IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE MUSHIR ALAM

CIVIL APPEALS NO. 150, 151 AND 152 OF 2006
(Against the judgment dated 22.11.2005 of the Peshawar High Court, Peshawar passed in Income Tax References No.117, 118 & 119 of 2003)

Lucky Cement Ltd., having its offices at Lakki Marwat, Dera Ismail Khan

...Appellant(s)
(in all appeals)

VERSUS

Commissioner Income Tax, Zone Companies, Circle-5, Peshawar

...Respondent(s)
(in all appeals)

...

For the appellant(s): (in all appeals)	Mr. Khalid Anwar, Sr. ASC Mr. M. S. Khattak, AOR
For the respondent(s): (in all appeals)	Ghulam Shoaib Jally, ASC Raja Abdul Ghafoor, AOR
Date of hearing:	31.03.2015

...

JUDGMENT

MIAN SAQIB NISAR, J.- The main question involved in these matters is:- whether the income received by the appellant from the investment(s) made by it of its surplus money into various profitable ventures/schemes and the amounts thus realized as profits thereupon amount to **income from business or income from other sources**. The facts relevant for the purposes of resolution of the noted question are:- the appellant is a public limited company *(listed at the stock exchange)*. The main and primary object of the appellant was/is to setup/establish and run a cement

factory, however, in its business prudence, the appellant decided to not seek and avail any financial support from outside *(i.e. financial institutions etc.)*, rather it relied upon its own resources *(i.e. the deposits/contributions made by the shareholder etc)*. It may be pertinent to mention here that for the accomplishment of the above venture *(cement factory)*, the appellant had collected and possessed in its reserves an amount of rupees 3.44 billion, which was not required to be used immediately *(in one go)* in lump sum and thus as the amount was lying unutilized with the appellant-company in banks or otherwise, it *(appellant)* decided to invest the said amount in certain profitable schemes through fund management process/arrangements. In this manner, the investments were made and certain profits were earned by the appellant during the financial years 1994-95, 1995-96 and 1996-97. The assessing officer *(Deputy Commissioner Income Tax)* vide order dated 24.3.1997 assessed the income **so** received by the appellant as from other sources under Section 30(2)(b) of the repealed Income Tax Ordinance, 1979 *(note: the rate of tax on such income was different than the rate of tax on income generated from the business of the assessee)*. However, the Commissioner on appeal through its order dated 30.10.1997 reversed the aforesaid decision and considered the said amount as the business income of the appellant. The department challenged this decision before the Tribunal which appeal was accepted on 29.9.2001, and by setting aside the order of the Commissioner Appeals, the order of the Assessing Officer was restored. The appellant unsuccessfully assailed the above *(two)* decisions vide tax references before the Peshawar High Court which were dismissed through the impugned judgment dated 22.11.2005.

Leave in these cases was granted on 24.1.2006 to consider the following points:-

> *"i) Whether earning from investment of surplus money in the portfolio and fund management ventures and such other activities of the petitioner would be income from the business as profit or interest?*
>
> *ii) Whether learned Division Bench of the High Court has erred in law in failing to consider that the Tribunal has erred in law treating the net amount received by the petitioner from portfolio and fund management ventures and other activities as an interest?*
>
> *iii) What would be the nature of relationship between the investor and the Bank when the latter is not responsible in case of any loss in case of investment?*
>
> *iv) Whether learned Division Bench of the High Court failed to appreciate that the business undertaken by the petitioner of portfolio and fund management ventures/activities was inextricably linked to the construction of cement plant and such surplus funds earned from the said ventures were specifically earmarked for construction of cement plant."*

2. Mr. Khalid Anwar, learned Sr. ASC, by relying upon Article III of the appellant-company's Memorandum of Association has argued that though the primary object and purpose of the company was to establish a cement factory and this would be the ultimate business of the appellant, however since the constitution i.e. the Memorandum of Association of the company permits investments to be made for the purposes of its *(appellant)* business to generate income, therefore any profits earned or income generated and received through such investments should be taxed as income from business, as opposed to income from other sources. For the

ease of reference, he has referred to relevant clauses of Article III of the Memorandum of Association of the appellant-company, which are reproduced below.

Clause 1 of Article III *ibid* reads as follows:-

> *"To carry out the design, engineering, procurement, manufacturing, delivery, erection, installation, testing and commissioning at site of a new, state of the art, plant including all auxiliary and ancillary equipment, complete in all respects for the purpose of manufacturing PORTLAND CEMENT as per Pakistan/British standard specifications, including all mechanical and electrical equipment and controls to ensure a smooth and continuous production clinkers and corresponding quantity of ordinary PORTLAND CEMENT."*

Clause 6 of Article III *ibid* reads as follow:-

> *"To invest or otherwise deal with the money of the Company in such manner as may from time to time be determined."*

Clause 36 of Article III *ibid* reads as under:-

> *"It is expressly declared that the several sub-clauses of this clause and all the powers expressed therein are to be cumulative but in no case unless the context expressly so requires is the generality of any one sub-clause to be narrowed or restricted by the name of the Company or by the particularity of expression in the same sub-clause or by the application or any rule of construction such as the ejusdem generis rule, and accordingly none of such sub-clauses or the objects therein specified or the power thereby conferred shall be deemed subsidiary or auxiliary, merely to the objects mentioned in any other sub-clause of this clause and the Company shall have full power to exercise all or any of the powers conferred by any provisions of this clause in any part of the world."*

It is thus submitted that Clause 6 *ibid* specifically and independently provides and enables the company to make such

investment in addition, the said clause when read in light of residuary Clause 36 *ibid*, makes the investments a permissible business activity of the appellant, notwithstanding its primary business of establishing the cement factory, therefore all such income received by the appellant shall be taxable as the income from business and not from any other source. It is also argued that the learned High Court has unnecessarily relied upon the judgment of this Court reported as **The Commissioner of Income-Tax, East Pakistan, Dacca Vs. The Liquidator, Khulna-Bagerhat Railway Company Ltd., Ahmadabad (PLD 1962 SC 128)**. Such decision is distinguishable on its own facts, and has no relevance and application to the proposition in hand. It is further urged that it is always the intention of the assessee which is germane and expedient for the purposes of deciding and determining whether the income generated by it *(the assessee)* is from the business of the assessee or from any other source. It is contended that even the earning of interest on investment(s) and the deposits as such, could also be a business of a company. And the apt example of this is, where investments are made by the banks etc. in certain treasury bonds etc. and the income is generated on that account, which for all intents and purposes shall be the income from business. In support of his plea(s), the learned counsel has made reference to the judgment of this Court reported as **The Commissioner of Income-Tax, West Zone, Karachi and another Vs. Messrs Khairpur Textile Mills Ltd. and others (1989 SCMR 61)**. It is also argued that since Clause 36 *ibid* is a residuary clause and on account of the interpretation assigned to such a clause *(residuary*

stipulation/provision), the investment(s) made by the appellant undoubtedly were a business investment and therefore, the same cannot be termed to be investment(s) beyond the scope of appellant's business and thus the income from any other source. In this regard, the judgments cited are **Commissioner of Income-Tax, U.P. Vs. Basant Rai Takhat Singh ((1933) ITR 197)**, **Commissioner of Income-Tax Vs. Govinda Choudhury and Sons ((1993) 200 ITR 881)** and **Asiatic Agencies Limited, Karachi Vs. Commissioner of Income-Tax (1967 PTD 286)**. Learned counsel has further argued that even a single transaction can be taken as a business of the assessee and it is not necessary that there should be a series of transactions. Support is drawn from **Kanwarlal Manoharwal Vs. Commissioner of Income-Tax, Madras ((1975) 101 ITR 439)** and **K. Nallathambi Pillai Vs. Commissioner of Income-Tax ((1975) 98 ITR 13)** for the above submission.

3. Contrary to the above, learned counsel for the respondent has made reference to Clause 37 of Article III of the Memorandum of Association which reads as under:-

> *"Notwithstanding anything contained in the foregoing object clauses of this Memorandum of Association, nothing herein shall be construed as empowering the Company to undertake or indulge in the business of banking, finance, investment, leasing or insurance, directly or indirectly or any unlawful operations."*

On the basis of above, it is argued that this being a prohibitory clause, no investments can be made by the appellant and the appellant cannot be said to have made the investment(s) under question in pursuit of its business venture and resultantly

the amount of the profit accruing to the appellant is assessable as income from other sources. It is also argued that according to Clause 1 of Article III of the Memorandum of Association, the primary/main and key object of the appellant is to establish a cement factory and even if it is considered that the investment business is permissible, since the same is not ancillary to the main business object of the appellant-company, any income generated through such investment business is to be taxed as income from other sources.

4. Heard. Before resolving the proposition in hand, we find it expedient to briefly state the nature and legal status/position of Memorandum of Association *(MOA)* and Articles of Association *(AOA)* of a company, the purpose and object of the same, the rules of its application and the construction/interpretation of such a document. In this regard, several judgments of superior courts have shed light and from the gist thereof, it can be held that the MOA and Articles of Association when read as a whole are the constitution of the company. MOA provides and prescribes the object(s) and the purpose(s) for which the company has been established and constituted, with specific reference to the business and the avocations which it can conduct, carryon and undertake. While the AOA are the organizational and governance rules of the company which primarily deal with the management affairs. There are judgments of the superior Courts to the effect that anything done by a company *(as the company is a juristic person and has to act through natural person i.e. its management)* which is beyond the scope of its MOA is *ultra vires* and thus cannot be given any legal sanctity. In order words, a

company cannot engage in a business which is not fairly covered by any of its independent objects, or such objects which are ancillary and incidental to those for which a company has been created and such MOA is duly recognized and accepted, by the regulatory body(ies) meant for the incorporation of a company and oversight thereof.

It has been noticed and experienced by us for various MOAs of different companies that in order to avoid any of its venture being declared as *ultra vires* of the object, besides the main object of the company and its ancillary purposes, the latest trend is that the company shall incorporate in the MOA certain other objects as well which are aloof and independent of its main object/business; this is also so because the company might at some point of time like to undertake some another or more business, but would be precluded from doing so, because of the lack of object and it is difficult to have the MOAs changed and altered frequently.

A company thus may have a primary object and purpose, but still there may also be several other objects mentioned in the objects clause, and after proper construction of such objects, by resorting to the relevant rules of interpretation, it should be considered whether those are ancillary to the main object of the company or can be held to be independent of each other. It may be pertinent to mention here that MOA of a company in law should be read and construed liberally and be given a wide meaning through literal interpretation of the clause. Since objects are considered to be the permissive activities which a company can undertake in order to do its business, the same should not be given a restrictive

meaning. In any case, rigid construction of the said document, unless and until inevitable and insurmountable, must be avoided.

5. In the context of the above, the question whether in the instant case, the investments made by the appellant-company are pursuant to its business or such investments and the profits derived therefrom are from other sources, now needs to be determined. But before doing that, we would like to reproduce the provisions of Section 30(2)(b) of the Income Tax Ordinance, 1979, which are as follows:-

> *30. Income from other sources:-*
> …..
>
> > *(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes shall, save as otherwise provided in this Ordinance, be chargeable under the head "Income from other sources", namely:*
> > …..
> > *(b) "interest, royalties and fees for technical services"*

6. From Clause 1 of Article III of the appellant-company's MOA, as reproduced above, it is clear that the primary and main object of the appellant-company is to install, establish and run a cement manufacturing plant. This, however, is not the only object of the appellant-company, rather there are numerous other ventures which are permissible under the objects clause of the company. Some are ancillary, but some are vividly and undoubtedly independent; and Clause 6 *ibid* amongst others falls within the latter category. According to Clause 6, it is unequivocally clear that the company is empowered to, and one of

its purposes and objects is *"To invest or otherwise deal with the money of the Company in such manner as may from time to time be determined"*. From a plain reading of this clause, it is manifest that investment of the money of the company, surplus or otherwise, for the purpose of earning income, would be within the pail of permissible business activities detailed in the MOA; the decision as to where, how and to what extent this money is to be invested, in which scheme and for what profit etc. is left for the management to decide in its commercial prudence and in the best interest of the company.

Notwithstanding the above clause, in clause 36 *(supra)*, which is a residuary clause, it has been specifically stated that all the aforesaid clauses shall be held to be independent objects of the company and no objects stated in any sub-clause shall be deemed or construed to be subsidiary or auxiliary to any objects mentioned in any other sub-clause and that the Company shall have full power to exercise all or any of the powers conferred by any provisions of this clause in any part of the world. The only exception to this general rule of interpretation of the MOA of the appellant-company as envisaged by Clause 36 is where the scope of sub-clause or object is expressly narrowed down or made dependent on any other object/sub-clause. Therefore, while reading Clause 6 in light of Clause 36, it may deduced that Clause 6 has been considered and held to be an independent object of the company as well.

7. In light of the above, suffice it to say that Section 30(2)(b) is only applicable where the investment of money by a person has not been made as part of his business activities. Where

money has been invested by a person in his business and profit is generated on such an investment, that profit shall, for all intents and purposes, be considered to be the profit earned from business and not from other sources.

To elucidate the above, it may be mentioned that if a person is engaged in a business of sale and purchase of paintings and pursuant to his business activity, he buys a painting worth Rs.100/-, sells that out for Rs.150/-, and thus earns Rs.50/- as profit, such profit of Rs.50/- shall be considered to be part of the income generated from his business. On the contrary, if a person, merely interested in collecting paintings for his personal collection, purchases one but later sells it at a profit margin, the profit/income earned by such person shall be deemed to be income from other source as opposed to income from business. The reason for this being that his purchase of the property i.e. paintings is only for the purposes of his private collection and not as part of any commercial/business activity he is engaged in. Therefore, it is the object/purpose for which investments are made which is relevant and the object, in the case of a company, has to be ascertained from its Memorandum of Association and in the case of any other individual, from the nature of his business activity.

8. As regards the judgment reported as **The Commissioner of Income-Tax, East Pakistan, Dacca Vs. The Liquidator, Khulna-Bagerhat Railway Company Ltd., Ahmadabad (PLD 1962 SC 128),** the learned High Court has heavily relied upon this verdict, but to our consideration, the judgment is not germane to the facts and circumstances of the case

in hand. The facts in which the aforesaid judgment was rendered were that the respondent was a railway company which had entered into an agreement with Secretary of State for India in-council in 1916 for construction and management of railway in what was previously East Pakistan. Later on in the year 1948, the railway was acquired by the Government of Pakistan. When the income tax return for the relevant period was filed by the respondent, exemption was claimed under subsections 3 and 4 of section 25 of the Income Tax Act. The question before the income tax officer was whether income from interest from monies kept in banks earned by the company during the relevant assessment year would be classified as income from business or from other sources. The income tax officer deemed such interest to be part of the legitimate business activities of the company. This decision however was reversed on appeal and the decision of the appellate authority was upheld throughout. The Supreme Court while hearing the matter held that per Article 2 and 3 of Memorandum of Association of the respondent-company, main business was construction and upkeep of the Railway system and though Article 26 did authorize the company to lend or invest monies belonging to it, because such an activity was not company's *(railways)* normal business. The Supreme Court in that case concluded that each case must be decided on its own facts, and in that case the circumstances brought out in the evidence did not indicate that the receiving of interest on Invested moneys was really included in the business-income of the company. The *supra* case is distinguishable from the one in hand because in the instant case, when the various

clauses of the MOA of the appellant-company are construed and applied specifically in the presence of Clause 36, it is clear that Clause 6 is an independent object of the company and not a mere authorization available with the appellant-company to make investments which may be narrowed down or confined or deemed auxiliary to Clause 1 *ibid*, which factor it seems was absent in the afore cited case *(emphasis supplied)*.

9. Now attending to the question raised by the counsel for the respondent that the provisions of Clause 37 *ibid* of the MOA specifically prohibits the appellant-company from making any investment of its money and carrying on any activity having no nexus to its main object for generating income. It may be held that unambiguously and undoubtedly the aforesaid is a **prohibitory clause**, it is couched in the negative language and therefore under the law of interpretation of statutes, such a provision of law and/or a clause appearing in a document *(such clause in the MOA)* should be construed and applied strictly. It should be assessed and ascertained as to what is the real intent and object behind such a clause, what mischief it has to suppress, circumvent and curb. Besides, such prohibitory clause unless no other interpretation is possible cannot be used as a tool for obliterating any other specific and express provision of the statute or document, *(in this case MOA)* which provision/clause unequivocally, categorically and clearly provides a particular act and object of the company as its permissible business, which otherwise is also lawful. It should not be construed and interpreted that a prohibitory clause in a statute/document is prescribed and is designed to render any other

specific provision/clause as nugatory, rather for all intents and purposes the rules of harmonious interpretation should be adhered and resorted to and all possible efforts should be made to save each and every provision of the statute/clauses of MOA *(as the case may be)*. In this context we find that Clause 6 *supra* in very clear and in unambiguous terms prescribes that the appellant-company can make an investment of its money. The precise words are *"To invest or otherwise deal with the money of the Company in such manner as may from time to time be determined"*. The word "deal" appearing in the clause is disjunctive and notwithstanding the word invest *(note: which shall be construed in the preceding part of this opinion not hit by Clause 37)* by itself permits the company to administer and apportion its money by ways of putting it in any profit bearing scheme and venture and earn income thereupon. Anyhow while interpreting the two clauses, we ask a question to ourselves that if Clause 37 was not there in the MOA, whether the company could invest its monies as its business venture as per the force of Clause 6 *ibid*. The answer we find is in the affirmative i.e. **YES**. Thus the question for consideration and resolution now is if Clause 37 has made the otherwise permissible business of the company as impermissible, the reply is in the negative, **NO**. For the above reply, the intent and the object of Clause 37 needs some elaboration, and the relevant comments in this context are:- that regardless of the empowerment of the company to carry out its objects clearly mentioned in the preceding part of the MOA; Clause 37 when read independently and in isolation of other clause it does debar the company from

undertaking and indulging in the business of banking, finance, investment, leasing or insurance or any other unlawful business.

Now for a moment excluding two words appearing in this clause from consideration i.e. finance and investment, if the clause is read, it is very much clear that a company has been precluded and denuded of the authority to undertake *(i.e. "to take on an obligation or task; to give a formal promise; to make oneself responsible for (a person, fact, or the like); a promise, pledge, or engagement" and indulge i.e. "to become involved in any activity")*, and indulge with the **business** *(this is an important word in the clause)* of banking, leasing or insurance. The word business unmistakably is also directly relevant to the two other components of this clause i.e. finance and investment, which connotes that the company shall not enter into any **business** of financing, meaning thereby to undertake and indulge into the business of financing i.e. providing money to others which concept in the commercial parlance and sense is understood to act and function as a financing company, or a company indulged in the business of lending money. Likewise, there is a prohibition and a bar per this clause that the appellant shall not act as an investment entrepreneur, or an investment company, by attracting and calling upon the public or class of people to invest money with it and pay investors, the interest, profit etc. on such investment, so as to act as an investment institution.

Clause 37 seemingly has been purposely added in the MOA with the clear intent, and as an extra precaution to eliminate any doubt that a company while misinterpreting any of its object clause might not undertake and indulge into such business which is

expressly covered and falls within the prohibitory domain thereof. But where a business of the company is covered expressly by anyone or more than one of its lawful objects, and do not clearly and unambiguously fall within the prohibitory clause, it is held to be beyond the pale of the said clause i.e. 37. Therefore, we are clear in our mind that this clause in no way affect, control or annul the specific object Clause 6 of the MOA, otherwise it is not conceivable that on the one hand the company has assigned to itself a lawful purpose and business in the shape of Clause 6, but on the other hand itself has nullified the said empowerment by Clause 37. Thus for the purposes of interpreting the two clauses the rule of harmonious interpretation as mentioned above should apply and both be saved for the purposes of serving their own object and purpose. Before parting with this point it may be relevant to mention here that for the purposes of banking; leasing and for insurance the licences are required and the above clause had such intent behind and for financing and investment as those are an unlawful business which imperially experienced and it is a publicly known fact has resulted in bid and critical scams, therefore the prohibition was placed in the MOA for such business with a purpose of preventing that. In fact the purpose of Clause 37 is to discourage, unregulated collection of funds from the public and safeguard against financial scams.

10. In light of what has been discussed above, we are clear in our mind that the amount of profit earned by the appellant-company from the investment made in the various schemes/banks is pursuant to its business activities and, therefore, this profit

cannot be termed to have been accrued from any other source so as to attract the application of Section 30(2)(b) i.e. income from other source. These appeals, thus, are allowed, the impugned judgment of the learned High Court and that of the Income Tax Tribunal is set aside. The question of law thus involved in the matter accordingly stands answered.

JUDGE

JUDGE

JUDGE

Announced in open Court
on _____ at _____
Approved For Reporting
Waqas Naseer/*

SH. AZMAT SAEED, J.- The brief facts necessary for adjudication of the *lis* at hand are that the Appellant is a limited Company, incorporated under the Companies Ordinance, 1984. The primary object of the Company was to setup a Cement Manufacturing Plant. It was incorporated on or about 18.09.1993 and commenced its business on 22.11.1993. It appears that from its surplus funds, investments were made in various Banks and Financial Institutions. Such investment was yielded income in the Assessment Years 1994-95, 1995-96 and 1996-97. In the audited Statement of Accounts, the Appellant set-off the income so realized against its unallocated capital expenditure. The Deputy Commissioner Income Tax (DCIT) issued a notice to the Appellant under Sections 61/62 of the Income Tax Ordinance, 1979 to show cause as to why the income realized from the aforesaid investments of surplus money should not be treated as "income from other sources" in terms of Section 30 of the Income Tax Ordinance, 1979. Explanations were offered by the Appellant, which was not accepted. However, the CIT Appeals accepted the contentions of the Appellant whereafter the Department invoked the jurisdiction of the Tribunal, which vide its decision dated 29.9.2001 held that the income realized by the Appellant from the surplus fund placed

in the Financial Institutions was to be treated as “income from other sources”. The Appellant filed three separate Tax References i.e. T.R. Nos.117 to 119 of 2003 before the learned Peshawar High Court, against the consolidated order of the Tribunal. The said Petitions were dismissed vide judgment impugned dated 16.11.2005. Whereafter, the Appellant invoked the jurisdiction of this Court by filing Civil Petitions Nos.38 to 40 of 2006 wherein leave to appeal was granted vide Order dated 24.01.2006.

2. Upon hearing the learned counsels and after perusal of the available record, it is evident that it is common ground between the parties that the amounts realized by the Appellant Company from the funds placed with the various Banks and Financial Institutions is income. The only matter in controversy is whether such amounts are to be treated as “Business Income” or “income from other sources”. It is the case of the Appellant that by virtue of its Memorandum of Association (MOA), more particularly, sub-clause 6 thereof the Appellant Company is authorized and entitled to invest its money and such venture is one of the declared objects of the Company. Furthermore, each and every object of Company as set out in the various sub-clauses of the MOA, by virtue of sub-clause 36 must be

construed independently unrestricted by any other sub-clause, including sub-clause I, identifying the main Business of the Company, sub-clauses 6 and 36 are reproduced herein below for ease of reference:

> "6. To invest or otherwise deal with the money of the Company in such manner as may from time to time be determined."
>
> "36. It is expressly declared that the several sub-clauses of this clause and all the powers expressed therein are to be cumulative but in no case unless the context expressly so requires is the generality of any one sub-clause to be narrowed or restricted by the name of the Company or by the particularity of expression in the same sub-clause or by the application or any rule of construction such as the ejusdem generis rule, and accordingly none of such sub-clauses or the objects therein specified or the power thereby conferred shall be deemed subsidiary or auxiliary, merely to the objects mentioned in any other sub-clause of this clause and the Company shall have full power to exercise all or any of the powers conferred by any provisions of this clause in any part of the world."

3. While, on the other hand, it is the case of the Department that all the sub-clauses of the MOA are qualified by sub-clause 37, which in no uncertain terms states the object clauses of the MOA cannot constrained to empower the Company to indulge in *inter alia* the Business of Investment. Thus, the income derived by the Company from the investment in Banks and Financial Institutions cannot be deemed to be

income derived from the “Business” of the Company but in fact is “income from other sources”. For ease of reference, sub-clause 37 is reproduced hereunder:

> “37. Notwithstanding any thing contained in the foregoing object clauses of this Memorandum of Association, nothing herein shall be construed as empowers the Company to undertake or indulge in the business of banking, finance, investment, leasing or insurance, directly or indirectly or any unlawful operations.”

4. The MOA of a Company is undoubtedly its Charter, which identifies the objects of the Company the business to be undertaken and the powers conferred upon the Company. Subject to the tenor of the MOU, one mode of interpretation the same would be to identify the primary or normal business of the Company and treat all other powers enumerated therein as pertaining or subservient to the such normal business and any income derived through exercise of such incidental powers was not treated as Business Income for tax purposes. Reference in this behalf may be made to the judgment of this Court, reported as Commissioner of Income Tax, East Pakistan Dacca Vs. The Liquidator, Khulna Bagerhat Railway Company Limited, Ahmadabad (PLD 1962 SC 128), wherein it has been held as follows:

> "We have considered the various Articles by which this Company was governed. We have no hesitation in agreeing with the view of the High Court that the normal business of the Company was the construction and the running of the Railway and not investment of its moneys on interest. Other powers were also given to the Company by the Articles of Association, but it is not contended that all those powers pertained to the earning of normal business income. If the Company, instead of retaining its surplus moneys in idle condition, invested them under the powers given to them by their Articles of Association, it would not follow that the income so derived would be part of the Company's normal business income. Each case must be decided on its own facts and, in the instant case, the circumstances brought out in the evidence do not indicate that receiving of interest on invested moneys was really included in the business income of the Company."

5. A Company can be incorporated to carry on multiple business. Furthermore, the object clauses of the MOA can be scribed so as to be read independently, unfettered by the other clauses, including the clause identifying the primary or normal business as has been attempted to be done in the instant case through sub-clause 36 reproduced hereinabove. But, be that as it may, we cannot ignore or avoid giving effect to sub-clause 37 (reproduced herein above). The said sub-clause is prefixed with the word "Notwithstanding" which defines in Black's Law Dictionary Ninth Edition to mean "Despite" or "in spite of".

6. On a plan reading, sub-clause 37 states in unequivocal terms states that in spite of anything contained any of the object clauses (including clause 6 and clause 36) nothing therein shall continued to empower the Company to undertake or indulge in the Business of *inter alia* Investment. Such is the clear and unambiguous import and meaning of sub-clause 37. To attribute to the said sub-clause any other meaning would require inflicting extreme violence on the plain language. In the circumstances, the accumulative effect of the MOA, more particularly, sub-clause 6, 36 and 37, which read together would be that the Appellant Company is empowered to invest its money but such a transaction cannot be deemed to be Business of Company; consequently, the income derived from such investment cannot qualify as Business Income and therefore must fall in the category of "income from other sources" as has been correctly held by the Tribunal and the High Court by way of the impugned judgment. Hence, these Appeals are liable to be dismissed.

Judge

Mushir Alam, J-. I had the privilege and benefit of reading the opinion of two very learned brothers (*Mian Saqib Nisar, J and Sh. Azmat Saeed, J*). I concur with the conclusion drawn by my learned brother *Justice Sh. Azmat Saeed.* However, I would like to supplement my own reasons for the same.

2. Facts of the case are straightforward and simple. Appellant-Lucky Cement Ltd, which is a public limited company, with authorized capital of Rupees Three Billion was incorporated on or about 18.9.1993 for the purpose of *inter-alia* to setup a cement plant to manufacture *"Portland Cement"*. To set up cement plant, Appellant had raised capital/funds, during the period of construction of cement plant, surplus funds not immediately required by it, were invested in various financial institutions. Period of investment comprised of three assessment years i.e. 1994-95, 1995-96 and 1996-97. Investments of funds were specifically permitted by Clause 6 of its Article and Memorandum of Association. For the subject three assessment years, no business was carried out as the cement plant was under construction. Appellant, however, declared income, in all three assessment years, earned from interest (earned through Pak Rupee Currency investment and Foreign Currency Investments). In the audited statement of account, the Appellant set off the aggregate of the sum so realized from the financial institutions against unutilized capital expenditure, which also included the financial charges and capitalized the balance claiming to have reduced the project cost.

3. The Deputy Commissioner of Income Tax, Circle-18, Zone-A, Peshawar *(DCIT)* rejected the claim of Appellant that the interest income was not liable to be taxed vide order dated 24.07.1997 and assessed the interest income under Section 30 (2)(b) of the Ordinance, 1979 so received by it under the head *"from other sources."* It was held that *"the Company does not enjoy exemption under any clause of the 2nd Schedule to the Income Tax Ordinance, 1979"*. It was further held *"that income earned on account of income on interest and other investments are liable to tax and is treated as "income from other sources"*. It may be observed that interest income earned from Foreign Currency investment was not taxed being exempted vide Section 5 of the *"Protection of Economic Reforms Act, 1992.* However, the Commissioner of Income/Wealth Tax, Appeals [*CIT (A)*], on

Appeal by the Appellant company, reversed the finding of the DCIT, vide order dated 30.10.1997 and, held that *"Income earned was directly related to the main business of setting up of cement project",* hence "*the appellant had correctly offset the said income against the cost of the project"*. Income Tax Appellate Tribunal *(ITAT)* accepted the Appeal filed by the *CIT(A)*, placing reliance on the case of *Commissioner of Income Tax, East Pakistan, Dacca v. The Liquidator, Khulna Bagerhat Railway Company Ltd. Ahmadabad* ***(PLD 1962 SC 128)*** and, held that *the main business of the Assessee is to earn income from manufacture and sale of cement and though clause 6 of the Article of Association, allows the Company to invest surplus money but in view of the observation in the cited case, it cannot be included in the normal business of the respondent (Lucky Cement),* which were unsuccessfully subjected to Tax References No.117, 118 and 119 of 2003 by the Appellant company under Section 133 of the Income Tax Ordinance, 2001. All the three References were dismissed by the Peshawar High Court vide impugned judgment dated 22.11.2005 (reported as *Lucky Cement v. CIT Zone Companies Circle Peshawar 2006 PTD 578).* Leave in all the three cases was granted vide order dated 24.1.2006, which has been reproduced in the opinion of my learned brother *(Mian Saqib Nisar, J)* and thus need not be reiterated herein.

4. Pivotal question that clichés the controversy in hand is whether the income (interest) earned by investing surplus fund not immediately required by the Appellant, during the period of construction of cement plant, in various financial institutions, either falls under the head "*Income from business and profession* per Section 15(d) and chargeable to tax under Section 22 or "*Income from other sources"* and chargeable to tax under Section 30 of the Ordinance, 1979.

5. Total income of the Appellant-company under the Ordinance, 1979 is chargeable to tax under Section 9 thereof. Head of income for the purpose of charging tax and computation of total income are classified in six sub-heads under Section 15 of the Ordinance, 1979, manner of computing income on each head is further detailed in separate provision as mentioned in the tabulation below.

Head of income U/s 15 of Ordinance, 1979	*Charging Provision*
a). Salary	*.....Section 16.*

b). Interest on Securities .....Section 17.
c).Income from house property.....Section 19.
d).Income from business and profession.....Section 22.
e).Capital Gain .....Section 27.
f). Income from other sources.....Section 30.

6. As noted above, computation of income falling under any of the heads as enumerated above is chargeable to tax under provision specified against each head. Admissible and inadmissible allowances and deductions are catered for each of the six sub-heads of income separately under the Ordinance, 1979. Any exemption, concession, deduction and or adjustment or set off on account of expenditure is permissible as per provisions of the Ordinance, 1979 and not otherwise. Generating income that may fall under any of the six sub-heads as noted above, does not affect its taxability in any manner whatsoever irrespective of application of such income for the payment of interest, adjustment and or setting off on account of expenditure etc.

7. It may be observed that a corporate entity like Appellant, have vast portfolio to operate upon under its Article and Memorandum of Association. A corporate entity or for that matter any person/assessee may have more than one source of income, each falling in any of the six sub-heads enumerated under section 15 *ibid.* Income falling under any of the six sub-heads is charged separately under different provisions of the Ordinance, 1979 as mentioned against each sub-head of income as noted above.

8. It may so happen, as in the instant case, that a company incorporated to undertake any commercial or business venture has not yet commenced its main business or commercial activity that may yield any income, may generate income from other sources, like renting out part of its premises, which is not yet put to use during period of completion of its factory/cement plant and or by purchasing and selling any real estate using its surplus fund and or by renting it out, and or by utilizing its surplus fund in any other commercial proposition including and not limited to placing such funds in fixed deposit or profit bearing scheme in any financial institution and or by investing in stock or securities etc. as may be permissible under its Article and Memorandum of Association. As has happened in the case in hand, to generate more revenue or earn interest or profit, Appellant Company, in its commercial prudence and rightly so,

instead of keeping its surplus money idle, *"chose to employ such fund in proactive manner in order to generate additional fund",* invested its surplus funds "*by way of portfolio, fund and cash management venture".* It is Appellant's case that *"by an active trading (buying and selling) of these financial assets, the Appellant was able to earn substantial amount by way of return"*.

9. As noted in the narrative above, DCIT disallowed the claim of the Appellant Company to set off the aggregate of the sum so realized from the financial institutions against unutilized capital expenditure, which also included the financial charges and capitalized the balance claiming to have reduced the project cost, which triggered controversy in hand. The decision of the DCIT was reversed by the CIT(A), however ITAT, restored the finding of the DCIT.

10. The controversy that has drawn attention of this Court in instant case is 'whether the *"interest income"* generated "*by way of portfolio, fund and cash management venture"* falls under *clause (d) and or (f) of Section 15 of the Ordinance, 1979*'. As noted above, income within taxable slab may fall under any of the six sub-heads enumerated under Section 15 ibid; are liable to be taxed in accordance with respective charging provisions, unless specifically exempted by law under Section 14 read with schedule 1 of the Ordinance.

11. For the purpose of controversy in hand, phrases "*Income from business"* (clause-d) and *"Income from other sources" (clause-f)* are relevant. *"Business"* is defined under Section 2(11) of the Ordinance, 1979 *"to include any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture.* As noted above each head of income enumerated in Section 15 ibid is charged separately under respective charging section. Charging provision for the purposes of *income from business* falling under clause (d) of Section 15 ibid; is Section 22 of the Ordinance, 1979, which provides "income" *that shall be chargeable under the head of income from "business or profession"* as follows:-

> *(a) Profits and gain of any business or profession carried on, or deemed to be carried on, by the assessee at any time during income year*

> *(b) Income derived by any trade, profession and similar association from specific service performed for its members; and*
>
> *(c) Value of any benefit or perquisite, whether convertible into money or not, arising from business or exercise of profession.*
>
> *Explanation : Where speculative transaction carried on by an assessee are of such a nature as to constitute a business, the business, the business (hereinafter referred to as "speculation business") shall be deemed to be distinct and separate from any other business carried on by the assessee."*

12. Income from *"other sources"* chargeable to tax per clause *(f)* of Section 15 is further elaborated in Section 30 of the Ordinance, 1979, which reads as follows:-

> *"30. Income from other sources: (1) Income of every kind which may be included in the total income of an assessee under this Ordinance shall be chargeable under the head "Income from other sources", if it is not included in his total income under any other head.*
>
> *(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following income shall, save as otherwise provided in this Ordinance, be chargeable under the head "Income from other sources" namely,*
>
> *(a) dividend;*
> *(b) **interest**, royalties and fees for technical services;*
> *(c) ground rent;*
> *(d) income from the hire of machinery, plant or furniture, belonging to the assessee and also of buildings belonging to him if the letting of the building is inseparable from the letting of the said machinery, plant or furniture; and*
> *(e) any income to which sub-section (12) of the Section 12 or Section 13 applies."*

13. Contentions of Mr. Khalid Anwar, learned senior ASC for the Appellant, that though primary object of the Appellant Company per object No.1 set out in the Memorandum of Association of Appellant Company was to install *"state of the art plant" for the purpose of manufacturing "PORTLAND CEMENT"*. It was urged that surplus money lying idle, during the three assessment year, when the cement plant was under construction, as business prudence would have demanded, were invested to earn interest to mitigate cost of installation of plant, cannot be termed anything but income from business. It was urged that investment of the surplus fund of

the Appellant company from part of the business activity is permissible under clause 6 of its Article and Memorandum of Association.

14. The controversy raised is not new, in our jurisdiction. Similar controversy prevailed in Indian jurisdiction, was resolved by the Supreme Court of India in the case titled as *Tuticorin Alkali Chemicals and Fertilizers Ltd. v. Commissioner of Income Tax, 1997 Supp. (1) SCR 528* (also reported in *1998 PTD 900*). In the cited case also the company raised funds for setting up plant for manufacturing heavy chemicals, utilized its funds, which were not immediately required by the company in short term deposit with the bank, such investment was specifically permitted under its Article and Memorandum of Association. In said case, also the company initially set off the interest income against the business loss, claimed benefit of carry forward of net loss, however, later filed revised return and claimed that interest and other finance charges along with other pre-production expenses will have to be capitalized, and that the interest income should go to reduce the pre-production expenses, which would ultimately be capitalized. The Supreme Court of India, considered large number of conflicting decisions of various High Courts and approved the judgment rendered by the Madras High Court in the case reported as *Commissioner of Income Tax v. Seshasayee Paper & Board Ltd. (156 ITR 543),* wherein it was held that "*the interest earned by the assessee from the bank deposit had to be assessed under the head "Other sources"*.

15. Position in Pakistan is no different. Similar controversy has arisen in the case of *Commissioner of Income Tax v. Liquidator Khulna-Bagerhat Railway Company Ltd* ***(PLD 1962 SC 128)*** wherein this Court confronted with proposition similar to one in hand and resolved the same at page 132 as follows:-

> *"We have considered the various Articles by which this Company was governed. We have no hesitation in agreeing with the view of the High Court that the normal business of the Company was the construction and the running of the Railway and not investment of its moneys on interest. Other powers were also given to the Company by the Articles of Association, but it is not contended that all those powers pertained to the earning of normal business-income. If the Company, instead of retaining its surplus moneys in idle condition, invested them under the powers given to them by their Articles of Association, it would not follow that the income so derived would be part of the Company's normal business-income. Each case*

> *must be decided on its own facts and, in the instant case, the circumstances brought out in the evidence do not indicate that the receiving of interest on invested moneys was really included in the business-income of the Company. We are, therefore, of the opinion that the view taken by the High Court is not open to any legal exception. The appeal fails and is hereby dismissed with costs."*

16. In another judgment reported as Genertech Pakistan Ltd v. Income Tax Appellate Tribunal of Pakistan **(2004 SCMR 1319)**, wherein facts are somewhat similar to the facts in instant case, the assessee company, received share capital from various sharers for the purpose of setting up *"Electric Generation Project"*, and instead of keeping the money idle, deposited said amount in the Bank. The amount so deposited earned interest. The company showed "nil" profit from power generation, however, at the same time claimed exemption from payment of tax on the interest earned from the Bank under item 176 of the 2nd Schedule of the Ordinance, *(which inter-alia exempted from tax any "Profit and gain derived by an assessee from an electric power generation project set up in Pakistan on or after 1st day of July 1988)*. Stance of the company was not accepted by the DCIT and the interest earned was treated as *"income from other sources",* and was taxed accordingly, which assessment order was concurrently maintained up to the High Court. Controversy landed in this Court, which examined all the relevant provisions and came to a conclusion as recorded in paragraphs 9 and 11 thereof at page 1323 as follows:-

> *"9. Now question for consideration is as to whether interest earned by the appellants from the share capital deposited in the Banks does fall within the scope of "income from other sources" under section 30 of the Ordinance. To answer the proposition it is to be borne in mind that Item 176 of Second Schedule of the Ordinance provides in clear terms that "profits and gains derived by an assessee from Electric Power Generation Project, set up in Pakistan on or after 1st of July, 1998 shall be exempted from total income tax." Essentially, profits and gains from the Electric Power Generation Project is distinct and different from the interest being obtained by the Company on the deposit of share capital in the Banks, during the financial years for which the return of income under the relevant provision of Ordinance is filed and the exemption is claimed from the payment of income tax under Item 176 of Second Schedule of the Ordinance. It is informed that Electric Generating Plants of appellants-companies had started functioning in 1994-95 but they instead of claiming exemption on the profits/gains from Power Generation, claimed it from the deposit of the share capital lying in the Banks. It is to be seen that no sooner as a Company goes in production it cannot claim exemption of income tax on the interest of share capital deposited in Banks because on commencement of the production,*

> *profits and gains are to be earned out of the income of Electric Generation independently.*
> *11. But in instant case, position is altogether different because the share capital deposits in the Banks by the appellants are providing a separate income to them after post production stage of the Power Generating activity, therefore, on the income of interest no exemption can be claimed by the appellants under Item 176 Second Schedule of the Ordinance as it is a different income from the profits/gains being earned from post production activity of power generation."*

17. In another case reported as CIT, Karachi v. Gelcaps (Pvt) Ltd **(2009 PTD 331)**, a learned Division Bench confronted with similar proposition, examined large number of cases from Pakistani and Foreign jurisdiction in detail and came to following conclusion in Paragraph 38 at page 350; as follows:-

> *"38. We fully agree with the reasoning contained in the above two judgments of the Patna High Court and hold that the interest income earned by the assessee in the two cases before us on short-term deposit out of the capital borrowed for the establishment of industry is not income from business but is income from other sources and cannot be allowed to be adjusted against the interest paid on the borrowed capital for the simple reason that the interest paid on the borrowed capital is to be capitalized and there is no provision in law whereby income earned under the head "other sources" can be permitted to be adjusted against the expenses which are to be capitalized."*

18. In a more recent judgment reported as UCH Power (Pvt) Ltd v. Income Tax Appellate Tribunal ***(2010 SCMR 1236),*** this Court once again reaffirmed the principle enunciated in the case of *Tuticorin Alkali Chemicals (1998 PTD 900); Gelcaps (Pvt.) Ltd (2009 PTD 331) and Genertech Pakistan Ltd (2004 SCMR 1319),* already noted in the preceding paragraphs above.

19. On examining the scheme of the Income Tax Ordinance, 1979, case law on the subject, consensus that emerges is that during the period or course of setting up of a factory or plant by the company, activity of investing surplus funds of the company and generating any sum, return or interest on such investment, could not be considered as *"Income from business" under* clause (d) of Section 15 of the Ordinance, 1979. Fact remains in the words of the Appellant, surplus funds in the hands of appellant company were employed "*in proactive manner in order to generate additional fund",* invested its surplus funds "*by way of portfolio, fund and cash management venture".* It is Appellant's case that *"by an*

active trading (buying and selling) of these financial assets, the Appellant was able to earn substantial amount by way of return". Such activity was carried out during the period cement plant/factory was under construction, therefore, the Appellant, under facts and circumstances cannot be said to be carrying on any business within the contemplation of Section 22 of the Ordinance, 1979. When income does not fit in any of the five sub-heads enumerated in clauses (a) to (e) of Section 15 of the Ordinance, 1979 and falls under the residuary sub-head of *"Income from other sources"* i.e. clause (f) of Section 15 ibid, the DICT, under the given facts and circumstances, was justified to treat the "*interest*" income yielding from the investment of the surplus funds of the company as *"Income from other sources"* and rightly assessed the same under Section 30 (2)(b) of the Ordinance, 1979, which was rightly sustained by the ITAT and so also by the learned Division Bench of the High Court.

20. Consequently, the appeals do not merit consideration and are dismissed.

Judge

ORDER OF THE BENCH

By majority of two to one, these appeals are, accordingly, dismissed.

Judge

Judge

Judge

Announced in open Court
on 10th July 2015 at Islamabad

(Judge)