Judgment Sheet

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

JUDICIAL DEPARTMENT

Income Tax Reference No.01 of 2024

Telenor Pakistan (Private) Limited.

***Versus**.*

Commissioner Inland Revenue and four others.

Date of hearing	***15.04.2025***
Applicant by:	*Hafiz Muhammad Idris, Advocate.*
Respondents by:	*Mr. Shahzib Masud and Barrister Abdul Ahad Khokhar, Advocates.*
Assisted By:	*Ms. Bayyinah Ali Shah. Law Clerk* *Mr. Afrasyiab Khan. Law Clerk* *Mr. Muhammad Waqas Shah, Law Clerk*

Sardar Muhammad Sarfraz Dogar, ACJ.: Instant Income Tax Reference filed under Section 133(1) of the Income Tax ordinance, 2001 (**"**The **Ordinance**) emanates from the decision of the learned Appellate Tribunal Inland Revenue, Islamabad ("**Appellate Tribunal**) dated 22.12.2023, in which the following questions have been proposed by the applicant for our consideration:-

a) Whether under the facts and circumstances of the case, the learned Tribunal was justified in partially upholding the orders of respondent No.2 (Assistant/Deputy Commissioner Inland Revenue) and respondent No.3(Commissioner Inland Revenue[Appeals-I])?

b) Whether the order passed u/s 122(5A) of the Ordinance, 2001 is a legal and valid order?

c) Whether the pre-conditions mentioned in section 122(5A) of Ordinance, 2001 (i.e., erroneous and prejudicial to the interest of revenue) exist in the case of the applicant?

d) Whether the respondent No.2 has established the loss of revenue before assuming the jurisdiction u/s 122 (5A) of Ordinance, 2001?

e) Whether respondent No.4 was justified to make the fishing inquiries u/s 122(5A) of Ordinance, 2001?

f) Whether the respondent No.4 was justified in confirming disallowance of Advertisement, Marketing & Sales Promotion Expenses by invoking section 24(1) read with 24(4) of Ordinance, 2001?

g) Whether the respondent No.4 was justified in confirming the disallowance of Expense under the head Customer Acquisition Cost?

h) Whether the respondent No.4 was justified in confirming the disallowance of Stock Consumed by invoking section 21(1) of Ordinance, 2001?

i) Whether the respondent No.4 was justified in confirming the disallowance of Inventory Written off by invoking section 20(1) of Ordinance, 2001?

j) Whether the respondent No.4 was justified in confirming the disallowance of Discount by invoking section 20(1) of Ordinance, 2001?

k) Whether the respondent No.4 was justified in confirming the disallowance of Exchange Loss by treating it as a Notional Expense?

l) Whether the respondent No.4 was justified in confirming the disallowance of Tax Depreciation by invoking section 174(2) read with Rule 12 of Income Tax Rules, 2002?

m) Whether the respondent No.4 was justified in confirming the disallowance of Legal & Professional Charges by invoking section 20(1) of Ordinance, 2001?

n) Whether the respondent No.4 was justified in confirming the disallowance of tax credit u/s 148 of Ordinance, 2001 on account of Import of Plant & Machinery by treating it as Minimum Tax Liability instead of Adjustable Tax as held by this Court?

2. In order to grasp the true import of the matter it is imperative to delineate the brief background of the instant case. The taxpayer/applicant is a private limited company with its primary business activity of providing cellular mobile services. The taxpayer filed return of income for the tax year 2020 which constituted a deemed assessment order under section 120(1)(b) of the Income Tax Ordinance, 2001 which was subsequently amended under section 122(5A) of the Ordinance thereby creating a tax demand of Rs.7,120,592,083/-. The taxpayer preferred an appeal, whereupon, the Commissioner (Appeals) annulled the amended order holding that the return of income filed by the taxpayer for the year 2020 did not constitute an assessment order issued to the taxpayer by the Commissioner in terms of section 120(1)(b) of the Ordinance as the same could only have been treated as an assessment order after lapse of a period of six months from the date of filing of return as provided in third proviso to section 120(2A) of the Ordinance, as this was the period during which adjustment(s) in terms of section 120(2A) of the Ordinance could have been made, however, the Commissioner (Appeals) also remarked that the assessing officer would be at liberty to take up the proceedings afresh, if the limitation permitted the same. Subsequently, the Additional Commissioner IR, LTO Islamabad finding the deemed assessment as erroneous as well as prejudicial to the interest of revenue, re-initiated the proceedings under section 122(5A) of the Ordinance and consequently, amended the assessment vide order dated 30.11.2022 wherein taxable income was determined at Rs.49,389,915,804/- creating a tax demand of Rs.6,743,794,393/-. The applicant, being aggrieved of said assessment, again preferred an appeal before the Commissioner (Appeals), which was disposed of vide order dated 27.04.2023. Feeling dissatisfied, the applicant filed appeal before the Appellate Tribunal Inland Revenue, which too was disposed of by the ATIR vide order dated 22.12.2023 while confirming the treatment meted out by the below foras. Hence, the reference.

3. The main thrust of arguments of learned counsel for the applicant, revolved around the legality of the jurisdiction exercised under section 122(5A) by the Additional Commissioner Inland Revenue, LTO, Islamabad/assessing officer (respondent No.2). It was contended that the said officer had actually overstepped the mandate conferred by the said provision. It was the position of the learned counsel for the Applicant that the Assessing Officer is not empowered to issue a show cause notice requiring the applicant to produce corroborative documents or furnish information, or to conduct enquiries. Such actions are akin to audit proceedings under section 177 of the Ordinance. Consequently, the jurisdiction exercised by the Assessing Officer in the present case is *coram-non-judice* and liable to be set aside. It was his position that the essential pre-conditions for invoking section 122(5A) of the Ordinance, namely, that the deemed assessment order is both erroneous and prejudicial to the interest of revenue, have not been established on record. In the absence of both these elements, the invocation of section 122(5A) was wholly unjustified and, therefore, *void ab initio*. It was further contended that both the forums below failed to appreciate these crucial aspects of the matter; therefore their orders are not sustainable in the eye of law. Further, controverting the findings of learned ATIR/respondent No.4 confirming disallowances by the respondent No.2 in respect of (**1**) Advertisement, Marketing & Sales Promotion Expense by invoking section 24(1) read with section 24(4) of Ordinance; (**2**) Expense under the head Customer Acquisition Cost; (**3**) Stock Consumed, (**4**) Inventory Written Off, (**5**) Discount and (**6**) Legal & Professional Charges by invoking provisions of section 20(1) of Ordinance; (**7**) Exchange Loss by treating it as a Notional Expense; (**8**) Tax Depreciation by invoking Section 174(2) read with Rule 12 of Income Tax Rules, 2002 and (**9**) depreciation of tax credit under section 148 of Ordinance on account of Import of Plant & Machinery by treating it as Minimum Tax Liability instead of Adjustable Tax, learned counsel for the applicant submits that these orders have not been passed after proper appreciation of facts & circumstances of instant case as the same could have only been made in consequence of proceedings under section 177 of the Ordinance. Learned counsel for the applicant summed up his arguments while contending that since the applicant has successfully established on record the sheer illegalities committed by respondent No.2 while passing reassessment order, therefore, all the proceedings conducted by said respondent are liable to be set aside and prayed for answering the reference in affirmative.

4. Conversely, learned counsel appearing on behalf of respondents, opposed the filing of instant Income Tax Reference on the grounds that forums below have passed speaking orders after proper appreciation of the facts and circumstances of the case, as such, the taxpayer has failed to bring on record any infirmity in the impugned orders, which are liable to be maintained; that all the questions proposed in the instant reference have already been settled up to the august Supreme Court of Pakistan, therefore, by filing instant reference, the applicant has just made an attempt to escape the statutory duty to pay tax.

5. Arguments have been heard; record perused.

Questions (a) to (e) formulated in the Reference are taken up together, as they revolve around a common set of facts & law and are interlinked in substance.

6. In response to question (a), it is pertinent to first refer to Section 132 of the Income Tax Ordinance, 2001, which governs the appellate jurisdiction of the Appellate Tribunal. Subsection (4) of the said provision, describes the powers of Tribunal to pass an order in respect of any appeal relating to assessment order. The said subsection is reproduced below for ease of reference:-

> (4) Where the appeal relates to an assessment order, the Appellate Tribunal may, without prejudice to the powers specified in subsection (3), make an order to—(a) **affirm, modify or annul the assessment order; (b) remand the case to the Commissioner for making such enquiry or taking such action as the Tribunal may direct; or (c) make such order as the Appellate Tribunal may deem fit**.' **(Emphasis supplied)**

In light of the express language of the statute *(which was also embodied in subsection (3) of section 132 before its substitution vide the Tax Laws (Amendment) Act, 2024)*, it is evident that the Appellate Tribunal is vested with ample authority to affirm, modify, annul, or remand an assessment order, or pass any other order it deems appropriate. Therefore, the partial affirmation of the orders passed by Respondent No.2 and Respondent No.3, falls squarely within the ambit of the Tribunal’s statutory powers. Accordingly, no exception can be taken to the jurisdiction so exercised by the learned Tribunal.

7. Adverting to questions “b” to “e”. A plain reading of section 122(5A) of the Ordinance makes it crystal clear that it empowers the Commissioner to amend the assessment order if it is erroneous and prejudicial to the interest of revenue. It is pertinent to mention that the language employed in section 122(5A) at the time when the assessment order was passed, mandated that the Commissioner may "make or cause to be made such enquiries as he deems necessary" before amending a deemed assessment. The power to conduct such enquiries was added through amendment in the Finance Act 2012. However, the expression 'after making, or causing to be made, such enquiries as he deems necessary' has been omitted subsequently from Section 122(5A) via Finance Act, 2021. Now, the situation is whether the amendment had already stripped the power/mandate of Commissioner to conduct enquiry at the time of reassessment or he had the same at that time. In order to reach a justifiable conclusion, it is *apropos* to reproduce both pre amendment and post amendments in section of 122(5A) of the Ordinance: -

> ***<u>Pre Finance Act 2021 Amendment:</u>***
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> *(5A) "Subject to sub section (9), the Commissioner may, after making or causing to be made, such enquiries as he deems necessary, amend, or further amend an assessment order, if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue"*
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> ***<u>Post Finance Act 2021 Amendment:</u>***
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> *(5A) "Subject to sub section (9), the Commissioner may amend, or further amend an assessment order, if he considers that the assessment order is erroneous in so far it is prejudicial to the interest of revenue."*

Prior to the amendment introduced through the Finance Act, 2012, the statute did not expressly empower the Commissioner to conduct inquiries before forming his opinion. This legislative amendment conferred upon the Commissioner, the power to, "make or cause to be made such inquiries as he deems necessary" before amending an assessment order. This power, which is admittedly procedural in nature, certainly affects the substantive rights of a taxpayer, as it broadens the scope of the Commissioner's ability to test the veracity of the assessment and thereby impacts the potential liability of the taxpayer. In this regard, it is now settled law, as enunciated by this Court in judgment passed in case titled "Bestway Cement Limited v Additional Commissioner Inland Revenue" **(2018 PTD 977)**, that such procedural amendments which affect vested rights operate prospectively. Relevant portion of the judgment is reproduced hereunder:-

> "In view of the above case law it is clear that **any amendment even though procedural in nature which affects the vested right of any person operates prospectively and not retrospectively**. The amendment made in section 122(5A) ibid provides power to the Commissioner to make inquiries as he deems fit. The consequences of these inquiries is that assessment order can be revised/modified which is a substantive right of an assessee. Prior to amendment in 2012 the assessment could only be revised only if the same appeared to be erroneous or prejudicial to revenue and no information could be sought to determine the same. The new procedure which allows the commissioner to make inquiries directly affects the existing rights of an assesee regarding modification or revision in assessment, hence, it shall operate prospectively."
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> **(Emphasis supplied)**

8. It is worth mentioning here that the amendment made through the Finance Act, 2021, which omitted the phrase permitting inquiries, was came into force on 01.07.2021 whereas the tax year under consideration is 2020. The legal position, therefore, remains unaffected by the subsequent omission, and the actions taken by the Commissioner must be tested against the legal framework prevailing at the relevant time.

9. The learned counsel for the respondent/department submitted that the Commissioner was justified in invoking jurisdiction under Section 122(5A) of the Ordinance for amendment of the assessment order. It was argued that the return filed by the appellant, on its own face, revealed non-compliance of statutory provisions in the computation of taxable income, thereby rendering the deemed assessment erroneous and prejudicial to the interest of revenue. In these circumstances, the two preconditions for assumption of jurisdiction under Section 122(5A), namely the existence of errors and prejudice to revenue, stood satisfied. It was further submitted that the power to amend is discretionary, and the inquiries were not speculative or arbitrary, but directed at specific statutory non-compliances, particularly with reference to Sections 20(1), 24(1), and 174(2) of the Ordinance. The counsel further clarified that no proceedings akin to an audit under Section 177 of the Ordinance were undertaken, and that the amended order was based on sound reasoning as well as material already available on record, including the return and accompanying documents filed by the taxpayer. It was their position that even the limited information sought by the Commissioner pertained to arithmetical clarification necessary for application of legal provisions, and did not amount proceedings in the nature of a fishing inquiry. With respect to the legislative amendment made to Section 122(5A), subsequent to filing of return for the tax year, through the Finance Act, 2021, wherein the phrase "after making or causing to be made, such enquiries as he deems necessary", was omitted, the tax authorities took the view that this amendment does not affect the validity of their actions in any case, as it relates to procedure effecting substantial rights and thereby it has prospective effect and not retrospective.

10. After evaluating the arguments of both sides in juxtaposition and perusing the relevant law, and material on record, it is evident that the issues identified by the Additional Commissioner rendered the deemed amended assessment order *ex-facie* erroneous and prejudicial to the interest of revenue. In such circumstances, the exercise of revisional jurisdiction was not only warranted but obligatory in order to align the deemed order with the correct application of law, as interpreted by the appellate fora. The only condition precedent for invoking provision of section 122(5A) of the Ordinance has been imposed by the legislature in shape of sub-section (9) of Section 122 of the Ordinance, which reads as under:-

> **(9)** No assessment shall be amended, or further amended, under this section unless the taxpayer has been provided with an opportunity of being heard;

Hence, therefore, it is clear that before making any such amendment, the taxpayer must be afforded an opportunity of hearing, which was so provided to the taxpayer and there is no denial of it. This Court in the judgment passed in case titled as "Pakistan Tobacco Company v Federation of Pakistan" (**2016 PTD 596)** discussed the powers under 122(5A) of the ordinance in the following terms:

> "11. […] Sub section (5A) of section 122 vests power in the Commissioner to amend or further amend an assessment order after making or causing to be made such inquiries as he deems necessary, and if in his opinion the assessment order is erroneous in as much as prejudicial to the interest of revenue. Sub section (5A) has expressly been made subject to subsection (9) which provides that no assessment shall be amended or further amended unless the tax payer has been provided with an opportunity to be heard. Sub section (6) of section 122 imposes a duty on the Commissioner to issue an amended assessment order to the tax payer after making an amended assessment under subsection (1), subsection (4) or subsection (5A) and such amended assessment order is declared to be treated in all respects as an assessment order for the purposes of the Ordinance."

In this context, the act of seeking clarifications or data pertaining to arithmetical working, solely to determine the correct quantum of tax, does not amount to a fishing inquiry, nor is it indicative of an attempt to unearth potential grounds of revision. Rather, such information is ancillary and necessary for properly giving effect to an amendment already justified on the face of the record. The act of calling for such data cannot be construed as inconsistent with the scheme of Section 122(5A) of the Ordinance. Even in absence of such further clarification, where the order is demonstrably erroneous and prejudicial to revenue, the jurisdiction under 122(5A) of the Ordinance may be validly invoked. Reference in this regard can also be made to the judgment of the Honorable Lahore High Court passed in the case titled "Services Industries Limited v Commissioner of Income Tax, Zone-III, Lahore" **(2006 PTD 1617)**, wherein while dilating upon the necessities to invoke revisional jurisdiction by I.A.C, the hon'ble Court held that failure on the part of assessing officer to require and examine documents in support of claim of taxpayer renders the assessment as erroneous as well as prejudicial to the interest of revenue. The relevant portion of which is reproduced hereunder:-

> "7. The two cases relied upon by the learned counsel for the petitioner are clearly distinguishable. Learned counsel for the Revenue is correct in pointing out that the scheme of section 66-A of the late Income Ordinance provided for the exercise of revisional jurisdiction in different manners. On having called for an examining the record of any proceedings, the I.A.C. considering them to be erroneous in so far as these are prejudicial to the interest of the Revenue was empowered to make an inquiry by himself or to direct it to be made by another person. On such inquiry either made by himself or caused to be made, he was competent to 'pass such orders thereon as the circumstances of the case justify including an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment to be made'
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> 8. In the case at hand the Revising Authority concluded that failure on part of the assessing officer to have insisted upon production of record to justify increase in Directors loan in the particular year was erroneous as well as prejudicial to the interest of Revenue. The conclusion finds support from the assessment order itself, a part whereof has already been reproduced above. At the relevant time it needs to be noted, the provisions section 12(18) of the late ordinance provided that where any sum claimed or shown to have been received as a loan or advance or a gift by an assessee otherwise than by a crossed cheque drawn or bank or through banking channel was to be deemed to be the income of the assessee for that income year. **The failure on part of the Assessing Officer to require and examine the documents in support of the claimed increase in the Directors loan was erroneous as well as prejudicial to the interest of the Revenue** therefore was sufficient to invoke the provisions of Section 66-A of the late Ordinance by the Revising Authority."**(Emphasis supplied)**

11. Even otherwise, in this case, even the tax authorities did not rest their jurisdiction on any extended factual inquiries; rather, they relied primarily on the contents of the return and accompanying documents already on record, supplemented only by limited clarification requests directed at arithmetical or computational inconsistencies. Reference in this regard can also be placed on the judgement of the Honorable Lahore High Court in the case titled "Commissioner Inland Revenue v Messrs Prime Commercial Bank Ltd" **(2023 PTD 997)**. The relevant portion of the same is hereby reproduced for the ease of reference**:-**

> 5. As stated above, sub section (5A) does not negate subsection (5) in material particulars and the only distinction is that the power to amend or further amend conferred upon the commissioner may be exercised under distinct circumstances.

> The power is conditional upon definite information acquired from an audit or otherwise as far as sub section (5) is concerned whereas the power to amend or further amend is not dependent on such pre-condition as envisaged by sub section(5A)[…] We find no illegality in this course of action by the taxation officer
> 6. Notwithstanding the above, even if the argument of learned counsel for the respondents is to be accepted, **<u>the assessment order can always be considered as one having been passed under subsection (5A) of section 122</u>**. The only condition to be satisfied priorly is that invocation of the powers is subject to subsection (9) which merely provides that an amendment or further amendment can only be made if a taxpayer has been provided with an opportunity of being heard[…]
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> **(Emphasis added)**

12. The Court also takes notice of the fact that several of the grounds for disallowance, such as amortization of advertisement expense, treatment of customer acquisition cost, and disallowance of adjustment of tax deducted under Section 148, have already received affirmation in decisions rendered by the Appellate Tribunal Inland Revenue (ATIR) in favor of the department. This further supports the Commissioner's stance that the original assessment suffered from legal and factual infirmities. The findings recorded by this Court as well as the conclusions drawn by the lower fora are in consonance with the judgment rendered by this Court in case titled "<u>M/s Telenor Pakistan (Pvt.) Ltd v ATIR, Islamabad</u>" **(2024 PTD 619)**, wherein it was held that:-

> "As per law, the Additional Commissioner was duty bound to amend the assessment order so as to bring the deemed order in harmony with law and as such, the only requirement to provide an opportunity of being heard has been extended before amending the order. **<u>The record reveals that the relevant information and data provided by the applicant taxpayer in the return has been scanned for correct arithmetical working on the tax demand per se. This aspect does not put any clog upon the tax authorities to call for information as to whether the deemed order is within the four corners of law or not</u>.** It has been observed by the forums below that the tax liability has not been assessed and calculated by the applicant company in accordance with law."
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> **(Emphasis supplied)**

Thus, this Court finds that the conditions stipulated under Section 122(5A) were met. The impugned order is supported both by the statutory framework and the underlying material on record. The assumption of jurisdiction by Respondents No. 2 and 3, therefore, does not suffer from any legal infirmity. Consequently, the objections raised by the applicant in questions "b" to "e" are accordingly repelled.

(f). Whether the respondent No.4 was justified in confirming the disallowance of Advertisement, Marketing & Sales Promotion Expenses by invoking section 24(1) read with 24(4) of Ordinance, 2001?

13. The next issue under consideration pertains to marketing and advertisement expenditure incurred by the respondent taxpayer. The assessing officer, upon examining the nature of the said expenditure, classified it as an *"intangible"* within the meaning of Section 24(11) of the Ordinance. There is no explicit denial by the applicant on its nature being "intangible" as admittedly, the same had already been amortized for a period of five years from tax years 2016 to 2020. However, applicant vehemently controverted that since it has useful life of not more than a year, therefore, the same cannot be amortized for 25 years.

14. Section 24(1) of the Ordinance allows a person to claim amortization of the cost of intangibles that are wholly or partly used in deriving income chargeable to tax and that have a normal useful life exceeding one year. Subsection (4), as amended through the Finance Act, 2019, categorically provides that where the normal useful life of an intangible is not ascertainable, it shall be treated as having a normal useful life of twenty-five years. Section 24 is reproduced hereunder to serve as a ready reference:

> "**24.** Intangibles.—(1) A person shall be allowed an amortization deduction in accordance with this section in a tax year for the cost of the person's intangibles–
> (a) that are wholly or partly used by the person in the tax year in deriving income from business chargeable to tax; and
> (b) that have a normal useful life exceeding one year.
> (2) No deduction shall be allowed under this section where a deduction has been allowed under another section of this Ordinance for the entire cost of the intangible in the tax year in which the intangible is acquired.
> (3) Subject to sub-section (7), the amortization deduction of a person for a tax year shall be computed according to the following formula, namely:—
>
> **A B**

where —
A is the cost of the intangible; and
B is the normal useful life of the intangible in whole years.
(**<u>4) An intangible that does not have an ascertainable useful life shall be treated as if it had a normal useful life of twenty five years</u>**
(5) Where an intangible is used in a tax year partly in deriving income from business chargeable to tax and partly for another use, the deduction allowed under this section for that year shall be restricted to the fair proportional part of the amount that would be allowed if the intangible were wholly used to derive income from business chargeable to tax.
(6) Where an intangible is not used for the whole of the tax year in deriving income from business chargeable to tax, the deduction allowed under this section shall be computed according to the following formula, namely:--
A x B/C
where —
A is the amount of 1 [amortization] computed under sub-section (3) or (5), as the case may be;
B is the number of days in the tax year the intangible is used in deriving income from business chargeable to tax; and
C is the number of days in the tax year.
(7) The total deductions allowed to a person under this section in the current tax year and all previous tax years in respect of an intangible shall not exceed the cost of the intangible.
(8) Where, in any tax year, a person disposes of an intangible, no amortization deduction shall be allowed under this section for that year and —
(a) if the consideration received by the person exceeds the written down value of the intangible at the time of disposal, the excess shall be income of the person chargeable to tax in that year under the head ―Income from Business‖; or
(b) if the consideration received is less than the written down value of the intangible at the time of disposal, the difference shall be allowed as a deduction in computing the person‘s income chargeable under the head ―Income from Business‖ in that year.
(9) For the purposes of sub-section (8) —
(a) the written down value of an intangible at the time of disposal shall be the cost of the intangible reduced by the total deductions allowed to the person under this section in respect of the intangible or, where the intangible is not wholly used to derive income chargeable to tax, the amount that would be allowed under this section if the intangible were wholly so used; and
(b) the consideration received on disposal of an intangible shall be determined in accordance with section 77.
(10) For the purposes of this section, an intangible that is available for use on a day (including a non-working day) is treated as used on that day.
(11) In this section, — ―
cost‖ in relation to an intangible, means any expenditure incurred in acquiring or creating the intangible, including any expenditure incurred in improving or renewing the intangible; and ―intangible‖ means any patent, invention, design or model, secret formula or

> process, copyright 1 [, trade mark, scientific or technical knowledge, computer software, motion picture film, export quotas, franchise, license, intellectual property], or other like property or right, contractual rights and any expenditure that provides an advantage or benefit for a period of more than one year (other than expenditure incurred to acquire a depreciable asset or unimproved land) but shall not include self-generated goodwill or any adjustment arising on account of accounting treatment in the manner as may be prescribed.
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> **(Emphasis added)**

15. In the present case, the respondent/taxpayer failed to produce any material establishing a determinable useful life for the marketing and advertisement expenditure. In the absence of such evidence, the expenditure squarely falls within the ambit of Section 24(4) of the Ordinance, thereby attracting the statutorily prescribed useful life of twenty-five years. This view finds support from the judgment of this Court rendered in "*Commissioner Inland Revenue (Zone-II), LTU v. M/s CM Pak Limited*" (ITR No. 234 of 2011), wherein it was categorically held that where the useful life of an intangible asset is not ascertainable, the statutory period provided under Section 24(4) shall apply. Further, as rightly observed by Justice Fazal Karim in his authoritative work, *Interpretation of Statutes*, "*machinery sections are to be liberally construed. If the incidence of tax be clear, the machinery sections should be so construed as to make the realization of the proper tax possible. They should not be so construed as to defeat the intention of the legislature and to prevent the realization of tax that is in fact due*." Viewed in this context, the treatment of the said expenditure by the assessing officer in accordance with Section 24 of the Ordinance is not only legally sound but also in consonance with the legislative intent. No interference is, therefore, warranted in the conclusion so drawn by the lower fora.

g).Whether Respondent 4 was justified in confirming the disallowance of Expenses under the head Customer Acquisition Cost?

16. In response to the question regarding the justification of respondent No.4 in confirming the disallowance of expenses under the head 'Customer Acquisition Cost,' it is observed that the applicant claimed a total amount of Rs. 3,048,251,000/-, which was stated to represent the 'activation tax' paid by the applicant on behalf of its customers. The taxpayer contended that the said amount primarily comprised expenditures incurred in the ordinary course of business, including NADRA verification charges, payments made to AQSA Language Services and other vendors, transaction cost payments, documentation costs, stamp duty on sales in Sindh, etc. It was further asserted that out of the total claimed expense of Rs. 3,048,251,000/-, an amount of Rs. 2,180,161,700/- had already been voluntarily added back by the applicant in its return of income for Tax Year 2020. Conversely, the Assessing Officer took the view that the amount of Rs. 2,180,161,707/- had already been reflected in the computation of income under the head 'Other Inadmissible Deductions,' while the remaining amount of Rs. 868,089,293/- was characterized as 'activation tax' purportedly paid by the taxpayer on behalf of its customers, and was thus disallowed to the extent of Rs. 868,089,293/- The decision of the Assessing Officer was subsequently upheld by the CIR (A) as well as by the Appellate Tribunal. The applicant is now invoking the reference jurisdiction of this Honorable High Court, seeking a declaration that the findings of Respondent No. 4 with respect to the disallowance under the head ‘Customer Acquisition Cost’ are liable to be set aside.

17. Before that, we need to determine liability related to the activation tax. The Revenue Division of the Ministry of Finance, Economic Affairs, Statistics and Revenue passed a notification i.e. S.R.O. 390(I)/2001, which stipulates that the liability to charge, collect and deposit the relevant amount shall rest on the 'cellular company operator'. As per the SRO, such amount is to be deposited through the monthly tax return in accordance with section 26 of the Sales Tax Act, 1990, and the rules framed thereunder. The text of SRO.390(I)/2001 is reproduced hereinbelow for reference:

> S.R.O. 390(I)/2001.- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), sub-sections (3A) and (6) of section 3, clause (b) of sub-section (1) of section 8, clause (a) of sub-section (2) of section 13 and section 71 of the Sales Tax Act, 1990, the Federal Government is pleased to exempt customs-duty leviable under the First Schedule to the Customs Act, 1969 (IV of 1969), and sales tax on the import or, as the case may be, on the supply of cellular telephone sets (hand-held sets) to the extent that the combined effect of both the levies shall be one thousand rupees per such set, hereinafter called the said amount, subject to the following conditions, namely:-
>
> (i) No customs-duty or sales tax shall be collected on such cellular telephone sets at the time of import or, as the case may be, at the time of supply, but the said amount will be charged, collected and paid by the cellular company operator at the time the sets are presented to the cellular company operator for activation or energization;
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> (ii) Omitted;
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> (iii) the cellular company operator shall, if not already registered, obtain registration under the Sales Tax Act, 1990;
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> (iv) no cellular telephone set shall be activated or energized by the cellular company operator without charging and collecting the said amount;
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> (v) the said amount shall also be charged, collected and paid on every new activation or energization done by the cellular company operator;
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> **(vi) the liability to charge, collect and pay the said amount shall be on the cellular company operator who shall deposit same through a monthly tax return in terms of section 26 of the Sales Tax Act, 1990, and rules made thereunder;**
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> (vii) the cellular company operator shall maintain proper records, whether in electronic form or otherwise, of all the sets energized or activated after payment of the aforesaid amount for a period of five years, and such records shall be produced for inspection, audit or verification as and when required by an officer authorised by the Collector of Sales Tax, and such officer shall not ask for proof of import of cellular telephone sets activated or energized; and
>
> (viii) no adjustment of input tax shall be admissible to the cellular company operator or the buyer against the amount chargeable and payable under this notification.

> Explanation.— For the purposes of this notification, a cellular telephone set (hand-held set) includes one battery and a battery charger identifiable for use in connection with such mobile telephone set; provided that the amount payable under this notification shall not be effected on the ground that such battery or battery charger has not been presented or is not accompanied with such telephone set at the time of activation or energization.
> Explanation 2.— For the purpose of condition (v), the expression "new activation or energization" means a new connection or number given by the cellular company operator but does not include a change in number given to a customer due to change in package or his location in Pakistan.

Clause (vi) of S.R.O. 390(I)/2001 clearly stipulates that the responsibility to deposit the said tax lies with the cellular operators. Accordingly, if a cellular company pays a government-imposed tax which, in substance, is the liability of the customer, such payment cannot be treated as the company's own deductible expense for tax purposes, irrespective of whether or not the amount is recovered from the customer. In case of "*M/s Telenor Pakistan (Pvt.) Ltd. v. Appellate Tribunal Inland Revenue, Islamabad and other*" (**2024 PTD 619**), this court adjudicated upon this issue in favor of the Department, holding that the customer acquisition cost was not admissible as a deductible expense.

18. Furthermore, the activation tax/charges are not the liability of the cellular company but are to be collected from the customer. This legal position has been affirmed by this Court in the case of "*Commissioner Inland Revenue, LTU, Islamabad v. CM Pak Limited*" (I.T.R No. 234/2011), wherein the disallowance of expenses claimed on account of activation tax was upheld. The relevant observations of the Honorable Court are reproduced as under:

> "8. The fact, that respondent did not pass on the burden and paid that amount in government treasury from its own funds, is not tenable, especially when the respondents has claimed the same as an expense for commercial expediency. Undoubtedly, the market is competitive and cut throat competition exists amongst the cellular companies but the same is not justification

> for not paying on liability to the customers, as the levy was across the board and not on any individual company.
> 9. As noted above, activation tax/charges were to be received from the customer and were not the liability of the cellular company.
> 10. The fact that cellular company did not pass on the burden is its own doing and cannot turn around to claim it as an expense. In this view of the matter, we are of the opinion that the assessing officer has rightly disregarded the expense claimed by the respondent company regarding payment of activation charges for the Tax Year 2018"

19. In light of the legal and factual position discussed hereinabove, it is held that the action of the Assessing Officer in disallowing the amount of Rs. 868,089,293/- was in accordance with law. The decision rendered by the Appellate Tribunal Inland Revenue, having duly appreciated the facts and applied the correct legal principles, does not suffer from any legal infirmity. Accordingly, Respondent No. 4 was justified in confirming the disallowance under the head 'Customer Acquisition Cost'.

(h,i,j & m) Whether the respondent No.4 was justified in confirming the disallowance of Stock Consumed, Inventory Written Off, Discount and Legal & Professional Charges by invoking provisions of section 20(1) of Ordinance, 2001.

20. The assessing Officer has disallowed the aforementioned expenses while invoking the provisions of section 20(1) of the Ordinance. It is, therefore, appropriate to reproduce the said provision hereunder for clarity and ease of reference:-

> **20. Deductions in computing income chargeable under the head "Income from Business".—** (1) Subject to this Ordinance, in computing the income of a person chargeable to tax under the head "Income from Business" for a tax year, a deduction shall be allowed for any expenditure incurred by the person in the year [1][wholly and exclusively for the purposes of business].

[1] The words "to the extent the expenditure is incurred in deriving income from business chargeable to tax" substituted by the Finance Act, 2004.

21. While, controverting the findings of ATIR, learned counsel for the applicant submits that disallowance of above expenses was never justified as the stock consumed mainly comprises of scratch cards on connections, old/unsold handsets, edge sticks, setup boxes, etc., and items were written off as per company's policy, and discount was extended to subscribers, hence the same was expense whereas, the department had paid legal & professional charges amounting to Rs.2,460,000,000/- to M/s Telenor ASA but the same has also not been allowed irrespective of the fact that department had produced sufficient documents/proof to support these expenses.

22. From the bare reading of section 20(1) of the Ordinance, it is clear that in computing the income of a person chargeable to tax under the head "Income from Business" for a tax year, a deduction **shall be allowed** for any expenditure incurred by the person in the year "<u>wholly and exclusively for the purposes of business</u>". Hence, in order to establish the deduction, it was incumbent upon the applicant to establish that the expenditures were incurred wholly and exclusively for the purposes of business. However, the applicant has failed to discharge this burden. In particular, it has been observed that the applicant did not furnish substantial evidence in support of the claimed consumption of stock amounting to Rs. 2,147,295,841. There is no denial to the fact that assessing officer had accepted the stance of applicant to the extent of stock consumed to the tune of Rs.473,253,395/-, which itself shows the impartiality of the assessing officer as had there been proof of consumed stock with respect to Rs.2,147,295,841/-, it would have been accepted too. Similarly, the applicant claimed Rs.176,909,000/- as inventory Written Off, which the assessing officer disallowed to the extent of amount of Rs.175,116,617/- on the basis of insufficient documentary corroboration. The applicant was under obligation to substantiate its claim, which he failed to do so. Even otherwise, during the arguments before us, learned counsel for the applicant has failed to pin-point any misreading or non-reading of the documents produced before the assessing officer with regard to consumed stock or inventory which was Written Off, hence, the findings do not call for any interference.

23. Taking up the next question of “Discount” amounting to Rs.228,000,000/-. The stance of applicant is that the said amount was incurred in respect of discount, however, during the course of arguments, there was no rebuttal to the fact that the amount was paid as “commission” to its “franchises” and not to “subscribers”. Again, the stance of applicant remained uncorroborated through documentary evidence, despite availing ample opportunity by the applicant in this regard. The documentary proof was of immense importance particularly when such type of deduction was being sought by the applicant for the first time.

24. With regard to the applicants claim of incurring Rs.2,460,000,000/- under the head of “Legal and Professional Charges”, it has been stated that the amount was allegedly paid to its associated entity, M/s Telenor ASA on the premise that such services are an integral part of business operations. While it is indeed true that access to legal and professional services is a sine-qua-non for any business, it is equally incumbent upon the tax payer to maintain proper documentation, evidencing the incurrence of such expenses in order to validly claim them as deductible for tax purposes. The applicant has failed to substantiate this claim, which is particularly significant given that the expense constitutes approximately 3.5% of its total sales. Therefore, the expenses so claimed were rightly discarded to be qualifying for deduction in terms of Section 20(1) of the Ordinance, 2001.

k) <u>Whether the Respondent No. 4 was justified in confirming the disallowance of Exchange Loss by treating it as a Notional Expense</u>?

25. The applicant in the matter also raised contention against Respondent No. 4, who disallowed the exchange loss aggregating to Rs. 612,041,033/- by partially accepting the realized exchange loss to the extent of Rs. 3,030,657,968/- out of details submitted to the tune of Rs. 3,642,699,000/- on the basis that the claim to this extent is notional and unrealized in nature. In determining the matter related to exchange loss, we read section 34 of the ordinance that deals with the accrual-basis accounting. Section 34 of the Income Tax Ordinance, 2001 is reproduced here for ease of reference;

> **34. Accrual-basis accounting.—**(1) A person accounting for income chargeable to tax under the head "Income from Business" on an accrual basis shall derive income when it is due to the person and shall incur expenditure when it is payable by the person.
>
> (2) Subject to this Ordinance, an amount shall be due to a person when the person becomes entitled to receive it even if the time for discharge of the entitlement is postponed or the amount is payable by instalments.
>
> (3) Subject to this Ordinance, an amount shall be payable by a person when all the events that determine liability have occurred and the amount of the liability can be determined with reasonable accuracy.
>
> [ ]
>
> (5) Where a person has been allowed a deduction for any expenditure incurred in deriving income chargeable to tax under the head "Income from Business" and the person has not paid the liability or a part of the liability to which the deduction relates within three years of the end of the tax year in which the deduction was allowed, the unpaid amount of the liability shall be chargeable to tax under the head "Income from Business" in the first tax year following the end of the three years.
>
> (5A) Where a person has been allowed a deduction in respect of a trading liability and such person has derived any benefit in respect of such trading liability, the value of such benefit shall be chargeable to tax under 4 [the] head "Income from Business" for the tax year in which such benefit is received.
>
> (6) Where an unpaid liability is chargeable to tax as a result of the application of sub-section (5) and the person subsequently pays the liability or a part of the liability, the person shall be allowed a deduction for the amount paid in the tax year in which the payment is made.

The said provision focuses on 'reasonable accuracy', which is a primary consideration for determining the question of exchange loss in the accrual basis accounting system. Particularly, the subsection (1) and (3) of the Section 34 make it very clear that a person who accounts for income subject to tax under the heading of "Income from Business" on an accrual basis shall derive income when it is due to person and incur expenditures when they are due; and, an amount shall be payable by an person once all the events that determine liability have taken place and the amount of the liability can be determined with reasonable accuracy. However, the applicant in this case is unable to establish reasonable accuracy as per the said provision and the amount of Rs. 612,041,033/- is not justified. In the case of *"M/s Telenor Pakistan (Pvt.) Ltd. v. Appellate Tribunal Inland Revenue ,Islamabad and other"* (**2024 PTD 619**), this court held that that a notional loss which has not actually been sustained cannot be treated as an allowable expense. The relevant paragraph is reproduced herein;

> "We are of the view that forums below have rightly held that loss being notional in nature and not sustained by the applicant company is not an allowable expenses, as a result whereof the exchange loss has rightly been disallowed to the applicant company"

26. No doubt, reference was made to various judgments pertaining to exchange losses on behalf of applicant; however, none of them justify the admissibility of an amount which is notional and unrealized in nature. By parity of reasoning, unrealized exchange losses that lack substantiation and remain notional in character are not admissible deductions under section 34(3) of the Ordinance. Accordingly, the disallowance of Rs. 612,041,033/- is in accordance with law, and the grounds of the taxpayer are repelled accordingly.

l) Whether the respondent No.4 was justified in confirming the disallowance of Tax Depreciation by invoking section 174(2) read with Rule 12 of Income Tax Rules, 2002?

27. The applicant claimed initial depreciation as well as normal depreciation on fixed assets and amortization on intangible assets which was allowed in the deemed assessment order. However, the assessing officer found that the same was not in accordance with Rule 12 of the Income Tax Rules, 2002, therefore, disallowed the same. In view of the complexity of the situation, it would be appropriate to analyze the same in juxtaposition with Rule 12 of the Income Tax Rules, 2002, which is hereby reproduced hereunder:-

> **12. Particulars required to be furnished for claiming depreciation deduction or initial allowance amortization deduction.-**
> (1) The following particulars **shall be** furnished by a taxpayer at the time of furnishing a return of income for any tax year <u>in order to claim a depreciation deduction under section 22, an initial allowance under section 23</u> or an amortization deduction under section 24 read with the Third Schedule to the Ordinance, namely:-
>
> **(a) a description of each depreciable asset and intangible in respect of which a deduction is claimed**;
>
> (b) where a depreciable asset or intangible is used in the tax year only partly in deriving income from business chargeable to tax, the extent of such part use;
>
> []
>
> (d) if the depreciable asset or intangible was acquired in the tax year, the date of acquisition;
>
> (e) the written down value of each depreciable asset at the beginning of the tax year computed in accordance with sub-section (5) of section 22 and the cost of each intangible as determined under sub-section (11) of section 24;
>
> (f) the amount of capital expenditure incurred in the tax year on additions, alterations. improvements or extensions in relation to any depreciable asset or intangible and where the depreciable or amortizable amount of such expenditure is limited under the Ordinance, the lower amount shall also be stated;
>
> (g) the total value of each depreciable asset for which a depreciation deduction is allowable for the tax year (this is the sum of the amounts specified in clauses (e) and (f), less any initial allowance allowed for the asset in that year;
>
> (h) the prescribed rate of depreciation and initial allowance (if any) for each depreciable asset or class of asset for the tax year, and the normal useful life for each intangible;
>
> (i) the amount of depreciation deduction and initial allowance (if any) for each depreciable asset for the year and the amount of amortization deduction for each intangible for the year;

> (j) the total depreciation deduction, initial allowance and amortization deduction allowed for the tax year; and
> (k) the written down value of each depreciable asset and the cost of intangible at the end of the tax year, and the remaining normal useful life.

The plain reading of Rule 12(a) makes it unequivocally mandatory for the taxpayer to furnish a detailed description of each depreciable asset and intangible for which a deduction is claimed. However, the taxpayer had failed to comply with this requirement and has merely stated generic terms such as "software and telecommunications equipment". Such a vague description falls short of the statutory requirement and has rightly been held to be in contravention of the law. Consequently, non-compliance with this mandatory provision renders the depreciation claim inadmissible, as it violates the prescribed method under the Ordinance. Therefore, the standpoint of learned counsel for the applicant terming the action taken by assessing officer as harsh and arbitrary is not tenable and is of no help. It is a well settled principle of law that where the legislature requires a thing to be done in a particular manner, the same should be done in the same manner and not otherwise. Reliance in this regard is placed on "Secretary, Ministry Of Finance, Finance Division, Government Of Pakistan and others Versus Muhammad Anwar" **(2025 SCMR 153),** "Commissioner Inland Revenue, Large Taxpayers Office, Islamabad Versus Pakistan Oilfields Ltd., Rawalpindi and others" **(2024 SCMR 853=**2024 PTD 1085 SC), and "Messrs Tri-Star Industries (Pvt.) Limited Versus Trisa Burstenfabrik AG Triengen and another" **(2023 S C M R 1502).** Therefore, the order of learned Appellate Tribunal is upheld.

n). Whether the respondent No.4 was justified in confirming the disallowance of tax credit u/s 148 of Ordinance, 2001 on account of Import of Plant & Machinery by treating it as

Minimum Tax Liability instead of Adjustable Tax as held by this Court?

28. It is the perspective of the tax authorities that the tax payer, being a telecommunications service provider, did not fall within the ambit of the definition of an *"Industrial Undertaking"* as provided under Section 2(29C) of the Ordinance, while on the other hand, the stance of applicant is that the definition of "industrial undertaking" was amended through the Finance Act, 2021 by insertion of sub-clause (c) in section 2(29C) of the Ordinance, extending the scope of industrial undertakings to include telecommunication companies. Hence, per learned counsel for the applicant, it does fall within the definition of "*Industrial Undertaking*" and deserves the treatment as such. When the stances of both the parties are evaluated in juxtaposition with the relevant law, it is revealed that, although the Telecommunication Companies have been included in the definition of "Industrial Undertaking" by way of above mentioned amendment, yet the Finance Act 2021 specifically mentions that it was to come into force from 01.07.2021, whereas, the return under consideration is of tax year 2020 i.e. before the amendment in definition clause. *Maxwell on the Interpretation of Statutes* cited findings of Rowlatt, J. given in case of *Cape Brandy Syndicate*, that "*in a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used*". It is a well-established principle of statutory interpretation that substantive changes in law, unless expressly stated, operate prospectively. The amendment brought about by the Finance Act 2021 does not indicate any intention of retrospective application. This presumption is strongly rooted in legal policy, as articulated in *Bennion, Bailey & Norbury on Statutory Interpretation (8th Ed.)*, which reiterates that:

> "Except in relation to procedural matters, changes in the law should not take effect retrospectively."

The principle is further underpinned by the maxim *lex prospicit non respicit*—<u>the law looks forward, not back</u>. The courts are slow to infer retrospective effect unless it is clearly mandated by the legislature. To do otherwise would disrupt the settled expectations of taxpayers who arrange their affairs in reliance on existing law. This principle was succinctly captured in *Phillips v. Eyre* where Willes.J observed that:

> "Legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

29. The Apex Court in the case titled "<u>Controller General of Accounts v Abdul Waheed and others</u>" (**2023 SCMR 111**) reaffirmed these principles in the following terms:-

> *"[...] If perchance any reasonable doubt exists, it should be resolved in favor of prospective operation. In other words, before a law will be construed as retrospective, its language must imperatively and clearly require such construction. Amendatory statutes are subject to the general principles discussed elsewhere herein relative to retroactive operation. Like original statutes, they will not be given retroactive construction, unless the language clearly makes such construction necessary[...]"*

Applying these principles, this Court is of the view that the insertion of telecommunication companies into the definition of "industrial undertaking" by the Finance Act 2021 does not have any bearing on the tax year currently under question. As such, respondent No. 4 was justified in treating the tax collected under Section 148 on import of plant and machinery as minimum tax liability rather than an adjustable credit, and in disallowing the adjustment claimed by the applicant.

30. In view of above, the questions of law are decided against the applicant/taxpayer and in favour of the respondent/Commissioner Inland Revenue and we uphold and maintain the findings of learned Appellate Tribunal.

31. Office is directed to transmit this judgment to the learned Appellate Tribunal Inland Revenue under section 133(8) of the Ordinance.

(**Inaam Ameen Minhas**) **(Acting Chief Justice)**
JUDGE

Announced in open court on **28.04.2025**

(**Muhammad Asif**)
JUDGE **(Acting Chief Justice)**

S**hamroz **Ali/P. S