a person under the head "Income from Business" for any contribution made by the person to a fund that is not a recognized provident fund, approved pension fund, approved superannuation fund, or approved gratuity fund.

24. Section 53(1)(a) of the 2001 Ordinance makes the income of persons specified in the Second Schedule to be exempt from tax under the said Ordinance *"subject to any condition and to the extent specified therein."* Clause 57(3)(ii) in Part-I of the Second Schedule to the 2001 Ordinance makes the income of trustees on behalf of an approved superannuation fund to be exempt from tax. An "approved superannuation fund" is defined in Section 2(4) of the 2001 Ordinance to mean a superannuation fund or any part of a superannuation fund approved by the Commissioner in accordance with Part-II of the Sixth Schedule.

25. Section 159 of the 2001 Ordinance provides *inter alia* that where the Commissioner is satisfied that an amount is exempt from tax under the said Ordinance, he shall, upon application in writing by the person, issue the person with an exemption certificate.

26. Learned counsel for P.T.E.T. has also brought on record exemption certificates issued every year from 2002 to 2014 by the Commissioner Inland Revenue under Section 159 of the 2001 Ordinance expressly certifying that P.T.E.T.'s income was *"exempt from the levy of tax under Clause 57(3)(ii) of Part-I of the Second Schedule to the Income Tax Ordinance, 2001."* Indeed, Clause 57(3)(ii) in Part-I of the Second Schedule to the 2001 Ordinance makes the income of the Trustees on behalf of an approved superannuation fund exempt from tax. It is an admitted fact that an approval in terms of Rule 1(1) in the Sixth Schedule to the 2001 Ordinance or its *pari materia* provision in the 1979 Ordinance had not been granted by the Commissioner to P.T.E.T. It is the approval dated 11.07.1994, granted to the P.T.C.E. Pension Fund, that formed the basis for the issuance of exemption certificates to P.T.E.T. from 1999 to 2014.

27. It may be mentioned that vide order dated 08.03.2016, the Commissioner Inland Revenue turned down P.T.E.T.'s application filed under Section 159 of the 2001 Ordinance for the issuance of a certificate for exemption from tax. The said order was assailed by P.T.E.T. in writ petition No.2666/2016 before this Court. We shall come to the outcome of the said petition at a subsequent stage in this judgment.

28. A week after the said order dated 08.03.2016 was issued, the Additional Commissioner Inland Revenue issued to P.T.E.T. a show cause notice dated 15.03.2016 under Section 122(9) of the 2001 Ordinance. In the said notice, it was asserted that P.T.E.T. was not an approved entity in terms of Clause 57(3)(ii) in Part-I of the Second Schedule to the 2001 Ordinance to make its income exempt from tax. P.T.E.T. was called upon to show cause as to why its deemed assessment finalized under Section 120(1) of the 2001 Ordinance may not be amended on account of being erroneous as well as prejudicial

to the interest of revenue. Proceedings pursuant to the said show cause notice culminated in an amended assessment order dated 08.04.2016 whereby an amount of Rs.1,975,013,658/- was determined as tax payable by P.T.E.T. The said order was assailed by P.T.E.T. in an appeal before the Commissioner Inland Revenue. Vide order dated 02.06.2016, the said appeal was dismissed. In the said order, it was held *inter alia* that P.T.E.T. was not an approved superannuation fund and that the earlier exemptions granted to it had been issued without any legal basis and were repugnant to the clear provisions of the law. Furthermore, it was observed that P.T.E.T., being a trust, was required to be approved by the Commissioner as a non-profit organization and only upon such approval could it claim exemption from tax under Clause 57(3)(ii) in Part-I of the Second Schedule to the 2001 Ordinance.

29. P.T.E.T. assailed the said order passed by the Commissioner before the Appellate Tribunal Inland Revenue (“A.T.I.R.”). Vide order dated 27.02.2017, the said appeal was allowed by the A.T.I.R. and it was held that P.T.E.T.’s income from its assets and contributions received from P.T.C.L. were exempt from tax under Clause 57(3)(ii) in Part-I of the Second Schedule to the 2001 Ordinance. In paragraph 12 of the said order, it was observed as follows:-

> ***“In terms of section 2(4) of the Income Tax Ordinance, 2001 an approved superannuation fund means a fund or part thereof which has been approved by the CIR under Part II of Second Schedule to the said Ordinance, whereas, in terms of section 239(10) of the Income Tax Ordinance, 2001, the approval granted by the CIR to PTCEPF under the 1979 Ordinance is to continue unless revoked, cancelled or repealed by the Income Tax Ordinance, 2001. It is also to note that clause (57) supra grants exemption of income in the hands of the trustees, which in view of the vesting order, in the instant case, is the Appellant Trust for the PTCEPF. This position is fortified by the judgment of Honourable Apex Court reported at 1987 SCMR 1197 supra and a binding precedent in view of Article 189 of the 1973 Constitution of Pakistan. Further, this is also reflected by the various CIR’s who for over 14 years consistently granted exemption certificates and Department continued to treat the income exempt under the said clause (57)(3)(ii) applicable to the approved pension fund.”***

30. The questions of law framed for our consideration arise from the said order dated 27.02.2017 passed by the A.T.I.R.

31. At this stage it may be mentioned that after the said order dated 27.02.2017 was passed by the A.T.I.R., writ petition No.2666/2016 (to

which reference has been made in paragraph 27 of this judgment) came up for hearing before this Court and was allowed vide judgment dated 05.06.2017; the Commissioner's decision not to grant an exemption certificate to P.T.E.T. was set-aside; and the matter was remanded to the Commissioner Inland Revenue with the direction to decide P.T.E.T.'s application for grant of exemption afresh. In the said judgment, it was observed that while rejecting P.T.E.T.'s application for the issuance of the exemption certificate, the Commissioner had not considered whether the petitioner qualified for exemption in accordance with Clause 57(3)(ii) in Part-I of the Second Schedule to the 2001 Ordinance. Reference in the said judgment was also made to an order passed by the Appellate Tribunal Inland Revenue, Islamabad that P.T.E.T. qualifies for such an exemption independent of the transfer of the assets and liabilities of the P.T.C.E. Pension Fund. Paragraphs 11 and 12 of the said judgment are reproduced herein below:-

> ***"11. Admittedly, the Fund was an approved Fund for the purpose of then Income Tax Ordinance, 1979 and even after transfer of the assets and liabilities, the respondent Department continued to recognize it as an approved Fund and granted exemption under clause 57(3(ii) of Part-I of the Second Schedule to the Ordinance. The legal status of the petitioner has not changed since its inception under section 44 ibid and transfer of assets and liabilities under section 45(1) of the Ordinance pursuant to SRO No.116(I)/96. In this backdrop, the petitioner had a legitimate expectation that it shall be granted exemption when the application was made in 2015 and subsequently, as there was no change in its legal status and functions.***
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> ***12. The petitioner is an entity different from Pakistan Telecommunication Corporation Employees Pension Fund, however, under section 45(1) of the Act, all assets and liabilities of the referred Fund stood transferred to it. In this behalf, the status of an approved Fund, granted to it, stood transferred to it pursuant to the aforementioned SRO. In this behalf, the word 'asset' has been defined in Black's Law Dictionary as an 'item' that is owned and has value. Moreover, the exemption earlier granted to the predecessor-in-interest of the petitioner, vested in it and stood transferred to the petitioner through referred Notification. Reliance is placed a case reported as 'Board of Foreign Missions Vs. The Government of Punjab' (1987 SCMR 1197)."***

32. The said judgment has attained finality since it had not been assailed any further by the Inland Revenue Service. Prior to the said judgment, the Commissioner Inland Revenue, while turning down the petitioner's application for the issuance of an exemption certificate

vide order dated 08.03.2016, had held that the P.T.C.E. Pension Fund had ceased to exist on 31.12.1995 for all practical and legal purposes and on the same date an absolutely new entity in the shape of P.T.E.T. came into being which could not claim exemption that had been granted to the P.T.C.E. Pension Fund. These observations of the Commissioner Inland Revenue stand overturned by the judgment dated 05.06.2017 passed by this Court in writ petition No.2666/2016. We have been informed that in the post-remand proceedings, the Commissioner Inland Revenue has not decided P.T.E.T.'s application for exemption due to the pendency of the instant references before this Court.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE INLAND REVENUE SERVICE:-

33. Mr. Adnan Haider Randhawa, Advocate, learned counsel for the applicants / Inland Revenue Service, after narrating the facts leading to the filing of the instant petitions, submitted that vide letter dated 11.07.1994, the Commissioner accorded approval and recognition to the P.T.C.E. Pension Fund in terms of Part-II of the Sixth Schedule of the 1979 Ordinance; that at no material stage after the establishment of P.T.E.T. has it been granted approval under Part-II of the Sixth Schedule of either the 1979 Ordinance or the 2001 Ordinance; that since P.T.E.T. is not an approved superannuation fund, its income is not exempt from tax; that the P.T.C.E. Pension Fund had ceased to exist since the P.T.C. stood dissolved pursuant to the provisions of the 1996 Act; that another reason why the P.T.C.E. Pension Fund ceased to exist is that all its properties and assets stood transferred to the P.T.E.T. through notification (SRO116(I)/1996) dated 07.02.1996 issued by the Federal Government; that P.T.E.T., established pursuant to Section 44(1) of the 1996 Act, is an entity different from the P.T.C.E. Pension Fund and therefore the approval granted on 11.07.1994 to the P.T.C.E. Pension Fund cannot be deemed to have been granted to P.T.E.T.; and that the P.T.C.E. Pension Fund was created by the Trust Deed whereas P.T.E.T. was established by the Federal Government through notification dated 01.01.1996.

34. Furthermore, it was submitted that the approval granted to the P.T.C.E. Pension Fund is deemed to have been withdrawn in terms of Rule 3(2) in Part-II of the Sixth Schedule to the 2001 Ordinance which provides that if any alteration in the regulations, constitutions, objects or conditions of the fund is made at any time after the date of the application for approval, the trustees of the funds shall forthwith communicate such alteration to the Commissioner and, in default of such communication, any approval given shall, unless the Commissioner otherwise directs, be deemed to have been withdrawn from the date on which the alteration took effect; that P.T.E.T. having objects and conditions different from those of the P.T.C.E. Pension Fund, was a material alteration which caused the approval granted to the P.T.C.E. Pension Fund on 11.07.1994 to be withdrawn by operation of the deeming provisions in Rule 3(2) in Part-II of the Sixth Schedule to the 2001 Ordinance; that the composition of the Board of Trustees of P.T.E.T. is different from that of the P.T.C.E. Pension Fund; that P.T.E.T. is a body corporate by virtue of Section 44(2) of the 1996 Act whereas the P.T.C.E. Pension Fund was not; that the P.T.C.E. Pension Fund was established exclusively as a pension fund whereas the Board of Trustees of P.T.E.T. has been empowered by Section 46(2) of the 1996 Act to perform several other functions including the execution of contracts and the acquisition etc. of moveable and immovable properties; that the management of the P.T.C.E. Pension Fund is just one of the objects of P.T.E.T; that for the conduct and management of the P.T.C.E. Pension Fund, its Board of Trustees had been empowered to frame Rules whereas under Section 44(9) of the 1996 Act, the Board of Trustees of P.T.E.T. can make Rules for the management and the conduct of business of P.T.E.T. but only with the approval of the Federal Government; and that under Rule 111 of the Income Tax Rules, 2002, all monies contributed to an approved superannuation fund and interest on the accumulated balance of such contributions are to be utilized for making payments under a scheme of insurance or a contract of annuity with the Life Insurance Corporation of Pakistan or Pakistan Post Office Insurance department; and that P.T.E.T., in violation of Rule 111 *ibid,* has been

investing the monies contributed to it in real estate. Learned counsel for the Inland Revenue Service prayed for A.T.I.R.'s order dated 27.02.2017 to be set aside and for the orders dated 08.04.2016 and 02.06.2016 passed by the Additional Commissioner Inland Revenue and the Commissioner Inland Revenue, respectively, to be restored.

CONTENTIONS OF THE LEARNED COUNSEL FOR P.T.E.T.:-

35. On the other hand, Mr. Rashid Anwar, Advocate, learned counsel for P.T.E.T., submitted that the P.T.C.E. Pension Fund was created by the P.T.C. for the benefit of telecommunication employees i.e., employees transferred to P.T.C. from the erstwhile T&T Department of the Federal Government; that P.T.E.T. is a statutory trust constituted under Section 44 of the 1996 Act for the sole purpose of disbursement of pension to telecommunication employees, who are the ex-employees of the T&T Department and of P.T.C. who have since retired and are entitled to receive pension; that all assets of the P.T.C.E. Pension Fund created by the Trust Deed dated 02.04.1994 stood vested and became the assets of P.T.E.T.; that the approval granted to the P.T.C.E. Pension Fund on 11.07.1994 by the Commissioner of Income Tax also stood transferred to P.T.E.T. by operation of law i.e., Section 45 of the 1996 Act read with notification (SRO 116(I)/1996) dated 07.02.1996; that P.T.E.T. is deemed to be an approved superannuation fund from the day it was constituted and therefore its income is exempt from tax in terms of Clause 57(3)(ii) in Part-I of the Second Schedule of 2001 Ordinance; that P.T.E.T. has continuously been granted annual exemptions for 16 years (from 1999 to 2014) as an approved superannuation fund under Part-II of the Sixth Schedule to the 2001 Ordinance; and that in the year 2014, the Inland Revenue Service had carried out a detailed audit of P.T.E.T. before coming to the conclusion that its income was exempt from tax.

36. Furthermore, it was submitted that the approval granted on 11.07.1994 cannot be deemed to have been withdrawn due to the transfer of the P.T.C.E. Pension Fund's assets and liabilities to P.T.E.T. since the Inland Revenue Service is deemed to have knowledge of the enactment of the 1996 Act as well as issuance of the

Notification (SRO 116(I)/1996) dated 07.02.1996, which has been published in the official Gazette; that the Commissioner has consistently issued exemption certificates over a period of sixteen years acknowledging that on account of being an approved superannuation fund, P.T.E.T.'s income is exempt from tax; that there is no change in P.T.E.T's. legal status between the period when it was granted exemption and the period when such exemption has been withheld; that the petitioner has a legitimate expectation that the existing departmental practice is adhered to and followed in accordance with the principle of estoppel; that this Court vide judgment dated 05.06.2017 passed in Writ Petition No.2666/2016 had held that after the transfer of the P.T.C.E. Pension Fund's assets and liabilities to P.T.E.T., the Inland Revenue Service continued to recognize P.T.E.T. as an approved superannuation fund and entitled to exemption from tax under Clause 57(3)(ii) in Part-I of the Second Schedule to the 2001 Ordinance; that it was also held that the legal status of P.T.E.T. had not changed since its inception and that P.T.E.T. had a legitimate expectation to be granted a certificate for exemption from tax; that it was also held that the exemption earlier granted to P.T.E.T's predecessor-in-interest stood transferred to P.T.E.T. through notification (SRO 116(I)/1996) dated 07.02.1996. Learned counsel prayed for the references filed by the Inland Revenue Service to be answered in the negative.

37. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petitions have been set out in sufficient detail in paragraphs 2 to 32 above and need not be recapitulated.

38. It is an admitted position that the P.T.C.E. Pension Fund, constituted through Trust Deed dated 02.04.1994 was accorded approval on 11.07.1994 by the Commissioner of Income Tax / Wealth Tax, Islamabad Zone in terms of Part-II of the Sixth Schedule to the 1979 Ordinance. This approval gave the P.T.C.E. Pension Fund the status of an "approved superannuation fund" as defined in Section 2(5) of the 1979 Ordinance. Section 14(1)(a) read with Clause 56(2)(ii)

in Part-I of the Second Schedule to the 1979 Ordinance makes the income of an approved superannuation fund exempt from tax. The P.T.C.E. Pension Fund did not pay tax on its income on account of having the status of an approved superannuation fund.

39. As explained in paragraphs 13 to 18 above, P.T.E.T. was established by the Federal Government pursuant to the provisions of Section 44(1) of the 1996 Act, and by dint of Section 45(1) of the said Act read with the notification dated 07.02.1996, all the assets and liabilities of the P.T.C.E. Pension Fund stood transferred and vested in P.T.E.T. In other words, P.T.E.T. became the P.T.C.E. Pension Fund's successor-in-interest.

40. The *non-obstante* clause in Section 51 of the 1996 Act made P.T.E.T.'s investments, income, assets, and wealth exempt from payment of all kinds of duties, levies, charges and fees payable under any Federal or Provincial law. This exemption came to an end with the omission of Section 51 *ibid* by Section 26 of the Finance Act, 1999. It is perhaps this omission that caused P.T.E.T. to apply to the Commissioner Income Tax for the grant of an exemption from tax.

41. On 09.06.1999 the Commissioner of Income Tax / Wealth Tax, Companies Zone, Islamabad issued a certificate exempting P.T.E.T.'s income from the levy of tax. It is not disputed that P.T.E.T. had been granted similar exemptions from tax under the provisions of the 1979 Ordinance, and after the promulgation of the 2001 Ordinance under Section 159 of the said Ordinance, every year for a period of sixteen years i.e., from 1999 to 2014.

42. By virtue of Section 53(1)(a) of the 2001 Ordinance, the income or the classes of income, or persons or classes of persons, specified in the Second Schedule to the said Ordinance are exempt from tax under the said Ordinance subject to any conditions and to the extent specified therein. As mentioned above, Clause 57(3)(ii) of the Second Schedule to the said Ordinance makes the income of the trustees on behalf of an approved superannuation fund exempt from tax. The several exemption certificates issued by the Commissioner to P.T.E.T. under Section 159 of the 2001 Ordinance were because the Inland Revenue Service / Commissioner considered P.T.E.T. to be an

approved superannuation fund in terms of Part-II of the Sixth Schedule to the 1979 Ordinance and the 2001 Ordinance.

43. Now, the Commissioner would be deemed to have knowledge of the provisions of the 1996 Act as well as the notifications issued by the Federal Government for the establishment of P.T.E.T., and the transfer of the P.T.C.E. Pension Fund's assets and liabilities to P.T.E.T., when every year from 1999 to 2014 he issued a certificate exempting P.T.E.T.'s income from the levy of tax. He would also be deemed to be aware of the composition of P.T.E.T.'s Board of Trustees and the functions that they could perform under Section 46 of the 1996 Act. He cannot claim lack of knowledge as to the said statute and notifications, all of which were published in the official Gazette. The exemption certificates granted over a period of sixteen years cannot simply be ignored as the Inland Revenue Service would want this Court to do.

44. Rule 3(2) in Part-II of the Sixth Schedule to the 2001 Ordinance (which is similar in material particulars to Rule 3(2) in Part-II of the Sixth Schedule to the 1979 Ordinance) provides that if any alteration in the regulations, constitutions, objects or conditions of the fund is made at any time after the date of the application for approval, the trustees of the fund shall forthwith communicate such alteration to the Commissioner and in default of such communication, any approval given shall, unless the Commissioner otherwise directs, be deemed to have been withdrawn from the date on which the alteration took effect.

45. The Inland Revenue Service's stance is that the creation of P.T.E.T. by dint of the provisions of the 1996 Act operated as an alteration in the constitution, objects or conditions of the P.T.C.E. Pension Fund created through the Trust Deed dated 02.04.1994, and therefore the approval granted by the Commissioner on 11.07.1994 under the Sixth Schedule to the 1979 Ordinance would be deemed to have been withdrawn. This stance is belied by its own conduct and departmental practice over a period of sixteen years *viz* the issuance of exemption certificates under Section 159 of the 2001 Ordinance. Each of the exemption certificates had been issued by the

Commissioner after the enactment of the 1996 Act and the establishment of P.T.E.T. These exemption certificates were not granted to the P.T.C.E. Pension Fund but to P.T.E.T., which was a creature of the 1996 Act. In these exemption certificates, it is explicitly mentioned that the income of P.T.E.T. is exempt from the levy of tax. These exemption certificates were granted by different Commissioners who are proficient in fiscal laws.

46. It is an admitted position that after the promulgation of the 2001 Ordinance, P.T.E.T. did not apply afresh for the recognition of P.T.E.T. as an approved superannuation fund. The Inland Revenue Service continued to grant exemption certificates under Section 159 of the 2001 Ordinance by giving the approval granted to the P.T.C.E. Pension Fund on 11.07.1994 protection under Section 239(10) of the 2001 Ordinance, which is reproduced herein below:-

> ***"(10) Any agreement entered into, appointment made, approval given, recognition granted, direction, instruction, notification, notice, order or rule issued or made under any provision of the repealed Ordinance and in force or valid at the commencement of this Ordinance shall, so far as it is not inconsistent with the corresponding provision of this Ordinance or any agreement, appointment entered into, approval given, recognition granted, direction, instruction, notification, notice, order or rule issued or made under this Ordinance, be treated as entered into, made, given, granted or issued, as the case may be, under that corresponding provision and shall unless revoked, cancelled or repealed by, or under, this Ordinance, continue in force accordingly."***
> **(Emphasis added)**

47. Now, the approval to accord recognition to the P.T.C.E. Pension Fund by the Commissioner on 11.07.1994 under the provisions of the repealed 1979 Ordinance had not been withdrawn and was in force when the 2001 Ordinance was promulgated. Therefore, the said approval is to be treated as also having been accorded under the relevant provisions of the 2001 Ordinance. Section 239(10) and (13) of the 2001 Ordinance empowers the authority that gave an approval or recognition to amend, modify, cancel or repeal such approval or recognition. At no material stage has the approval dated 11.07.1994 been revoked or cancelled.

48. Rule 1(1) in Part-II of the Sixth Schedule to the 2001 Ordinance provides that the Commissioner may accord approval to any superannuation fund or any part of a superannuation fund which, in

his opinion, complies with the requirements of Rule 2 and may, *"at any time withdraw such approval"* if, in his opinion, the circumstances of the fund or the part, as the case may be, cease to warrant the continuance of the approval. Rule 1(2) of the Sixth Schedule provides that an order according approval *"or withdrawing approval"* shall take effect from such date as the Commissioner may fix. Rule 1(3) of the Sixth Schedule provides *inter alia* that the Commissioner shall not withdraw approval to any superannuation fund unless he has given the Trustees of that fund a reasonable opportunity of being heard.

49. Rule 2 in Part-II of the Sixth Schedule to the 2001 Ordinance provides that in order that a superannuation fund may receive *"and retain approval,"* it shall satisfy the following conditions and any other conditions that the Board may prescribe by rules:-

> ***"(a) the fund shall be a fund established under an irrevocable trust, in connection with a trade or undertaking carried on in Pakistan, and not less than ninety per cent of the employees shall be employed in Pakistan;***
>
> ***(b) the fund shall have for its sole purpose the provision of annuities for employees in the trade or undertaking on their retirement at or after a specified age or on their becoming incapacitated prior to such retirement, or for widows, children or dependants of persons who are or have been such employees on the death of these persons;***
>
> ***(c) the employer in the trade or undertaking shall be a contributor to the fund; and***
>
> ***(d) all annuities, pensions and other benefits granted from the fund shall be payable only in Pakistan."***

50. The aforementioned conditions are required to be satisfied by a superannuation fund, not just in order to obtain an approval under Rule 1 but also to continue to retain the same. Therefore, the requirement to fulfil the said conditions by an approved superannuation fund is a continuing obligation. The mere fact that the Commissioner had been issuing exemption certificates under Section 159 of the 2001 Ordinance over a period of sixteen years, would lead to an inference that P.T.E.T. (the successor-in-interest of the P.T.C.E. Pension Fund) continued to remain compliant with the said conditions.

51. A conjoint reading of Rules 1(1), 1(2) and 1(3), and Rules 2 and 3(2) in Part-II of the Sixth Schedule to the 2001 Ordinance shows that the Commissioner, after affording an opportunity of a hearing to the

trustees of an approved superannuation fund, can withdraw the approval if he considers such a fund not compliant with the conditions enumerated in Rule 2 or any other condition prescribed in the rules made by the Federal Board of Revenue. The thrust of Mr. Randhawa's argument was that the organizational and constitutional structure of P.T.E.T. was not such as would entitle it to an approval under Part-II of the Sixth Schedule to the 2001 Ordinance. If the investments being made by P.T.E.T. are not such as are permissible to an approved superannuation fund, or P.T.E.T. does not fulfil the conditions set out in Rule 2 in Part-II of the Sixth Schedule to the 2001 Ordinance, or if the Commissioner is of the view that the approval given to the predecessor-in-interest of P.T.E.T. on 11.07.1994 under the provisions of the 1979 Ordinance is inconsistent with the corresponding or *pari materia* provisions of the 2001 Ordinance, the question which therefore begs an answer is why has the Commissioner not resorted to the procedure for the withdrawal of the said approval? It is, after all, the said approval that formed the basis for the issuance of certificates exempting P.T.E.T.'s income from tax over a period of sixteen long years. As long as the approval dated 11.07.1994 is in the field, P.T.E.T. should be treated as an approved superannuation fund (as did the Commissioner during the period between 1999 and 2014) and cannot be denied benefit under Section 53(1)(a) read with Clause 57(3)(ii) in Part-I of the Second Schedule to the 2001 Ordinance. This Court cannot arrogate to itself the role of a Commissioner under Part-II of the Sixth Schedule of the 2001 Ordinance and declare that the said approval dated 11.07.1994 lost its efficacy on the establishment of P.T.E.T. when the Commissioner has exempted P.T.E.T. from the payment of tax on the basis of said approval over a period of sixteen years and has not initiated any proceedings for the withdrawal of the said approval.

52. Vide un-reported order dated 11.07.2018 passed by the Division Bench of this Court in Intra Court Appeal No.232/2017 titled "Pakistan Telecom Mobile Limited Vs. Federation of Pakistan," it was held that the exemption certificates issued by the Commissioner to Pakistan Telecom Mobile Limited under Section 159 of the 2001 Ordinance

would remain valid till the recognition of their funds had been withdrawn in the manner described in the Sixth Schedule to the said Ordinance. The petitioner in the said case had challenged a circular issued by the Federal Board of Revenue to the effect that the persons who were required to withhold income tax would be entitled to avail exemption if a valid exemption certificate under Section 159 of the 2001 Ordinance had been issued by the concerned Commissioner of Inland Revenue and the same is produced by the withholdee. The operative part of the said order is reproduced hereinbelow:-

> ***"9. In the light of the above discussion it is obvious that the appellants are justified in arguing that compelling them to obtain exemption certificates is a futile exercise because recognition of the fund is in itself an acknowledgement of being eligible for the purposes of the exemption provided under clause 57 of part I of the Second Schedule. They also have force in the argument that as long as the recognition of the fund under the Sixth Schedule remains valid, compliance of section 159 requirements is a mere formality. A plain reading of the Sixth Schedule shows that in case the Commissioner intends to withdraw the recognition of a fund then he or she is under a statutory obligation to afford an opportunity of hearing to the trustees. When section 2(48), clause 57 of Part I of the Second Schedule and the Sixth Schedule are read together then it becomes obvious that the recognition granted in case of a fund defined under section 2(48) amounts to certifying that the entity is entitled and eligible for the purposes of exemption. In such an eventuality provisions of section 159 of the Ordinance of 2001 and compliance therewith indeed is a mere formality. The exemption under clause 57 of Part I of the Second Schedule is no more applicable nor attracted when the recognition of the fund is withdrawn by the concerned Commissioner after fulfilling the conditions prescribed under sub-regulation 4 of Regulation 1 of Part I of the Sixth Schedule.***
>
> ***10. A plain reading of section 159 as a whole shows that there is no requirement to apply for and obtain an exemption certificate for each financial year or on case to case basis. The concerned Commissioner, therefore, while granting recognition under the Sixth Schedule of the Ordinance of 2001 is empowered to simultaneously issue an exemption certificate under section 159 of the Ordinance of 2001 which would then remain valid as long as the recognition of the fund is not withdrawn under the Sixth Schedule. The exemption certificate would be valid unless the recognition has been withdrawn in the manner prescribed under the Ordinance of 2001. The learned counsels for the Department could not give any plausible explanation for compelling the appellant to obtain exemption certificates for each financial year when admittedly in case of a recognized fund clause 57 of Part I of the Second Schedule is attracted.***
>
> ***11. The learned Single Judge in Chambers has rightly interpreted the provisions of the 2001 Ordinance in holding that the provisions of section 159 cannot be made redundant. The learned Lahore High Court in the judgment, dated 10-10-2017***

rendered in W.P. No.32241 of 2015 titled 'Usman Hassan and another vs. Federation of Pakistan and others' has also dealt with in detail the question of efficacy of obtaining an exemption certificate under section 159 of the Ordinance of 2001 when entitlement to avail exemption is not denied. Nevertheless, with utmost respect we do not concur with the view that section 159 is not attracted. However, as we have noted above, the Commissioner as a public functionary has to observe the principles of fairness and to exercise discretion in accordance with the law enunciated by the superior Courts.

12. We, therefore, hold that granting recognition under the Sixth Schedule is in itself an acknowledgement by the Commissioner that the fund has become eligible for the purposes of exemption specified under clause 57 of Part I of the Second Schedule. The Commissioner after granting recognition may, therefore, issue an exemption certificate, which shall remain valid until the aforesaid recognition has not been withdrawn in the manner prescribed, inter-alia, under sub-regulation 4 of Regulation 1 of Part I of the Sixth Schedule of the Ordinance of 2001. It is an admitted position that the respective funds of the appellants are recognised under the Sixth Schedule of the Ordinance of 2001 by the concerned Commissioners. It is also not denied that the appellants would be eligible to avail exemption till the recognition remains subsisting. It is also not disputed that after recognition of the fund issuance of a certificate under section 159 of the Ordinance 2001 become a mere formality.

13. For the above reasons we allow the appeals and direct the concerned Commissioners to issue exemption certificates in favour of the appellants which would remain valid till the recognition of their respective funds have not been withdrawn in the manner prescribed under the Sixth Schedule of the Ordinance of 2001. The same shall be a sufficient compliance insofar as the withholdee are concerned. The impugned judgment, dated 19-05-2017, therefore, stands modified in the above terms."

53. In view of the above, the questions of law framed for our consideration are answered in the negative. There shall be no order as to costs.

54. In its reference applications No.30, 31, 32, 33, 34 and 35 of 2017, P.T.E.T. has raised a ground that the power conferred upon the Commissioner under Section 122(5A) and (6) of the 2001 Ordinance cannot be exercised by the Additional Commissioner Inland Revenue in the absence of specific delegation on case to case basis. Since we have decided not to interfere in the judgment of the A.T.I.R. whereby the Additional Commissioner's order was set-aside therefore, this ground has become infructuous. Moreover, learned counsel for P.T.E.T. did not seek formulation of a separate question for

determination by this Court in the said reference applications and did not advance any argument in this regard.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(ARBAB MUHAMMAD TAHIR)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 09/02/2022

(JUDGE) **(JUDGE)**

*Qamar Khan** ***APPROVED FOR REPORTING***

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